STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

VERIFIED PETITION OF NORTHERN INDIANA PUBLIC SERVICE COMPANY LLC FOR (1) APPROVAL OF AND A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR A FEDERALLY MANDATED ASH POND COMPLIANCE PROJECT; (2) AUTHORITY TO RECOVER FEDERALLY MANDATED COSTS INCURRED IN CONNECTION WITH THE ASH POND COMPLIANCE PROJECT; (3) APPROVAL OF THE ESTIMATED FEDERALLY MANDATED COSTS ASSOCIATED WITH THE ASH POND COMPLIANCE PROJECT; (4) AUTHORITY FOR THE TIMELY RECOVERY OF 80% OF THE FEDERALLY MANDATED COSTS THROUGH RIDER 887 – ADJUSTMENT OF FEDERALLY MANDATED COSTS AND APPENDIX I – FEDERALLY MANDATED COST ADJUSTMENT FACTOR ("FMCA MECHANISM"); (5) AUTHORITY TO DEFER 20% OF THE FEDERALLY MANDATED COSTS FOR RECOVERY IN NIPSCO'S NEXT GENERAL RATE CASE; (6) APPROVAL OF SPECIFIC RATEMAKING AND ACCOUNTING TREATMENT; (7) APPROVAL TO AMORTIZE THE ASH POND COMPLIANCE PROJECT COSTS THROUGH 2032; (8) APPROVAL OF ONGOING REVIEW OF THE ASH POND COMPLIANCE PROJECT; ALL PURSUANT TO IND. CODE § 8-1-8.4-1 ET SEQ., § 8-1-2-19, § 8-1-2-23, AND § 8-1-2-42; AND, TO THE EXTENT NECESSARY, APPROVAL OF AN ALTERNATIVE REGULATORY PLAN PURSUANT TO IND. CODE § 8-1-2.5-6.	)	**CAUSE NO. 45700**

JOINT SUBMISSION OF PROPOSED ORDER

NIPSCO Industrial Group, the Indiana Office of Utility Consumer Counselor, and Citizens Action Coalition of Indiana, Inc. (collectively the "Consumer Parties"), by counsel, hereby submit their Joint Proposed Order in the above captioned matter. In Attachment A, the

Consumer Parties submit a redline pdf of NIPSCO's Proposed Order. In Attachment B, the Consumer Parties submit a clean version of their Proposed Order in pdf.

A Word version of Attachment B will be provided to the Administrative Law Judge and counsel of record by separate email.

Respectfully submitted[1],

LEWIS KAPPES, P.C.

/s/ Joseph P. Rompala
Todd A. Richardson, Atty. No. 16620-49
Joseph P. Rompala, Atty. No. 25078-49
Counsel for the NIPSCO Industrial Group

One American Square, Suite 2500
Indianapolis, Indiana 46282-0003
Telephone: (317) 639-1210
Facsimile: (317) 639-4882
Email: TRichardson@lewis-kappes.com
JRompala@lewis-kappes.com

[1] Counsel for the OUCC and CAC have given counsel for the Industrial Group authorization to make this joint filing.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the following via electronic mail, this 13th day of December, 2022:

Robert E. Heidorn
Bryan M. Likins
NISOURCE CORPORATE SERVICES - LEGAL
150 West Market Street, Suite 600
Indianapolis, Indiana 46204
rheidorn@nisource.com
blikins@nisource.com

Nicholas K. Kile
Lauren Aguilar
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
nicholas.kile@btlaw.com
lauren.aguilar@btlaw.com

***Courtesy copies to*:**
Alison M. Becker
Debi McCall
NORTHERN INDIANA PUBLIC SERVICE COMPANY
150 West Market Street, Suite 600
Indianapolis, IN 46204
abecker@nisource.com
demccall@nisource.com

William Fine
Abby Gray
Randall Helmen
OFFICE OF THE UTILITY CONSUMER COUNSELOR
115 W. Washington St., Suite 1500 South
Indianapolis, Indiana 46204
wfine@oucc.in.gov
agray@oucc.in.gov
rhelmen@oucc.in.gov
infomgt@oucc.in.gov

Jennifer A Washburn
CITIZENS ACTION COALITION
1915 West 18th Street, Suite C
Indianapolis, IN 46202
jwashburn@citact.org
rkurtz@citact.org

/s/ Joseph P. Rompala
Joseph P. Rompala

LEWIS & KAPPES, P.C.
One American Square, Suite 2500
Indianapolis, Indiana 46282-0003
Telephone: (317) 639-1210
Facsimile: (317) 639-4882

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

VERIFIED PETITION OF NORTHERN INDIANA PUBLIC SERVICE COMPANY LLC FOR (1) APPROVAL OF AND A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR A FEDERALLY MANDATED ASH POND COMPLIANCE PROJECT; (2) AUTHORITY TO RECOVER FEDERALLY MANDATED COSTS INCURRED IN CONNECTION WITH THE ASH POND COMPLIANCE PROJECT; (3) APPROVAL OF THE ESTIMATED FEDERALLY MANDATED COSTS ASSOCIATED WITH THE ASH POND COMPLIANCE PROJECT; (4) AUTHORITY FOR THE TIMELY RECOVERY OF 80% OF THE FEDERALLY MANDATED COSTS THROUGH RIDER 887 – ADJUSTMENT OF FEDERALLY MANDATED COSTS AND APPENDIX I – FEDERALLY MANDATED COST ADJUSTMENT FACTOR ("FMCA MECHANISM"); (5) AUTHORITY TO DEFER 20% OF THE FEDERALLY MANDATED COSTS FOR RECOVERY IN NIPSCO'S NEXT GENERAL RATE CASE; (6) APPROVAL OF SPECIFIC RATEMAKING AND ACCOUNTING TREATMENT; (7) APPROVAL TO AMORTIZE THE ASH POND COMPLIANCE PROJECT COSTS THROUGH 2032; (8) APPROVAL OF ONGOING REVIEW OF THE ASH POND COMPLIANCE PROJECT; ALL PURSUANT TO IND. CODE § 8-1-8.4-1 *ET SEQ.*, § 8-1-2-19, § 8-1-2-23, AND § 8-1-2-42; AND, TO THE EXTENT NECESSARY, APPROVAL OF AN ALTERNATIVE REGULATORY PLAN PURSUANT TO IND. CODE § 8-1-2.5-6.	**)**	**CAUSE NO. 45700**

ORDER OF THE COMMISSION

Presiding Officers:
James F. Huston, Chairman
Loraine L. Seyfried, Chief Administrative Law Judge

On March 30, 2022, Northern Indiana Public Service Company LLC ("Petitioner" or "NIPSCO") filed its Verified Petition initiating this Cause and its direct testimony and attachments on May 2, 2022.[1]

[1] NIPSCO filed Attachment 1-B (Certificate of Publication of Legal Notices) on November 10, 2022.

Petitions to intervene were filed by Citizens Action Coalition of Indiana, Inc. ("CAC") on April 6, 2022, and NIPSCO Industrial Group[2] ("Industrial Group") on May 26, 2022. The Presiding Officers granted the petitions to intervene by docket entry on April 18, 2022 and June 7, 2022, respectively.

On August 1, 2022, the Indiana Utility Regulatory Commission ("Commission") conducted a public field hearing at 6:00 p.m. in the City Hall Chamber, 100 East Michigan Boulevard, Michigan City, Indiana.

On September 7, 2022, the Indiana Office of Utility Consumer Counselor ("OUCC"), CAC, and Industrial Group filed their respective direct testimony and attachments. On September 9, 2022, the OUCC filed corrected testimony of witness Brian Wright[3] and OUCC Consumer Comments. Industrial Group filed cross-answering testimony of witness Brian Collins on September 27, 2022. On September 27, 2022, NIPSCO filed its rebuttal testimony and attachments.

On September 7, 2022, the OUCC, Industrial Group, and CAC filed a Joint Motion for Judgment on the Evidence ("Joint Motion"), to which NIPSCO responded on September 19, 2022, and the joint movants replied on September 26, 2022. The Presiding Officers denied the Joint Motion by docket entry on October 21, 2022.

A public evidentiary hearing was initially convened on November 2, 2022, and continued to November 10, 2022, at which time the prefiled evidence of NIPSCO, the OUCC, CAC, and Industrial Group, was admitted into the record without objection.

Based upon the applicable law and evidence presented, the Commission finds:

1. Notice and Jurisdiction. Due, legal and timely notice of the hearing in this Cause was given and published as required by law. Petitioner is a "public utility" as defined in Ind. Code § 8-1-2-1(a) and an "energy utility" as defined in Ind. Code §§ 8-1-2.5-2 and 8-1-8.4-3. Under Ind. Code § 8-1-8.4-6 and -7, the Commission has authority to issue a certificate of public convenience and necessity ("CPCN") and to approve cost recovery for projects necessary to comply with federally mandated requirements. Accordingly, the Commission has jurisdiction over Petitioner and the subject matter of this proceeding.

2. Petitioner's Characteristics. NIPSCO is a public utility limited liability company organized and existing under the laws of the State of Indiana with its principal office and place of business at 801 East 86th Avenue, Merrillville, Indiana. Petitioner is engaged in rendering electric utility service in the State of Indiana. NIPSCO renders retail electric utility service to approximately 470,000 retail customers located in all or part of Benton, Carroll, DeKalb, Elkhart, Fulton, Jasper, Kosciusko, LaGrange, Lake, LaPorte, Marshall, Newton, Noble, Porter, Pulaski, Saint Joseph, Starke, Steuben, Warren and White Counties in northern Indiana. NIPSCO owns, operates, manages and controls plant and equipment within the State of Indiana that is in service

[2] The companies that comprise the NIPSCO Industrial Group in this Cause are Cleveland-Cliffs Steel LLC, Linde, Inc., NLMK Indiana, Marathon Petroleum Company, and USG Corporation.

[3] The only change to Mr. Wright's testimony was to the exhibit reference in the header of the testimony.

and used and useful in the generation, transmission, distribution and furnishing of such service to the public.

3. Requested Relief. NIPSCO requested (1) approval of and a CPCN for a federally mandated Ash Pond Compliance Plan (referred to herein as the "Compliance Project"); (2) authority to recover federally mandated costs incurred in connection with the Compliance Project; (3) approval of the estimated federally mandated costs associated with the Compliance Project; (4) authority for the timely recovery of 80% of the federally mandated costs through Rider 887 – Federally Mandated Cost Adjustment Rider and Appendix I – FMCA Factors (the "FMCA Mechanism"); (5) authority to defer 20% of the federally mandated costs incurred in connection with the Compliance Project for recovery in NIPSCO's next general rate case; (6) approval of the specific ratemaking and accounting treatment described herein; and (7) approval of ongoing review of the Compliance Project; all pursuant to Ind. Code § 8-1-8.4-1 *et seq.*, § 8-1-2-19, § 8-1-2-23 and § 8-1-2-42.

The Ash Pond Compliance Project will close five ponds at NIPSCO's Michigan City Generating Station ("Michigan City"), ~~which~~ including dewatering and excavation of as much of the coal combustion residual ("CCR") material as possible, and once removed, backfilled with clean fill, a cover system and topsoil. The federal mandate driving the Ash Pond Compliance Project is the CCR rule (40 C.F.R. Parts 257 and 261) promulgated by the Environmental Protection Agency ("EPA") under Subtitle D of the Resource Conservation & Recovery Act ("RCRA") (42 U.S.C. §6901) (the "CCR Rule").

4. Summary of Evidence of the Parties. NIPSCO, the OUCC, and Intervenors each submitted evidence in this Cause, which is summarized below.

A. NIPSCO's Case-in-Chief.

(1) Overview and Costs of Compliance Projects. Alison M. Becker, Manager of Regulatory Policy for NIPSCO, described NIPSCO's request for a CPCN for federally mandated projects associated with NIPSCO's proposed Compliance Project to comply with federally mandated requirements under Ind. Code 8-1-8.4-5 for recovery through NIPSCO's FMCA Mechanism. Ms. Becker testified concerning ~~explained~~ the statutory authority ~~supporting~~ pursuant to which NIPSCO~~'s~~ request~~eds~~ relief, ~~explained why~~ testified that NIPSCO's requested relief is appropriate and will serve the public interest, and ~~supported~~further testified concerning~~, to the extent necessary,~~ NIPSCO's proposed alternative regulatory plan. Ms. Becker also testified that the public convenience and necessity will be served by NIPSCO's compliance with the RCRA and CCR Rule. She stated the Compliance Project is in the public interest since it will enable the Company to comply with the RCRA and CCR Rule and do so in an appropriate manner. She ~~explained~~ stated Indiana Code ch. 8-1-8.4 defines eligible projects as those that are federally mandated, including those mandated by the EPA. She ~~explained~~ testified that NIPSCO seeks relief within the bounds provided by the General Assembly in the enabling statute consistent with public policy and serves the public interest. She testified that NIPSCO's approach to compliance with the RCRA and CCR Rule is sound and reasonable, and that the requested Compliance Project is appropriate.

Ms. Becker testified that to the extent additional relief is necessary from the requirements of the Federal Mandate Statute or traditional accounting and ratemaking rules to allow for the requested accounting and ratemaking treatment and to support recovery of all federally mandated

costs incurred in connection with the Compliance Project, NIPSCO seeks approval of an alternative regulatory plan and elects to become subject to Ind. Code § 8-1-2.5-6. She stated that just prior to the filing of its Verified Petition, the Indiana Supreme Court issued a decision related to Duke Energy Indiana which reversed the Commission and found that Duke should have obtained pre-approval from the Commission before recording certain environmental remediation costs as a regulatory asset on its books. She ~~explained~~ stated that in that case, it appears that the Order approving recovery of such costs was issued approximately ten (10) years after Duke created that entry on its books. She ~~explained~~ testified that while this proceeding involves a request for the recovery of federally mandated compliance costs pursuant to Indiana statute providing for such recovery, and that NIPSCO~~is~~ therefore believes is different in terms of the applicable law and the timely nature of NIPSCO's request for cost recovery, given the potential uncertainty related to the interpretation of this recent court decision, NIPSCO has included this request for approval of an alternative regulatory plan to confirm that its federally mandated costs, which include costs that must be incurred throughout most of 2022 related to compliance requirements, are authorized to be recovered. She testified that recovery of the federally mandated costs as proposed by NIPSCO is in the public interest and enhances and maintains the value of NIPSCO's utility service and ~~it~~ is beneficial to NIPSCO, its customers, and the State of Indiana for NIPSCO to recover its federally mandated costs of the Compliance Project.

Mr. Robert Ridge, Manager of Project Engineering for NIPSCO, explained NIPSCO's commercial and project execution activities related to the Compliance Project, and the alternatives NIPSCO considered, NIPSCO's cost estimate for the Compliance Project, and its execution timing to achieve compliance. He described that the Compliance Project is closing five ponds at Michigan City, which includes dewatering and excavation of CCR material. He explained that removed CCR material will primarily be transported to the CCR-permitted landfill at NIPSCO's R.M. Schahfer Generating Station ("Schahfer") and that after CCR material is removed, the ponds will be backfilled with clean fill, a cover system and topsoil to allow vegetation to grow and future storm water to shed off the closed ponds. He testified the earliest compliance date for closure of the ash ponds is November 10, 2023. He explained that the Compliance Project involves several scopes of work. One of the first steps of the project includes installation of a dewatering system to lower groundwater elevations to facilitate safe excavation of CCR at deeper elevations. A water treatment system will be installed to treat, as needed, contact water, interstitial water, and water generated during groundwater extraction activities. Excavation activities will be completed utilizing equipment such as excavators, dozers, and front end loaders. CCR will be loaded into on-road dump trucks for offsite disposal. It is estimated that approximately 170,600 cubic yards of material will be removed from the ponds. The majority of the CCR removed from the ponds will be transported to Schahfer for disposal in NIPSCO's existing, permitted landfill. Material that meets the requirements for beneficial reuse will be transported to a local facility for this purpose. After CCR removal is complete for each pond, the pond will be backfilled with clean fill obtained from an offsite borrow location. It is estimated that approximately 164,100 cubic yards of offsite material will be utilized to backfill the ponds. As the ponds are backfilled, stormwater features will be installed, and vegetation will be established to allow future stormwater to shed off of the closed ponds. Mr. Ridge explained that NIPSCO began engineering work in 2017 to start developing the Closure/Post-Closure Plan which was submitted to IDEM for review. Engineering continued to progress as NIPSCO received feedback from IDEM during the review and approval process. After awarding the RFP, some initial preparation work began on March 1, 2022 and has continued over the next couple months. He explained that undertaking this kind of work was necessary, because a delayed project start would potentially cause NIPSCO to: (1) lose critical subcontracted resources

with a limited ability to secure other qualified workers; (2) push excavation activities into the winter season which can slow progress and add additional costs; and (3) expand dewatering activities beyond the time allowed in the dewatering approval provided by IDEM. He stated that ultimately, had NIPSCO waited to do any site work until after filing the petition in this proceeding, it would have put NIPSCO at increased risk of missing the compliance deadline. He explained that there is also similarly scoped CCR pond work required at Schahfer and the Bailly Generating Station ("Bailly"). He testified that completing the Compliance Project in 2022 reduces potential impacts to the schedule and associated compliance dates for the work that will be performed at Schahfer and Bailly, as attempting to complete work at multiple locations simultaneously places constraints on subcontracted resources available in the area, as well as logistics concerns when offloading material into the landfill at Schahfer.

Mr. Ridge described that excavation work began on April 27, 2022, with workers having been onsite since February 2022 to support mobilization (all the preparatory work necessary before formal excavation begins). He stated that in the first few weeks of work, NIPSCO has also installed stormwater pollution prevention measures and truck washes and has completed a dewatering and water treatment pilot test.

Mr. Ridge explained problems that could occur if construction were pushed into the winter season beyond the December 9, 2022 targeted completion date, most of which stem from the northern Indiana winter weather, which often becomes more impactful given the work site is located along Lake Michigan. He described that frozen ground makes work difficult and snow, ice, and wind can prohibit workers from traveling to the work site and limit the hours available for safe work to occur. He stated that because the Compliance Project involves extensive trucking activity, icy road conditions can slow or halt progress and use large amounts of fuel and winter storms can affect the work site and work equipment, increasing costs and slowing progress. He also explained that freezing conditions can also lead to increased cost and complications for the dewatering and water treatment system that will be used to support the project.

Mr. Ridge testified that to ensure all aspects of the Compliance Project are executed in compliance with all requirements, NIPSCO submitted a Construction Quality Assurance ("CQA") Plan to IDEM with the Closure/Post-Closure Plan, which was approved on March 10, 2021. He said an updated CQA Plan was also submitted to IDEM after award of the construction contract to Charah. He explained NIPSCO has employed a fulltime, third party CQA contractor to ensure work is being performed in accordance with the CQA Plan and Closure/Post-Closure Plan.

Mr. Ridge testified that the current estimated total cost of the Compliance Project is $40,044,000 ($36,112,000 in direct costs and $3,932,000 in indirect costs). Mr. Ridge discussed how the cost estimate was developed and testified that the estimated cost for the Compliance Project is reasonable. He testified the cost estimate is the result of updates from the CBR estimate prepared by Wood from 2019 based on the final design of the closure and requirements in the approved Closure/Post-Closure Plan. He said the current cost estimate includes owner's costs, contingency, and reflects actual contract amounts, most notably from NIPSCO's construction contractor (Charah) to perform the work. This estimate is considered to be a Class 2 estimate. He explained the contract was awarded primarily utilizing firm unit prices for the work to be performed and that the contract also includes liquidated damages to help ensure the project is completed within the defined project schedule but does include provisions to account for fluctuations in unit quantities, as well as fuel costs. Mr. Ridge testified the Compliance Project is

not intended to "extend" the useful life of Michigan City or other NIPSCO facilities but is instead intended to allow NIPSCO to comply with the requirements of the RCRA and CCR Rule, which was promulgated under RCRA, by closing five ponds at Michigan City.[4] He did note that achieving compliance with these requirements does preserve NIPSCO's ability to use the site for generation.

(2) Federal Mandates. Maureen Turman, Director of Environmental Policy & Sustainability for NiSource Corporate Services Company ("NCSC"), ~~explained~~testified concerning the federally mandated requirements and associated compliance deadline related to the Compliance Project. Ms. Turman ~~discussed~~ testified concerning the federally mandated requirements, how NIPSCO believes these federally mandated requirements are driving the pond closure activities related to the Compliance Project, ~~and~~ as well as affecting the closure alternatives considered and ultimately rejected.

Ms. Turman testified that all five ash ponds at Michigan City are subject to RCRA, as well as the Agreed Order.[5] Two of the ash ponds are also regulated by the CCR Rule. These five ponds are generally referred to as (1) West Primary Fly Ash Basin (Primary #1 Pond), (2) West Secondary Fly Ash Basin East (Secondary #1 Pond), and (3) Secondary Fly Ash Basin (Secondary #2 Pond) (collectively, the ("RCRA ash ponds"), and (4) Primary Fly Ash Basin East (Primary #2 Pond), and (5) Bottom Ash Settling Pond and Storage Area (Boiler Slag Pond) (collectively, the "CCR ash ponds").

Ms. Turman testified that for the CCR ash ponds, in 2018, NIPSCO made operational changes that caused operations to cease receipt of CCR materials to those ponds. The requirements of the CCR Rule mandate closure within 5 years of closure being initiated, by ceasing receipts or otherwise.[6] The Michigan City CCR ash ponds ceased receipt of waste on October 11, 2018 and April 15, 2019, resulting in a compliance date for closure of the ash ponds of November 11, 2023 and May 15, 2024, respectively.

Ms. Turman testified as to NIPSCO's belief that the RCRA ash ponds are not regulated under the CCR Rule because, as of the CCR Rule's effective date, they had been filled in with material and could not impound water.[7] She stated that under the Agreed Order, NIPSCO was required to submit closure and post-closure plans to IDEM for the three RCRA ash ponds no later than December 31, 2018. IDEM agreed to closing the three RCRA ash ponds in combination with the two CCR ash ponds in a combined IDEM closure application, approved by IDEM and received by NIPSCO on March 10, 2021. Ms. Turman ~~explained~~ testified that the closure date for the RCRA ash ponds is not stipulated in the Agreed Order however, due to the configuration of the ponds on

---

[4] The federally mandated requirements contained in RCRA and the CCR Rule and NIPSCO's compliance therewith is further discussed by NIPSCO witness Turman.

[5] A Corrective Action Agreed Order approved by the Indiana Department of Environmental Management ("IDEM") (Cause H-13872) on October 21, 2013), including all amendments thereto ("Agreed Order").

[6] Once closure has been initiated, as it was for the two CCR ash ponds, the unit must commence closure no longer than 30 days after the date on which the unit receives the known final receipt of waste.

[7] By entering into the Agreed Order and keeping the RCRA ash ponds only subject to RCRA, NIPSCO was provided more flexibility in potential closure methods.

the Michigan City property, it was necessary to close the ash ponds as part of one project, which necessitates that the entire project be complete by November 11, 2023.

Ms. Turman ~~explained~~ testified as to the allowable closure methods – closure by removal and closure in place. She stated the closure by removal entails dewatering of the free liquids within/on top of the ash, followed by excavation of all ash within the pond limits, including the liner (if one is present), which is then properly managed, and the pond can then be backfilled and graded. The closure in place entails the removal of the free liquids within and on top of the pond as well as free liquids in materials placed in the pond (to make a stable base for the engineered capping system). Once the pond is dewatered, the remaining CCRs must be graded, and, in most circumstances, have additional fill materials brought in to provide a suitable base for the cap. The CCRs are then capped with soil, clay, and/or an engineered barrier, then mulched and seeded with a vegetative cover.

She testified NIPSCO evaluated closing the five ponds via closure in place, as this had the potential to be the most cost-effective option; however, IDEM indicated that a slurry wall and hydraulic controls would be necessary if CCRs remained in contact with the groundwater, which would have made that method the most costly option. She stated NIPSCO also evaluated closing all five ponds via closure by removal. In addition to the potential cost savings (since no slurry wall or hydraulic controls would be required), that method also provided more compliance and cost certainty and would also involve removal of the ash as a potential source of impact to groundwater quality, thereby potentially reducing the cost of groundwater corrective measures and post-closure care. Therefore, NIPSCO determined that removal of the majority of the ash was the most appropriate method for closure.She ~~explained~~ testified that after the CCR materials are removed, NIPSCO's position is that the five ponds must be "capped" – meaning the ponds must be backfilled with clean fill, a cover system and topsoil applied to allow vegetation to grow and future storm water to shed off the closed. Under the CCR Rule, 40 C.F.R. § 257.10~~0~~2(~~5~~c), Ms. Turman explained that it must be demonstrated that the underlying native materials are decontaminated, ~~which~~ and that NIPSCO believes this cannot be done if the underlying groundwater is impacted, as is the case at Michigan City.~~;~~ ~~t~~Therefore, according to Ms. Turman, NIPSCO believes that it is appropriate to place a cap on the contaminated soil underneath the removed ash, ~~this is considered leaving "CCR in place," thus necessitating a cap~~ per the CCR Rule, 40 C.F.R. § 257.102~~0~~(~~1~~d).

(3) Estimated Federally Mandated Costs. Mr. Ridge testified that the estimated total cost of the Compliance Project is $40 million ($36 million in direct costs and $4 in indirect costs). Mr. Ridge discussed how the cost estimate was developed and testified that the estimated cost for the Compliance Project is reasonable.

(4) Accounting and Ratemaking. Kevin J. Blissmer, Manager of Regulatory for NCSC, explained NIPSCO's proposed recovery of the Compliance Project through the FMCA Mechanism. Mr. Blissmer provided (1) a description of the cost recovery provided for under the Federal Mandate Statute; (2) an overview of the FMCA Mechanism and its related ratemaking treatment; (3) an explanation of how the deferred federally mandated costs will be reflected in NIPSCO's FMCA Mechanism tracker filings; and (4) a description of NIPSCO's proposed allocators to allocate the various components of the FMCA Mechanism. He explained

NIPSCO's requests to (1) recover 80% of the approved federally mandated costs[8] incurred in connection with the Compliance Project through NIPSCO's FMCA Mechanism pursuant to Ind. Code § 8-1-8.4-7, and (2) defer 20% of the federally mandated costs and ongoing expenses incurred in connection with the Compliance Project for recovery in NIPSCO's next general rate case, where the deferred balance will be subject to a carrying charge based on the effective weighted average cost of capital ("WACC") on an interim basis until such costs are recognized for ratemaking purposes in its next general rate case; (3) recover any federally mandated costs, including but not limited to federally mandated costs incurred prior to and after approval of a Final Order in this proceeding to the extent such costs are reasonable and consistent with the scope of the Compliance Project, and (4) utilize the proposed factors to allocate between rate classes.

Mr. Blissmer described that NIPSCO seeks authorization for recovery of a return on and of the Compliance Project. He explained that because the Compliance Project relates to the federally mandated closure of a capital asset, the federally mandated costs associated with the project will be captured on a retirement work order and recorded as a reduction to accumulated depreciation. He testified that NIPSCO therefore proposes recovery based upon the incremental effect of the Compliance Project costs on NIPSCO's net original cost rate base, with 80% of that total amount timely recovered through the FMCA Mechanism, with the other 20% being deferred to a future electric base rate case. He stated that rather than amortizing the federally mandated costs associated with the Compliance Project over the period during which they are projected to be incurred, which would be over a period of less than 12 months, upon project completion NIPSCO proposes to amortize the costs associated with the Compliance Project through 2032. Mr. Blissmer testified that NIPSCO is proposing to recover carrying costs only on the 20% portion of federally mandated costs that is deferred for recovery in a future rate case. He explained that while authorized under the Federal Mandate Statute, NIPSCO is not seeking recovery of carrying costs on federally mandated costs for the period between when the Compliance Project is initiated and when such costs are included for recovery through the FMCA Mechanism. He testified there are no operations and maintenance ("O&M") expenses associated with the Compliance Project, and no property taxes to be incurred. The federally mandated costs associated with this Project include the actual costs incurred to complete the project (recovered through amortization of that investment), the financing costs associated with the investment in net original cost rate base (NIPSCO's WACC as applied to the costs of the project), associated federal and state income taxes and the public utility fee, which will be the annual calculation of federally mandated costs. He described that when NIPSCO has completed the Project, NIPSCO will file for recovery of 80% of this annual calculation and will defer 20%. Each ensuing year, NIPSCO's filing will reflect that one year of the total investment has been amortized.

Mr. Blissmer stated NIPSCO proposes that all federally mandated costs associated with the Compliance Project be allocated based on the demand allocators set forth in the Cost of Service Study from NIPSCO's most recent electric base rate case in Cause No. 45159 and reflect the significant migration of customers amongst the various rates to prevent any unintended consequences of the migration of customers between rates and to properly allocate their share of the revenue requirement in its FMCA semi-annual tracker filings. He explained that in accordance with Ind. Code § 8-1-8.4-7(c)(1), NIPSCO will include the operating income associated with the

[8] This includes a return on the actual project retirement costs using NIPSCO's effective WACC plus amortization both for the 80% and the 20% deferral.

Compliance Project in the total electric Comparison of Electric Operating Income for purposes of the Ind. Code § 8-1-2-42(d) earnings test.

Gunnar J. Gode, Vice President and Chief Accounting Officer for NCSC, provided an explanation of how NIPSCO will account for the deferred federally mandated costs, which then leads to how the costs will be reflected in NIPSCO's FMCA Mechanism tracker filings, and a description of the amortization rate NIPSCO proposes for the federally mandated projects included in the Compliance Project.

B. OUCC's Case-in-Chief. Cynthia M. Armstrong, Chief Technical Advisor in the OUCC's Electric Division, presented the OUCC's review of NIPSCO's proposed environmental compliance plan and discussed the CCR Rule driving NIPSCO's stated need for the Compliance Project. ~~She testified~~While the OUCC agrees the Compliance Project is necessary to comply with federal environmental rules and ~~that~~it appears NIPSCO has selected the most reasonable option for compliance, ~~but that~~ Ms. Armstrong testified that NIPSCO did not meet the requirements for cost recovery under the Federal Mandate Statute, as it will incur the majority of the costs before it receives a CPCN for the Project. She explained that NIPSCO recognized these costs in past base rates via Asset Retirement Obligations ("AROs") but removed them from its most recent rate case in Cause No. 45159. She stated that if NIPSCO has under-recovered CCR closure costs due to this omission, then allowing NIPSCO to recovery any such loss incurred prior to the Commission issues a CPCN constitutes retroactive ratemaking. She stated that NIPSCO's request disregards any costs recovered through past rates and could lead to NIPSCO partially recovering these costs from customers twice. She testified that allowing NIPSCO to by-pass the pre-approval requirements of the Federal Mandate Statute with the ARP Statute is inappropriate and NIPSCO's request for an ARP and associated recovery should be denied.

She stated that should the Commission issue a CPCN for the Compliance Project and grant NIPSCO's request for an ARP for costs incurred prior to the Commission issuing a final order in this Cause, the OUCC recommends cost recovery be structured in a manner that mitigates costs to consumers, including crediting any ash pond closure costs NIPSCO recovered through past rates, requiring the Company to conduct a comprehensive analysis of all current and past insurance policies and filing~~e~~ reimbursement claims under each applicable policy, to treat these costs as expenses, not capital projects, and therefore only allow a return "of" but not a return "on" costs. She explained that any costs included in "owner's costs" that include NIPSCO employee time, benefits and the like should also be removed, as NIPSCO already receives recovery through base rates to avoid double recovery.

Ms. Armstrong also discussed the Indiana Supreme Court's decision in *Ind. Off. Of Util. Consumer Couns. v. Duke Energy Ind., LLC*, 183 N.E.3d 266 (Ind. 2022). She noted that while Ms. Becker attempted to differentiate between Duke and what NIPSCO is requesting, the Project's costs are being incurred under the same scenario as DEI's past closure costs. In NIPSCO's most recent rate case, Cause No. 45159, NIPSCO removed CCR closure costs from the decommissioning costs used to calculate net salvage value for the purposes of determining depreciation rates. However, ash pond closure costs were accounted for in depreciation rates proposed and approved in rate cases Cause Nos. 43969 and 44688.

Ms. Armstrong noted that NIPSCO could have requested recovery of CCR closure costs by including them in its calculation of depreciation rates, but NIPSCO chose to exclude these costs

from its most recent depreciation study. She stated that NIPSCO cannot change depreciation rates or expense between rate cases, so seeking recovery of them now would constitute retroactive ratemaking. She pointed out that as the Supreme Court indicated in its decision, I.C. ch. 8-1-8.4 offered an alternative route to recover these types of costs if they were found to be "federally mandated." However, both the Indiana Supreme Court and Commission noted that the statute requires the Commission to approve the utility's compliance plan *prior* to their recovery. Since NIPSCO has not yet received approval for the Project under I.C. § 8-1-8.4-6, and most of the Project's costs will be incurred before the Commission can approve them, they are disqualified from recovery under I.C. § 8-1-8.4-7(c).

Ms. Armstrong also discussed NIPSCO's request for an ARP. She stated that the plain language of the ARP statute involves the Commission declining to exercise its jurisdiction over a utility because it will be selling wholesale power, offering a voluntary retail service or program, or offering a retail service that is ill-suited for traditional regulation. She therefore concluded that it is not intended to be used by utilities to obtain special ratemaking treatment afforded in other statutes while circumventing their requirements or caselaw prohibiting retroactive ratemaking.

Ms. Armstrong discussed the previous amounts recovered by NIPSCO for remediation, pointing out that NIPSCO recovered costs for ash pond remediation in its rate cases in Cause Nos. 43969 and 44688. She stated it becomes complicated to cleanly separate these costs into a tracked federally mandated compliance project because it is difficult to know how demolition costs factored into previous Commission base rate case decisions for determining the utility's overall revenue requirement. The OUCC recommends the Commission deny NIPSCO's request for an ARP for the Project and its associated cost recovery. The ARP statute does not and should not apply to CCR closure costs. The OUCC further recommends the Commission deny Project costs incurred prior to a final Commission order approving a CPCN for the Project, as NIPSCO's request does not meet the requirements of pre-approval pursuant to I.C. § 8-1-8.4-6(a) and would allow NIPSCO to retroactively recover costs outside the confines of a base rate case that should have been accounted for in accumulated depreciation.

Brian A. Wright, a Utility Analyst II in the OUCC's Electric Division, discussed the environmental regulatory history and requirements leading to the Compliance Project, the compliance alternatives NIPSCO considered, and the reasonableness of the Compliance Project's cost estimate.

Kaleb G. Lantrip, a Utility Analyst in the OUCC's Electric Division, discussed NIPSCO's proposed ratemaking treatment and recovery of the Compliance Project's costs. Mr. Lantrip stated the Compliance Project costs are for the removal of coal ash from NIPSCO's ash ponds; as costs are incurred, they are charged to the Accumulated Depreciation account. This increases NIPSCO's rate base, less any salvage costs, plus the effects on the Accumulated Depreciation account, leading to increases in depreciation rates to cover future removal costs. The entries for cost of removal are include in a base rate case where they impact rate base and depreciation rates for all removal costs incurred between the last rate case to the next. NIPSCO did not account for coal ash pond closure costs in its last rate case and is requesting recover the effect of the ash pond removal cost with a charge to Accumulated Depreciation ("Account 108"), and then include this cost effect in rate base in the FMCA mechanism to earn a return "on" and a return "of" as if this cost was an investment

in plant or asset. As discussed further below, this is not the appropriate cost recovery mechanism under the circumstances.

NIPSCO's current request creates a risk of double recovery at the time of its next rate case because its Accumulated Depreciation account must be adjusted to remove ash pond removal costs from rate base and depreciation rate calculations. Failing to do so would result in NIPSCO double-charging these costs in base rates and in the FMCA. NIPSCO acknowledges that it will have to adjust depreciation rate calculations to prevent the FMCA cost recovery of removal from impacting base rate assessment of depreciation rates. NIPSCO also admits it could seek recovery of these costs in its next base rate case.

Mr. Lantrip noted that NIPSCO did not seek to use regulatory asset accounting because it did not seek the Commission's pre-approval, recognizing that the Supreme Court had denied Duke relief on those grounds. Mr. Lantrip recommended that in the alternative, NIPSCO could include these costs of removal as part of its depreciation study in its upcoming base rate case as it has done in previous rate cases (Cause Nos. 43526, 43969, and 44688). Therefore, Mr. Lantrip concluded that NIPSCO should offset its $40.044 million estimated request using previously collected ash pond closure costs from prior rate cases. NIPSCO did not show that its request to recover costs of CCR removal had been reduced for any previously collected accumulated depreciation. NIPSCO also included internal resources in its estimate of the Owner's Costs ($3.488 million) and Indirect Costs ($3.932 million) portions of the Compliance Project, and Mr. Lantrip recommended that the Compliance Project costs should be reduced by the amounts already included in base rates for these categories. Mr. Lantrip stated that it is the OUCC's position that indirect costs of removal do not qualify as capital costs.

Mr. Lantrip recommended that the Commission dismiss NIPSCO's petition for an ARP approval for recovery through an FMCA Rider, as this recovery can be addressed as part of its base rate case. Further if the Commission grants Petitioner's request for recovery of these Compliance Project costs, the Commission should order NIPSCO to make compliance Project Costs net of any recovered coal ash pond closure costs through depreciation rates accrued through the effective period of base rate cases prior to the current rates, which have omitted CCR-based recovery. Further, he recommended that the Commission make Compliance Project costs recovered under the FMCA mechanism limited to "return of"; that it exclude double recovery of indirect overhead and internal labor; and eliminate the ash pond removal cost effect from the FMCA in the next base rate case and credit any amortization of the removal costs in the FMCA to accumulated depreciation.

~~He recommended denial of NIPSCO's proposed cost recovery but proposed alternative ratemaking treatment of the Compliance Project should the Commission grant NIPSCO's requested CPCN and ARP for the Compliance Project.~~

C. CAC's Case-in-Chief. Benjamin Inskeep, Program Director at CAC, recommended that the Commission (1) encourage NIPSCO to fully clean up its Michigan City site of coal ash and constituents, including coal ash fill, as requested by NIPSCO's customers at the Field Hearing and as is necessary for NIPSCO to provide safe electricity service to its customers and to best situate itself to meet federal requirements; (2) deny cost recovery of all Ash Pond Compliance Project costs previously incurred that would contravene Indiana's statutory prohibitions on retroactive ratemaking; (3) deny cost recovery for all Ash pond Compliance Project

costs that are not federally mandated and therefore cannot be recovered under the Federal Mandate Statute; (4) deny cost recovery for all Ash Pond Compliance Project costs associated with NIPSCO's cleanup of its CCR ponds that does not comply with the plain language requirements in the CCR Rule; and (5) deny NIPSCO's proposed cost allocation using adjusted demand allocators and instead approve cost allocation based on NIPSCO's adjusted energy allocators for any Ash Pond Compliance Project costs approved in this proceeding (and future proceeding proposals for coal ash project cost recovery).

In support of these recommendations, Mr. Inskeep testified that NIPSCO has not put forth any plan to fully clean up the Michigan City site in the future that would mitigate the significant risk to human health and the environment by leaving the large quantity of CCR fill at the site in place. According to Mr. Inskeep, the Commission should deny cost recovery for projects related to the closure of the "RCRA ponds." Mr. Inskeep testified that, because there is no provision of RCRA that mandates those pond closures, their closure costs are not "federally mandated" within the meaning of the Federal Mandate Statute. The only RCRA provision that NIPSCO is able to point to as relevant is a provision that requires corrective action for hazardous waste releases, but NIPSCO does not even concede that there have been any releases at the site for which corrective action is required, let alone that closure of the RCRA ponds would qualify as a corrective action measure. Nor is NIPSCO able to identify any other RCRA provisions that would require closure of the RCRA ponds. Therefore, Mr. Inskeep testified, "NIPSCO is trying to have its cake and eat it too" by seeking to recover costs that it claims are federally mandated while not actually complying with the relevant federal mandates.

Similarly, Mr. Inskeep also testified that NIPSCO's proposed method of closure for the impoundments that it acknowledges are covered by the CCR Rule is not consistent with the CCR Rule's requirements. As noted by Mr. Inskeep, the CCR Rule at 40 C.F.R. Section 257.102(c)-(d) requires utilities to close impoundments *either* by removal of coal ash *and* decontamination of affected areas, *or* by capping the ash in place if the utility can demonstrate that water will not continue to infiltrate the ash. NIPSCO's proposed closure method is not consistent with these requirements, because NIPSCO proposes to remove the ash *without* decontaminating affected areas, as required by 40 C.F.R. Section 257.102(c), and then cap the contaminated areas in place without cleaning them up. As Mr. Inskeep points out, the mere fact that IDEM approved NIPSCO's closure plans does not absolve them from enforcement liability, including by enforcement actions by U.S. EPA or federal enforcement litigation brought by private citizens. NIPSCO also is subject to a separate CCR Rule requirement, pursuant to 40 C.F.R. Sections 257.90-257.98, to conduct corrective actions to clean up contaminated groundwater. Therefore, Mr. Inskeep concludes, NIPSCO's proposed costs of capping contaminated areas in place rather than cleaning them up do not comply with "federally mandated requirements" under the Federal Mandate Statute, and the Commission should reject cost recovery for those costs.

Concerning the retroactive ratemaking issue, Mr. Inskeep testified that the Indiana Supreme Court's recent decision in *Duke Energy* barred cost recovery for any costs incurred prior to the Commission's final order in this proceeding, to avoid retroactive ratemaking.

Mr. Inskeep also testified that NIPSCO's demand allocators are based on each customer class's contribution to coincident peak ("CP") demand during the four summer months of June-September, referred to as the 4CP [coincident peak] methodology. Mr. Inskeep explained that CAC is extremely concerned with this cost allocation methodology because it allocates costs

on the basis of demand even though the costs are clearly energy-related costs. He explained that coal ash is generated as a function of energy generation, that is, the more coal that is burned to generate electricity, the more coal ash that is created, which in turn results in additional coal ash disposal costs. He noted that the amount of coal ash created is not related to capacity nor for meeting NIPSCO's capacity obligations. He went on to detail how the 4CP methodology is particularly egregious and inappropriate in this instance because coal ash is generated in all months of the year in proportion to the amount of electricity that is generated by the plant, whereas the 4CP methodology, only considers a customer class's contribution to the peak demand in four summer months when allocating costs to customer classes.

Mr. Inskeep calculated that Rate 831 industrial customers would receive a cross-subsidy of $8.6 million in reduced revenue requirements under the 4CP methodology—the costs of which would be shifted to other rate classes—compared to his recommendation to use NIPSCO's adjusted energy allocators for these energy-related costs. Mr. Inskeep calculated that NIPSCO's cost proposal would unfairly allocate approximately $14.2 million (35.34%) of the total $40.0 million in costs to residential customers, when these customers should have only been allocated $9.6 million (23.92%) of the costs based on the proportion of energy used (and, by extension, the proportion of coal ash created). Mr. Inskeep concluded that the 4CP methodology produces unjust and unreasonable rates that harm some customer classes, including residential customers, and create windfall rate subsidies to other customer classes, and that the adjusted energy allocators would be appropriate to use instead.

D. Industrial Group's Case-in-Chief. Brian C. Collins, Managing Principal with the firm of Brubaker & Associates, Inc., recommended that (1) the $40 million proposed cost recovery for the Ash Pond Compliance Project be denied as NIPSCO failed to provide evidence identifying any incremental amount of costs that should be recovered from ratepayers for the Ash Pond Compliance Project and instead use the $22.1 million adjusted Ash Pond Compliance Project costs, with offsets for previous closure costs collected from customers as depreciation expense in base rates, if any, would be the appropriate amount for cost recovery; and (2) if the Commission approves NIPSCO's proposal to amortize a large portion of the cost recovery, the amortization should not include a carrying cost at NIPSCO's WACC, in order to minimize the long term impact on customers and instead proposed that if any carrying charge is approved, it should reflect NIPSCO's cost of debt, which would be more appropriately recognize the costs incurred by NIPSCO over the 10-year period it proposes to amortize the regulatory asset that it effectively proposed to create. Brian C. Collins, a Managing Principal of Brubaker & Associates, Inc., testified on behalf of the NIPSCO Industrial Group. Mr. Collins recommended that the Commission deny NIPSCO's request to recover $40 million of ash pond compliance costs for its Michigan City Generation Station.

Mr. Collins testified that NIPSCO had not demonstrated that the proposed $40 million in Compliance Project cost were incremental to the costs above those already built into NIPSCO's rates for normal and ongoing expenses. Mr. Collins testified that in the absence of such a showing, recovery was inappropriate. IG Ex. 1 at 9.

More specifically, Mr. Collins testified that NIPSCO provided no evidence that existing base rates were inadequate to cover the costs of the Compliance Project. He also testified that NIPSCO had incurred Compliance Project costs in the years predating the case, without seeking approval for recover, and that it was incurring costs during 2022 and the pendency of the case. IG

Ex. 1 at 9-10. Mr. Collins, referring to NIPSCO's responses in discovery which he included as attachments to his testimony, testified that NIPSCO had incurred approximately $14.8 million in engineering, construction, and owner's costs as of July 31, 2022, with "approximately" $8.226 million in construction costs having been incurred by that time. IG Ex. 1 at 10. Mr. Collins testified that the Company has not provided evidence that the costs it seeks to recover from customers for the same categories of expenses (e.g., engineering costs, owner's costs, and indirect costs) are incremental to the costs it recovers through base rates for operating Michigan City. IG Ex. 1 at 10-11.

Mr. Collins testified that NIPSCO had not identified any prior Commission order authorizing deferred accounting for Compliance Project costs and provided evidence, produced in discovery, that NIPSCO had been incurring compliances costs years prior the filing of the case. IG Ex. 1C at 11, Confidential Attachment BCC-3. He reiterated that NIPSCO did not demonstrate that its base rates during a period prior to the filing of this proceeding and during its pendency were insufficient to recover these costs. IG Ex. 1C. at 11.

Mr. Collins then noted that NIPSCO could have collected costs for the ash ponds prior to the new depreciation rates set in 2011, as closure costs for the ash ponds likely would have been included as part of the depreciation expense approved for the Michigan City generation station built into base rates prior to 2011. IG Ex 1 at 12-13. Mr. Collins testified that approximately $3 million in ash pond closure costs that have already been recovered from ratepayers through depreciation rates. IG Ex. 1 at 13. Mr. Collins testified that this approximately $3 million should be removed from any approved recovery so that ratepayers do not pay twice for the costs of the Compliance Project – once through depreciation rates and then through the FMCA. IG Ex. 1 at 13.

Mr. Collins further testified in addition to removing the costs which NIPSCO had not shown to be incremental to those embedded in base rates ($2.7 million in engineering, $3.5 million in owners' costs, $3.3 million in contingency costs, and $3.9 million in indirect costs) the remaining incremental amount, if any, would be $26.7 million. IG Ex. 1 at 8, 12. Mr. Collins objected, however, to the recovery of an additional $4.5 million in contingency costs which he testified should be removed as they were unknown and unmeasurable. IG Ex 1 at 12. With these adjustments, not including the previously incurred $8.226 million in construction costs identified as already having been incurred or the approximately $3 million in depreciation expense recovered in base rates, would reduce any potential recovery $22.1 million. IG Ex. 1 at 12. Given that Mr. Collins did not take any position as to retroactive recovery, this figure necessarily includes costs incurred in 2022 while this case was pending. IG Ex. 1 at 4-5, IG Ex 1C at Confidential Attachment BCC-3. Mr. Collins was clear, however, that NIPSCO should not have its proposed recovery approved. IG Ex. 1 at 16.

Mr. Collins also expressed concern about NIPSCO's proposed cost recovery. He noted that the Company is proposing to deviate from the terms of the Federal Mandate Statute, and recovery the costs of the Compliance Project, together with carrying charges, over a 10 year period, which will increase costs to customers. IG Ex. 1 at 15. Mr. Collins also testified that NIPSCO's proposed recovery mechanism would leave customers responsible for costs long into the future – until 2032 – for an asset that is effectively retired. IG Ex. 1 at 15. Mr. Collins recommended that if the Commission approves any recovery with carrying charge, the return should reflect the Company's

cost of debt, which would more appropriately recognize the incurrence of costs over the 10 year recovery period proposed by the Company. IG Ex. 1 at 16.

He noted that the Company proposes to allocate the Compliance Project costs to classes based on demand allocators noted in a filing in NIPSCO's electric case in Cause No. 45159 which he did not disagree with. Mr. Collins recommended, however, that new, approved, demand allocators from NIPSCO's pending rate case, should be used to allocate the costs of the Compliance Project in the future. IG Ex. 1 at 16.

E. Industrial Group's Cross-Answering Testimony.

In his cross-testimony, Mr. Collins responded to Mr. Inskeep's direct testimony on behalf of Citizens Action Coalition ("CAC"). Mr. Collins recommended that the Commission deny Mr. Inskeep's recommendation to allocate coal ash pond compliance costs on an adjusted energy allocator, including an allocation to Rate 831 Tier 2 customers. Mr. Collins testified that it is appropriate to allocate any approved Compliance Costs on a demand basis as the ash ponds are fixed cost structure associated with production plant, and typically allocated to FERC accounts for production plant. IG Ex. 2 at 3. He testified that such plant needs to be sized to meet demand, and that it is appropriate to allocate production plant on a demand basis. IG Ex. 2 at 3-4. He noted that this was the manner in which the Commission allocated production plant in NIPSCO's last base rate case. IG Ex. 2 at 4.

Mr. Collins also noted that NIPSCO's Commission approved tariff does not allocate FMCA charges to Rate 831 Tier 2 and explained the cost justification for this. Specifically, he testified that Tier 2 capacity is subject to curtailment by NIPSCO unless it is firmed up through the PRA or a third-party contract, meaning it is an interruptible level of service that allows NIPSCO to avoid building generation plant to serve that load. IG Ex. 2 at 4-5. He also testified that Rate 831 Tier 2 energy is priced at LMP, removing Tier 2 energy from the fuel costs benefits of NIPSCO's generation and purchased power portfolio, and instead exposing customers to market pricing risk. IG Ex. 2 at 5. Mr. Collins recommended that no costs should be allocated to Rate 831 Tier 2 customers and that they are not, as asserted by Mr. Inskeep, receiving a "windfall" or subsidy under NIPSCO's proposed allocation methodology for the reasons he explained. IG Ex 2 at 5.

~~**E. Industrial Group's Cross-Answering Testimony.** Mr. Collins filed cross-answering testimony in support of NIPSCO's proposed 4CP demand allocators, stating that coal ash pond costs are normally included in the production plant account, such as FERC Account 312, and that the costs of such fixed cost structures are appropriately allocated on a demand basis. He also explained that Rate 831 is a cost-based rate, and Rate 831 Tier 2 customers are not reliant upon NIPSCO's generation portfolio and do not receive the fuel cost benefits associated with that portfolio; therefore, there is no subsidy or "windfall" for Rate 831 Tier 2 under NIPSCO's demand allocation proposal.~~

F. NIPSCO's Rebuttal.

(1) NIPSCO Witness Gode. In rebuttal, Mr. Gode testified how NIPSCO will account for the Compliance Project costs and clarified that, except for approximately $2.9 million (as of December 31, 2021) of estimated general pond closure costs embedded in and collected through depreciation commencing with NIPSCO's Cause No. 43969 rate case, NIPSCO's prior and existing base rates do not include recovery for any of the Compliance Project

costs. He explained that as a result, NIPSCO will reduce the Compliance Project costs to be collected through the FMCA mechanism by $2.9 million. He noted that this estimated collection amount will be updated at the time the project is completed and collection begins in the tracker.

Mr. Gode supported NIPSCO's proposed ratemaking treatment as reasonable and appropriate, refuting the Intervenors' assertion that incurred, actual Compliance Project costs recovered through the FMCA should not include indirect, owner's, engineering, or design costs. He also responded to the Intervenors' arguments regarding a return "on" component for the Compliance Project.

Finally, Mr. Gode reiterated his testimony as to why the FMCA mechanism is appropriate for recovery of costs for the Compliance Project, explaining that these costs were not included in NIPSCO's last rate case, where it was proposed and accepted that the costs would be presented to the Commission for approval in a future case.

(2) NIPSCO Witness Turman. In response to Mr. Inskeep's ~~wrongful belief~~testimony that certain costs are not federally mandated, Ms. Turman ~~explained how~~testified that all the costs associated with the closure of the ponds subject to this proceeding are subject to RCRA. She also ~~explained~~testified that RCRA authority being delegated to IDEM by the US EPA does not negate a federal mandate designation. Finally, she ~~described how~~stated that, contrary to Mr. Inskeep's ~~belief~~testimony, NIPSCO's proposed Ash Pond Compliance Project ("Compliance Project") complies with the CCR Rule (a RCRA regulation).

(3) NIPSCO Witness Blissmer. Mr. Blissmer responded to Mr. Inskeep's recommended denial of NIPSCO's proposed demand allocators and 4 coincident peak ("4 CP") methodology to allocate the costs of the proposed Ash Pond Compliance Project. He testified that NIPSCO's proposed allocation factors are the same as those that would have been used to allocate ash pond closure costs through base rates and are consistent with how costs were to be allocated under the FMCA Tracker pursuant to NIPSCO's last base rate case. He stated that it is appropriate to allocate the Ash Pond Compliance Project costs using demand allocators as opposed to energy allocators. He explained that prior FMCAs have delineated allocation of costs between fixed and variable costs, with fixed costs being allocated on a demand basis and variable costs on an energy basis. He explained that since only the first tier of Rate 831's service is firm service and backed by NIPSCO's production assets, Mr. Inskeep's recommendation to allocate the costs of NIPSCO's Ash Pond Compliance Project on an energy basis is inconsistent with how fixed FMCA costs have been allocated in the past and ignores the fact that the ash ponds are associated with NIPSCO's production facilities, which are designed to meet the demands of NIPSCO's customers.

Mr. Blissmer noted that although Mr. Collins supports NIPSCO's proposed allocation factors, he recommended to apply only the Company's cost of debt to NIPSCO's 20% deferral. He testified that NIPSCO's 4 CP methodology has been approved by the Commission for purposes of allocating costs in setting its base rates, and NIPSCO is proposing to use the same methodology to allocate costs to set its FMCA rates for this Project.

Mr. Blissmer disagreed with Mr. Collins' recommendation to reduce the carrying charge to 20% deferral to solely the Company's cost of debt. He testified that Indiana Code § 8-1-8.4-7(c)(2) allows for 20% of the approved federally mandated costs, including depreciation, allowance for funds used during construction, and–importantly, for this issue–post in service

carrying costs based on the overall cost of capital most recently approved by the Commission to be deferred and recovered in a future general rate case. He stated the statute specifically allows for this to compensate utilities for its cost of capital while it is waiting to collect the federally mandated costs it incurred. He explained that NIPSCO funds its capital projects through a combination of debt and equity and, as such, should recover its fully weighted average cost of capital when recovery expands over multiple year.

(4) NIPSCO Witness Becker. Ms. Becker responded to Intervenors' incorrect claims that the Federal Mandate Statute does not apply to costs that are incurred before an order is issued. She stated that the two critical findings the Commission must make are that the public convenience and necessity "will be served" by a compliance project and that the compliance project "will allow the energy utility to comply." She testified NIPSCO's project "will" serve the public convenience and necessity from the day that it is completed and for many years in the future and "will allow" NIPSCO to comply with the federal mandate. She stated that whether costs have already been incurred has no impact on these findings.

Ms. Becker also explained that the provision in Ind. Code § 8-1-8.4-6(b)(1)(B) concerning "projected federally mandated costs" is information the statute requires an energy utility "set forth in [its] application." She pointed out that it must therefore be a projection as of the date of the petition. She testified NIPSCO's cost estimate was a projection for the cost to complete the project when it filed its petition, and it continues to be a projection, since the work is not yet complete. She stated such a projection can include project costs incurred prior to and during the proceeding, especially when, as is often the case with compliance projects, there are mandated compliance deadlines that must be met and costs must be incurred prior to the petition date in order to meet those deadlines. She also pointed out the multiple orders of the Commission authorizing recovery of federally mandated costs incurred on a federally mandated compliance project before the issuance of the order.

Ms. Becker testified that Intervenors' recommendation for disqualification of costs incurred before the order issuance relies upon use of future tense in selective phrases in the statute. She noted there really is no need to parse verb tense because when the General Assembly intends for nothing to be done before an Order is issued, it knows how to say so.

Ms. Becker discussed why inclusion of contingency is appropriate as part of a best estimate. She explained that NIPSCO's proposed Compliance Project includes $3.3 million of contingency costs. She noted that based on her review of Mr. Collins' testimony, it appears he refers to the approximate $4.5 million of contingency, which is the amount of contingency that was calculated at the time of the estimate dated November 27, 2019. She explained that approximately $3.3 million of contingency was included to cover contingency items known at the time of the filing. She testified that since NIPSCO will not seek recovery of the federally mandated costs until the project is complete, any contingency included in the estimate will only be sought for recovery if actually incurred.

In response to Mr. Collins' recommendation that NIPSCO's $3.3 million contingency allowance be denied because it is "not prudent and [] not known and measurable" she stated the $3.3 million contingency allowance is primarily calculated based off the contracting structure for the Ash Pond Compliance Project. She explained that contingency was assigned (1) for unit quantity fluctuations since the construction contract is largely composed of unit price line items

that are subject to change based on the amount of work completed, (2) to dewatering and water treatment costs due to potential variability in groundwater conditions based on weather and soil conditions, and (3) for variability in NIPSCO's owner's costs since most of these costs are based on time and expense contracts. She stated that through the FMCA tracker, NIPSCO will only recover actual federally mandated costs it incurs; therefore, if it does not incur all of the contingency allowance included in its Compliance Project estimate those costs would not be recovered through the FMCA tracker.

She also explained that in making this recommendation, Mr. Collins ignores prior Commission decisions that have approved contingencies for similar construction projects. She stated that in NIPSCO's most recent TDSIC Plan case, Cause No. 45557, the Commission denied Mr. Collins' request to remove contingency because it was "unnecessary" finding that excluding contingency would be unreasonable and would result in the TDSIC cost estimates to not be a "best estimate" as required by statute and that the Commission also found that "including contingency costs in the cost estimate is consistent with the AACE system and with industry practice." Cause No. 45557 Order at 56. Ms. Becker testified that NIPSCO's contingency allowances in this Cause serve a similar purpose to that in its TDSIC Plan and should be approved.

4. Commission Discussion and Findings.

We view this case in light of the decision in *Office of Utility Consumer Counselor v. Duke Energy Indiana, LLC*, 183 N.E.3d 266 (Ind. 2022) in which the Indiana Supreme Court reaffirmed Indiana's longstanding prohibition on retroactive ratemaking. We consider that case controlling in this matter.- In *Duke Energy*, the Court explained that the prohibition on retroactive ratemaking is grounded in the Commission's statutory authority as reflected in Indiana Code § 8-1-2-68, which permits us to set only rates to be followed "in the future." *Duke Energy*, 183 N.E.3d at 268.

The decision in *Duke Energy* made clear that the dividing line for purposes of determining whether rates are retroactive, and therefore unlawful, and those which are prospective, and therefore lawful (provided they are just and reasonable), lies at the date of the Commission's order, not at the date of the utility's initiation of the case. *See Id*. at 268 and 270. The Court's decision in *Duke Energy* reversed that portion of our order in Cause No. 45253 permitting Duke to recover environmental costs incurred between rate cases, and prior to the date of our final order, which authorized adjustment of Duke's base rates to permit recovery of those costs from ratepayers. Conforming our decision here to the Supreme Court's holding in *Duke Energy*, we must reject NIPSCO's request to recover costs associated with the Compliance Project incurred prior to the date of this order.

For purposes of this analysis, we acknowledge NIPSCO's assertion that under traditional ratemaking, it could have sought recovery for the costs of the Compliance Project through depreciation rates set in a base rate case. If NIPSCO proposed depreciation rates reflecting the compliance project costs, and the Commission had the opportunity to determine the resulting base rates were just and reasonable and that the costs had not been incurred prior to adjustment of the base rates, would have resulted in an order that was prospective in nature, and therefore lawful. But, NIPSCO did not do so.

Instead NIPSCO testified, in its last rate case, the Company voluntarily proposed not to adjust its depreciation rates to reflect future costs associated with the Compliance Project, and

instead proposed to seek recovery of such costs in its next rate case or under the terms of the Federal Mandate Statute, Indiana Code ch. 8-1-8.4.- That the other parties to the settlement which resolved NIPSCO's revenue requirement in Cause No. 45159 agreed to NIPSCO's proposal has no bearing on our analysis. Having undertaken to proceed under the Federal Mandate Statute, and having itself agreed to do so as part of the resolution of Cause No. 45159, NIPSCO is obliged to conform to the terms of the statute in order to obtain any relief.

Indeed, on this point we fundamentally disagree with NIPSCO's assertion that if we do not permit recovery of these costs through the Federal Mandate Statute, then "NIPSCO would not be barred recovery of these costs as part of its *next* depreciation study." (NIPSCO's Proposed Order at 19 (emphasis added)). What NIPSCO suggests is the very essence of retroactive ratemaking – the establishment of a new rate to recover costs incurred by the utility in the past. *See Public Service Commission v. City of Indianapolis*, 235 Ind. 70, 88, 131 N.E.3d 308, 315 (1956) ("Past losses of a utility cannot be recovered from consumers nor can consumers claim a return of profits and earnings which may appear excessive."). We simply have no statutory authority to permit such retroactive recovery. *See*, *e.g.*, *Indiana Telephone Co. v. Public Service Commission*, 131 Ind. App. 314,, 340, 171 N.E.2d 111, 124 (1960); *Indiana Bell Telephone Co. v. OUCC*, 717 N.E.2d 613, 625 (Ind. Ct. App. 1999); *Airco Industrial Gases v. I&M*, 614 N.E.2d 951, 953 (Ind. Ct. App. 1993). Under *Duke Energy*, it is clear that the only permissible rates must be prospective in orientation and cannot include retroactive recovery of costs incurred prior to the issuance of an order approving rate recovery. Accordingly, only if NIPSCO sought to include the costs of the Compliance Projects as part of its depreciation expense in a prior proceeding, seeking retirement obligation costs which had not yet been incurred, would it be entitled to include them in rates. As the costs here were specifically excluded, by NIPSCO's own choice, from rates, it cannot seek to recover them in base rates in any future proceeding.

The central question for this Commission to address, then, is whether NIPSCO has complied with Ind. Code ch. 8-1-8.4 by filing a request for recovery of Compliance Costs incurred both prior to, and contemporaneously with, the pendency of this case. (*See* Ind. Group Ex 1C at Confidential Attachment BCC-3) (showing compliance costs incurred years prior to and after the March, 2022 filing by NIPSCO)). Upon analysis of the Federal Mandate Statute we find that NIPSCO has not brought itself under the terms of that statute, and is instead seeking unlawful retroactive relief.

We reach this conclusion because the Supreme Court's decision in *Duke Energy* specifically addressed the terms of the Federal Mandate Statute. *Duke Energy*, 183 N.E.3d at 270. Indeed, in its opinion, the Court expressly stated that: "Although we have not yet interpreted the statute, we note it is framed in the future tense and speaks of 'projected' costs for 'projected' projects . . . which would seem to require commission approval before a utility incurs the costs." *Id*. (emphasis in original) (citing Ind. Code §§ 8-1-8.4-6(a), 6(b), 6(b)(1), 7(b)(1) and 7(b)(2)). There is no question that the statute only allows a utility to track compliance costs through a mechanism such as NIPSCO's FMCA after this Commission issues a CPCN allowing that treatment. Ind. Code § 8-1-8.4-6. The purpose of a CPCN proceeding is to determine whether a project and its projected costs are prudent before those costs are subsequently passed on to ratepayers. Only with prior authorization from this Commission, then, are costs subject to recovery through the FMCA.

In light of the unequivocal dividing line between impermissible retroactive and lawful prospective recovery established by the Indiana Supreme Court in *Duke Energy*, a statute drafted entirely in the future tense and dependent upon Commission issuance of a CPCN prior to recovery of costs, and explicit discussion by the Indiana Supreme Court of the Federal Mandate Statute, we conclude that the Supreme Court correctly construed Indiana Code Chapter 8-1-8.4 to require "commission approval before a utility incurs" mandated compliance costs. *Duke Energy*, 183 N.E.3d at 270. As NIPSCO has unquestionably incurred costs prior to not only a final order in this cause, but even prior to the submission of a petition in this case, we deny the requested relief.

In reaching this conclusion we are not persuaded that our prior decisions are incompatible with our decision here. NIPSCO cites several cases where we have allowed recovery of pre-filing or pre-order costs. (NIPSCO Proposed Order at 23.) We have reviewed those cases - which include Cause Nos. 44971, 45052, 44988, and 44367 FMCA4 - and find they are readily distinct from the case here. With the exception of Cause No. 44367 FMCA4, and the attending order on reconsideration, there was no indication that any challenge was raised regarding retroactive ratemaking. Further, Cause No. 44988, was resolved by a comprehensive settlement which also resolved NIPSCO's request for recovery of costs through its FMCA in Cause No 45007, and is therefore of no precedential value. To the extent Cause No. 44367 FMCA4 addresses the recovery of previously incurred costs through the Federal Mandate Statute, we made plain that costs incurred prior to Commission approval is impermissible. (Original Order at 28-29). Insofar as we explained on Reconsideration that our initial decision was driven by the facts of the case, we also noted that prior instances, including Cause No. 44971 and 44367 FMCA 1, where we permitted recovery of substantial costs incurred prior to the issuance of an order were in the context of request "filed in a timely manner within the context of the [statute mandating compliance] and the utility's compliance request." (Cause No. 44367 FMCA4 Order on Reconsideration at 3).

Although NIPSCO tries to bring itself into that category of timely recovery, it fails to do so. In this instance, NIPSCO has known for years of the federal mandate and that compliance costs will be required to be incurred. In fact, it seeks recovery for costs incurred in periods prior to its last rate case. (Ind. Group Ex 1C at Confidential Attachment BCC-3). It could not, have made the proposal in its 2018 Rate case to seek recovery through a proceeding under the Federal Mandate Statute instead of through increased depreciation expense if it had not known the costs would be incurred. Indeed, NIPSCO made an alternative calculation of estimated compliance costs for ratemaking purposes in the rate case. In other words, NIPSCO did not act in a timely manner to seek recovery of costs commensurate with the imposition of the compliance requirement by the federal government. NIPSCO is not, under the Federal Mandate Statute, entitled to automatic recovery of all costs associated with projects; only those which are pre-approved. Here, it had advance foreknowledge of the need for compliance and the ability to proactively seek recovery of projected costs, but it did not act. It is now left to the standards of traditional ratemaking, which preclude the retroactive recovery of such costs.

Finally, we note that part of NIPSCO's petition requested that the Commission consider relief under an Alternative Regulatory Plan expressly as a means to avoid the prohibition on retroactive ratemaking. (*See* NIPSCO Proposed Order at 25). The Alternative Utility Regulatory Act, Indiana Code ch. 8-1-2.5, was enacted in 1995 to provide the Commission with the statutory authority to approve alternatives to traditional regulation so that Indiana's energy utilities could address the "increasingly competitive environment for energy services. . . ." I.C. § 8-1-2.5-1(3). In other words, the AUR Act was meant to provide a means by which this Commission could

review and approve flexible alternatives to traditional ratemaking in order to allow the state's energy utilities to remain competitive in a changing marketplace.

We note that like the Federal Mandate Statute, the AUR is framed in the future tense. A utility like NIPSCO seeking approval under Section 6 of the Act must "file with the commission an alternative regulatory plan *proposing* how the commission will approve retail energy services or just and reasonable rates and charges. . . ." I.C. 8-1-2.5-6(c) (emphasis added). Further, only after a "notice and a hearing" may this Commission "approve, reject, or modify the energy utility's proposed plan if the commission finds that such action is consistent with the public interest." *Id*. at §6(e). *Id*. at §4. In other words, the AUR Act speaks about the establishment of alternative and flexible plans to be implemented in the future; not as a means to ratify or rectify on a retroactive basis those actions taken in the past. Likewise, Section 4 of the Act makes clear that any relief under Section 6 is to be "limited to the approval of energy services or the establishment of rates and charges . . . ." Here too, the relief must be prospective in nature, via the "establishment" of rates and charges on a going forward basis; not the establishment to retroactive recovery of past costs or losses incurred by the utility.

We simply do not read the AUR Act, as NIPSCO would propose, as a means to circumvent the statutory prohibition on retroactive ratemaking. As noted, the statute is intended to promote flexible arrangements to assist Indiana utilities in remaining competitive on a prospective basis. That flexibility, however, must be exercised with the interests of the public in mind. *Id*. §§1(6), 5(b), 6(a)(1)(A). We fail to see how the public interest is served by undoing a longstanding legal principle which is, itself, designed to protect the public from being charged rates that allow a monopoly enterprise the ability to recover past losses through future rates. Indiana has long adhered to the basic regulatory principle that the "chance of loss or profit from operations is one of the risks" a utility "must take" so that the utility "must bear the loss and is entitled to the gain depending on the efficiency of its management and the economic uncertainties of the future after a rate is fixed." *City of Indianapolis*, 235 Ind. at 89, 131 N.E.2d at 315. Were we to read the AUR Act as NIPSCO proposes, we would not only undo the incentive for utilities to maximize efficiency, but wholly relieve utilities of the risk of any loss. Indeed, we would undo the very limitations imposed by the statutory prohibition on retroactive ratemaking found in I.C. 8-1-2-68. We do not believe the General Assembly intended that result, and will not interpret Ind. Code ch. 8-1-2.5 in a manner that completely undoes the underpinnings of regulation in a manner inconsistent with the purpose the AUR Act itself.

~~As we approach this case, we are mindful of the context in which this case has been filed. This is especially so in light of the very recent Indiana Supreme Court decision on retroactive ratemaking in *Office of Util. Cons. Couns. v. Duke Energy Indiana, LLC*, 183 N.E.3d 266 (Ind. 2022). As explained by witness Gode, the costs of the Ash Pond Compliance Project are costs of removal associated with the planned retirement of the Michigan City facility. Pursuant to the FERC USOA, these costs are ordinarily recorded by debiting (reducing) Accumulated Depreciation and thereby increasing net original cost rate base. Over time, through the course of setting depreciation accrual rates, these costs would be recovered through depreciation rates. We have required major electric utilities like NIPSCO to follow this practice by duly promulgating a regulation adopting the FERC USOA. 170 IAC 4-2-1.1(a). Accounting for retirements and costs of removal pursuant to the FERC USOA and the resulting ratemaking treatment is consistent with our statutory duty under Ind. Code §8-1-2-19:~~

> The commission, from time to time, shall ascertain and determine the proper and adequate rates of depreciation of the several classes of property of each public utility. The rates, tolls and charges shall be such as will provide the amounts required over and above the reasonable and necessary operating expenses to maintain such property in an operating state of efficiency corresponding to the progress of the industry. Each public utility shall conform its depreciation accounts to such rates, so ascertained and determined by the commission. The commission shall make changes in such rates of depreciation from time to time, as it may find necessary.

Thus, so long as the compliance costs are reasonable and necessary to satisfy estimated retirement obligations, such costs are recoverable through future depreciation rates, and recovery would not be foreclosed as "retroactive ratemaking" under *Duke*. Notably, in its last electric rate case, NIPSCO submitted testimony describing the preliminary scope of its compliance project and explaining its decision to not include costs in its depreciation rates at that time, and to instead, when the federal environmental regulations were better understood, seek recovery in a future base rate case or FMCA proceeding. These costs are therefore clearly not part of costs already recovered in rates.

In this case, NIPSCO has selected and presented an alternative method for approval of and recovery of these costs, one that the General Assembly has created through the Federal Mandate Statute. It is the eligibility for this alternative method of recovery that we are called to decide in this case. If we find the required elements set forth in Ind. Code §8-1-8.4-7(b) ("Section 7(b)") have been met, we are required to issue a CPCN and to provide for the *timely* recovery of the federally mandated costs pursuant to Ind. Code §8-1-8.4-7(c). Accordingly, we evaluate the Section 7(b) CPCN factors below and ultimately determine that each factor has been satisfied. Upon making this determination, Section 7(c) of the Federal Mandate Statute requires that timely recovery of 80% of an energy utility's federally mandated costs be recovered through its FMCA mechanism and the remaining 20% is deferred for recovery in its ensuing general rate case. We therefore turn to the elements of Section 7(b).

A. Ind. Code ch. 8-1-8.4 ("Chapter 8.4") Certificate. Pursuant to Ind. Code Section 7(b), "[t]he commission shall hold a properly noticed public hearing on each application and grant a certificate only if the commission has:

> (1) made a finding that the public convenience and necessity will be served by the proposed compliance project;
>
> (2) approved the projected federally mandated costs associated with the proposed compliance project; and
>
> (3) made a finding on each of the factors set forth in section 6(b) of this chapter."

We begin our analysis by reviewing and making a finding on each of the factors set forth in Ind. Code §8-1-8.4-6(b) ("Section 6(b)"). These findings will then guide our analysis of the first two elements of Section 7(b).

(1) Section 6(b)(1) Federally Mandated Requirements. NIPSCO sought approval of the Ash Pond Compliance Project at Michigan City to comply with the federal

requirements and associated compliance deadline of RCRA and CCR rule. Witness Turman thoroughly described the requirements of RCRA and the CCR rule and how RCRA and the CCR rule are requiring the closure of the five Michigan City ponds (the three RCRA ponds and two CCR ponds). She also described NIPSCO's agreed order. We find her testimony has persuasively set forth a description of the requirements at hand. Ind. Code § 8-1-8.4-5 defines a federally mandated requirement to include a "requirement that the commission determines is imposed on an energy utility by the federal government in connection with … [a]ny other law, order, or regulation administered or issued by the United States Environmental Protection Agency[.]" EPA promulgated the CCR Rule under RCRA, which is one of the federal mandates explicitly listed in Ind. Code § 8-1-8.4-5.

The OUCC concluded that NIPSCO's Compliance Project is a federally mandated requirement and that NIPSCO selected the most reasonable option for compliance. (Wright at p. 5 and Armstrong at p. 2.) The IG took no position on whether the Compliance Project costs qualify for recovery under Ind. Code ch. 8-1-8.4. (Collins at p. 4.)

CAC asserted that NIPSCO's RCRA pond closure costs are not federally mandated and recommended denial of that portion of NIPSCO's requested relief. (Inskeep at p. 15.) CAC witness Inskeep contended that IDEM's approval of NIPSCO's closure plans does not make the closure of those ponds a federal requirement under RCRA within the meaning of Ind. Code § 8-1-8.4-5. (Inskeep at p. 14.) He also asserted that NIPSCO's proposed Project does not comply with the CCR rules because the Project does not decontaminate all areas affected by release from the Michigan City coal ash ponds. (*Id.* at 18.)

We find CAC's testimony unconvincing. The record evidence is clear that all five ash ponds at Michigan City are subject to RCRA. (See Turman Direct at 2.) Consistent with Ind. Code § 8-1-8.4-5(3), we have regularly approved CPCN requests for recovery of environmental compliance costs generally and coal ash related compliance costs in particular. *See*, *e.g.*, our Orders in Cause Nos. 44765, 44794, 45052, and 44872. IDEM, the state agency with delegated authority to implement RCRA per 329 IAC 10 and to administer and enforce the RCRA hazardous waste program per Ind. Code 13-30 and 329 IAC 3.1 in the State of Indiana, approved NIPSCO's combined closure application in 2021. We decline CAC's invitation to invade IDEM's regulatory providence and overturn IDEM's prior approval. We find that RCRA and the CCR rule require that the three RCRA ponds and the two CCR ponds be closed.

Accordingly, we find that NIPSCO's Ash Pond Compliance Project allows it to comply with the federal requirements and associated compliance deadline in the RCRA and CCR rules, and each represent federally mandated requirements as that term is defined in Ind. Code § 8-1-8.4-5. Pursuant to Ind. Code§ 8-1-8.4-7(b)(3), we find NIPSCO's request satisfies Ind. Code§ 8-1-8.4-6(b)(l)(A).

(2) Federally Mandated Costs. (Ind. Code §§ 8-1-8.4-4, 8-1-8.4-6(b)(1)(B), 8-1-8.4-7(b)(2), and 8-1-8.4-7(b)(3)). Ind. Code § 8-1-8.4-4 defines federally mandated costs, in part, as "costs that an energy utility incurs in connection with a compliance project, including capital, operating, maintenance, depreciation, tax, or financing costs." It does not include fines or penalties for violations related to a federally mandated requirement. (*Id.*) While no party objected to whether NIPSCO's Project costs met the definition of "federally mandated costs," the parties raised several other related arguments, which we address in turn below. Intervenors'

arguments concerning the applicability of the Federal Mandate Statute to costs incurred prior to the date of this Order are discussed in Section 4(B).

NIPSCO witness Ridge presented the Ash Pond Compliance Project cost estimate of $40,044,000 ($36,112,000 in direct costs and $3,932,000 in indirect costs). (Ridge at p. 15 and Attachment 3-A.) NIPSCO witness Gode explained that the Project costs will be recorded as a retirement work order which reduces NIPSCO's Accumulated Depreciation (Account 108) balance and increases rate base, which has the same effect as NIPSCO making an investment in Utility Plant in Service. (Gode Direct at p. 6.) NIPSCO witness Blissmer stated there are no O&M expenses associated with the Project, and therefore no need to defer any ongoing O&M. He testified that the federally mandated costs associated with the Project are the financing costs associated with the investment in net original cost rate base (NIPSCO's WACC as applied to the costs of the Project) plus the amortization of that investment, in addition to federal and state income taxes and the public utility fee. (Blissmer Direct at p. 9.)

Incremental Costs

IG witness Collins raised concerns that NIPSCO had not proven the Ash Pond Compliance Project costs are incremental to those built into NIPSCO's base rates for normal and ongoing expenses such as engineering and owner's costs. (Collins Direct at p. 9.) OUCC witness Lantrip asserted that recovering the costs of NIPSCO's Ash Pond Compliance Project through the FMCA creates risk of double recovery at the time of NIPSCO's next base rate case because its accumulated depreciation account must be adjusted to remove ash pond removal costs from rate base and depreciation rate calculations. (Lantrip at p. 6.) NIPSCO reduced the amount it seeks to recover by $2.9 million to reflect estimated closure costs embedded in and collected through depreciation rates commencing with NIPSCO's Cause No. 43969 rate case in its rebuttal testimony. (Gode Rebuttal at p. 2.) No party objected to the accuracy of this amount.

We start by acknowledging the unique nature of cost of removal ratemaking and distinguishing it from traditional capital cost recovery in that the FERC USOA does not precisely assign COR reserves for specific removal tasks, specific projects, or specific assets. Depreciation rates are set to collect estimated cost of removal for overall asset classes. NIPSCO took the step to estimate the amount it has collected through historical depreciation rates for general ash pond closure costs and reduced its proposed Project cost recovery through the FMCA mechanism by that amount. Doing so reasonably resolves any concern of double recovery of the federally mandated costs. We approve NIPSCO's requested CPCN and accept Petitioner's proposal to recover its compliance-related costs presented in this proceeding, less $2,900,000 already collected.

Contingency, Design, and Indirect Costs

IG witness Collins opposed including contingency and design costs in NIPSCO's proposed Project costs, contending that these costs are not prudent and are not known and measurable. (Collins Direct at pp. 11-12.) OUCC witness Lantrip stated that NIPSCO's indirect Project costs should not be capitalized. (Lantrip at p. 10.) OUCC witness Armstrong testified that allowing utilities to recover waste remediation or costs of removal as a capital investment creates a perverse incentive to not address waste concerns earlier or to pursue other cost reduction options. (Armstrong at p. 14-15.)

We are not persuaded by Intervenors' testimony on these matters. In order to present a viable project that meets applicable environmental standards, achieves compliance with the underlying federally mandated requirements, and to have the cost estimates necessary to present a case that meets the evidentiary provisions of the Federal Mandate Statute, NIPSCO must incur planning and design costs. We have permitted recovery of similar costs in cases involving complex capital projects (Cause Nos. 45647, 44971, 45052, and 44988). NIPSCO's design costs in this Cause are no different from those authorized in these prior cases and are therefore approved.

Regarding contingency costs, we agree with NIPSCO witness Becker that NIPSCO's contingency allowance in this Cause serves a similar purpose to the contingency costs we approved in NIPSCO's most recent electric TDSIC Plan, in which we found that including contingency costs in a cost estimate is consistent with the AACE system and industry practice. We also note that through the FMCA tracker, NIPSCO will only recover the actual federally mandated costs it incurs; therefore, if it does not incur all of the contingency allowance included in its Project estimate, the total federally mandated cost will be less, and customers will only pay for what has been incurred. NIPSCO's proposed contingency allowance is therefore approved.

NIPSCO proposes to capitalize indirect labor costs, as these costs are allocated to all capital projects as part of standard plant accounting. We find NIPSCO's proposal is consistent with FERC accounting guidance and our treatment of capitalized indirect costs in TDSIC Plan cases and is hereby approved. We disagree with OUCC witness Armstrong's belief that earning a return on costs of removal incentivizes utility delay in addressing clean-up and observe that NIPSCO's proposal is consistent with how normal retirement accounting would similarly treat recovery of these costs. We note that NIPSCO has not delayed in seeking to meet the RCRA and CCR Rule compliance deadlines set by the EPA. As such, NIPSCO's proposal to apply a return "on" its proposed Ash Pond Compliance Project cost is hereby approved.

Insurance Proceeds

OUCC witness Armstrong recommended that NIPSCO be required to comprehensively re-evaluate all current and past insurance policies, file claims under each policy for CCR closure costs, and offset Project costs by any insurance proceeds NIPSCO receives. (Armstrong at p. 20.) In rebuttal, NIPSCO witness Turman stated that costs related to CCR Rule and RCRA compliance are not reimbursable under NIPSCO's current insurance policies, but with respect to historical policies, NIPSCO is currently undertaking an evaluation to determine if there is potential coverage associated with the Ash Pond Compliance Project and will report back to the Commission and stakeholders in its FMCA Tracker proceedings following completion of this evaluation. (Turman Rebuttal at p. 12.) We find NIPSCO's rebuttal testimony provides a reasonable resolution and a method for the Commission and interested parties to stay apprised of NIPSCO's ongoing evaluation. We order NIPSCO to provide an update on its efforts in its first FMCA tracker filing.

Based on the evidence presented, we find NIPSCO's Ash Pond Compliance Project cost estimate of $40,044,000 is reasonable and should be approved. Pursuant to Ind. Code § 8-1-8.4-7(b)(3), we further find that NIPSCO has satisfied Ind. Code§ 8-1-8.4-6(b)(l)(B).

(3) Compliance with Federally Mandated Requirements. (Ind. Code §§ 8-1-8.4-6(b)(1)(C) and 8-1-8.4-7(b)(3)). NIPSCO witness Turman explained the federally mandated requirements that are driving the pond closure activities related to the Ash Pond Compliance Project, namely RCRA and the CCR Rule, including NIPSCO's Agreed Order with

~~IDEM. IDEM agreed to closing NIPSCO's three RCRA ash ponds in combination with the two CCR ash ponds in a combined IDEM closure application, approved by IDEM and received by NIPSCO on March 10, 2021. While the closure date for NIPSCO's RCRA ash ponds is not stipulated in the Agreed Order, evidence demonstrates the configuration of the ponds on the Michigan City property necessitates closing the ash ponds as part of one project. NIPSCO's two CCR ash ponds have a compliance based on closure date, based on the date each pond ceased receipt of waste; therefore, the entire Ash Pond Compliance Project must be complete by November 11, 2023.~~

~~CAC witness Inskeep asserted that NIPSCO's "hybrid approach" to closing the Michigan City ash ponds goes outside of the two allowable options provided for in the plain language of federal regulations. (Inskeep at p. 19.) NIPSCO's rebuttal testimony (Turman Rebuttal at p. 9) makes plain that IDEM has reviewed and approved the proposed Closure Plan and that the Plan is designed to meet closure-in-place performance standards set by federal regulations. We decline to second guess IDEM's judgment on matters within its jurisdiction, including those involving all coal ash closure, post-closure and compliance obligations in the State of Indiana.~~

~~Pursuant to Ind. Code§ 8-1-8.4-7(b)(3), we find that NIPSCO's request satisfies Ind. Code§ 8-1-8.4-6(b)(l)(C).~~

~~(4) Alternative Plans for Compliance. (Ind. Code §§ 8-1-8.4-6(b)(1)(D) and 8-1-8.4-7(b)(3)). A utility's application under Chapter 8.4 is required to include alternative plans that demonstrate that the proposed compliance project is reasonable and necessary. Ind. Code § 8-1-8.4-6(b)(1)(D).~~

~~NIPSCO witness Ridge presented the potential closure methods and related cost estimates prepared by an engineering contractor and explained there are key scope differences between the two approaches. (Ridge at p. 5.) For example, to use closure in place, NIPSCO would not remove CCR material prior to installing a cover system, and it expected that it would also need to install a slurry wall around the perimeter of the closed ponds to allow a pump and treatment system to be installed. Mr. Ridge further detailed that NIPSCO reviewed multiple options to beneficially reuse the CCRs being removed from the five Michigan City ponds, and that any boiler slag excavated during the Ash Pond Compliance Project that meets the specified requirements will be sold for beneficial reuse and credited to the overall Project cost. He stated that NIPSCO reviewed the potential of beneficial reuse for fly ash that is currently contained within the Michigan City ponds and concluded that the ponds did not have the quality or quantity of material needed to allow beneficial reuse to be a practical solution for fly ash. (*Id.* at p. 6.)~~

~~OUCC witness Brian Wright recommended approval of NIPSCO's closure plan and stated that this alternative is less costly and poses less risk for future contamination and additional cleanup being required. (Wright at pp. 5-6.) CAC witness Inskeep opined that NIPSCO's Michigan City site poses a risk to public health and the environment even after the completion of the Ash Pond Compliance Project because coal ash not located in the five ponds being closed will remain at the site. (Inskeep at p. 9.)~~

~~NIPSCO presented extensive testimony and attachments to support its conclusion that the Ash Pond Compliance Project is reasonable and should be approved. NIPSCO's closure plan for the five Michigan City ash ponds includes a cover system to limit infiltration of surface water into any residual ash in the impoundments. Moreover, we note that closure of the ponds is only the first~~

step in addressing groundwater contamination at the site, and that after the impoundments are closed, NIPSCO will continue to evaluate, and with input from IDEM, select groundwater corrective action to address CCR impact to the groundwater. As such, we conclude that the concerns raised by CAC were addressed as part of the process NIPSCO completed to obtain approval of its closure plan from IDEM.

Accordingly, we find that NIPSCO reasonably considered alternative plans for compliance with the federally mandated requirements. The evidence demonstrates that the Ash Pond Compliance Project is reasonable and necessary. Pursuant to Ind. Code § 8-1-8.4-7(b)(3), we find that NIPSCO's request satisfies Ind. Code § 8-1-8.4-6(b)(l)(D).

(5) Useful Life of the Facility. (Ind. Code §§ 8-1-8.4-6(b)(1)(E) and 8-1-8.4-7(b)(3)). Ind. Code § 8-1-8.4-6(b)(1)(E) requires the energy utility's application for a CPCN to include "information as to whether the proposed compliance project will extend the useful life of an existing energy utility facility and, if so, the value of that extension." We note that Section 6(b)(1)(E) only requires a utility to provide this information, not to demonstrate the useful life of its facility *will* be extended by the proposed compliance project.

NIPSCO's substantial evidence shows it is required to comply with the RCRA and EPA CCR Rule at its Michigan City generating station. Therefore, the primary purpose of its Ash Pond Compliance Project is compliance with these federally mandated requirements. Pursuant to Ind. Code § 8-l-8.4-7(b)(3), we find that NIPSCO's request satisfies the requirement in Ind. Code§ 8-1-8.4-6(b)(l)(E).

(6) Conclusion on CPCN. Having considered and made the required findings on each of the Section 6(b) factors, we now return to Section 7(b), having already approved the projected federally mandated costs. Based on the evidence presented, we find that the Ash Pond Compliance Project is reasonable and necessary to comply with the federally mandated requirements, and serves the public convenience and necessity. Accordingly, the Commission grants a CPCN for the Ash Pond Compliance Project under Chapter 8.4.

B. Chapter 8.4 Accounting and Ratemaking. Ind. Code§ 8-l-8.4-7(c) sets forth the accounting and ratemaking treatment for approved federally mandated costs associated with an approved compliance project. The statute provides the utility's authorized net operating income shall be adjusted to reflect any approved earnings for purposes of Ind. Code § 8-1-2-42(d)(3) and that actual costs that exceed the projected federally mandated costs of the approved compliance project by more than 25% shall require specific justification by the utility and specific approval by the Commission before being authorized in the next general rate case filed by the utility.

Retroactive Ratemaking

Witnesses for the CAC and OUCC recommended denial of cost recovery for NIPSCO's proposed Ash Pond Compliance Project within the FMCA on the basis that such recovery would violate Indiana's prohibition against retroactive ratemaking and further that the Federal Mandate Statute allegedly only applies to costs incurred after the issuance of a CPCN. (Inskeep at p. 11; Armstrong at p. 8.) Based upon the discussion below, we find these arguments unconvincing and approve NIPSCO's requested cost recovery as proposed.

We begin with retroactive ratemaking and note that this is not a rate case. More importantly, and as we have noted previously, a retroactive ratemaking argument would not be applicable to these costs even in a general rate case. As noted above, these are costs of removal. Absent the timely recovery provided by the Federal Mandate Statute, they are properly accounted for and recovered through Accumulated Depreciation and future depreciation accrual rates pursuant to Ind. Code §8-1-2-19 and the FERC USOA. If NIPSCO had not sought or we had not granted NIPSCO's requested CPCN, NIPSCO would not be barred recovery of these costs as part of the next depreciation study. Ind. Code § 8-1-2-68 permits the Commission, when it finds rates to be "unjust, unreasonable, [or] insufficient" to "fix just and reasonable rates … to be imposed, observed and followed in the future." Ind. Code § 8-1-2-42(d) provides the only state exception to this general prohibition against undoing previously established rates by allowing for an adjustment to a utility's fuel cost recovery if the utility is earning in excess of its last approved rate revenue requirement.

Indiana appellate courts have applied Section 68 to generally prohibit retroactive ratemaking. (*Public Service Commission v. City of Indianapolis*, 131 N.E.2d 309, 315 (Ind. 1956) – "[p]ast losses of a utility cannot be recovered from consumers nor can consumers claim a return of profits and earnings which may appear excessive" and *City of Muncie v. Public Service Commission*, 396 N.E.2d 927, 929 (Ind. Ct. App. 1979), holding that retroactive ratemaking includes "recoupment of actual operating losses not foreseen in the original rate-making process".)[9] In *Indiana Telephone Corp. v. Public Service Commission*, the Indiana Court of Appeals held:

> We find nothing in the statute giving the Commission the power to cancel, or to fix, rates retroactively. The statute provides the Commission with the power to fix rates *for the future* if it finds the rates in effect to be unreasonable or unjust; but we look in vain to find statutory authority for the Commission to fix rates *for the past*. The commission has no powers except those conferred by statute. (131 Ind. App. 314, 340, 171 N.E.2d 111, 124 (1960)) (emphasis in original).

The depreciation/cost of removal treatment that we have described is *not* what was proposed by Duke and considered by the Indiana Supreme Court. Instead, Duke had recorded its removal costs incurred in the past to a regulatory asset and sought recovery in a general rate case outside of setting depreciation accrual rates pursuant to Ind. Code § 8-1-2-19. The Supreme Court held that what Duke had proposed would be retroactive ratemaking. The Intervenors' reliance on *Duke* in the context of cost of removal accounting and ratemaking therefore is misplaced. Even had NIPSCO not sought a CPCN under the Federal Mandate Statute, *Duke* would have no

[9] The Federal Energy Regulatory Commission is bound by a similar retroactive ratemaking prohibition sometimes referred to as the "filed rate doctrine." Courts have recognized two exceptions to this general prohibition: (1) the parties had notice that the tariff provision could be waived retroactively or (2) the tariff provision is embodied in a private contract between the parties, who have agreed in that contract to make the agreed-upon rate effective prior to filing that contract with the Commission. (*Sunflower Elec. Power Corp.*, 173 F.E.R.C. P61,054, 61340, 2020 FERC Lexis 1542, *14-16, 2020 WL 6118447 (F.E.R.C. October 16, 2020) *citing Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 969, 358 U.S. App. D.C. 239 (D.C. Cir. 2003); *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 795-97, 282 U.S. App. D.C. 386 (D.C. Cir. 1990).

application to the treatment of these costs through normal depreciation accounting and ratemaking in a general rate case.

The Intervenors continue their misapplication of *Duke* when they attempt to extend its holding to the Federal Mandate Statute. OUCC witness Armstrong (p. 7) and CAC witness Inskeep (p. 11) both argue that the Commission should be guided by the *Duke* decision in this Cause, which they believe would bar cost recovery of NIPSCO's request in this Cause as a matter of law. Ms. Armstrong argues that NIPSCO's "costs are being incurred under the same scenario as DEI's [Duke] past closure costs." (Armstrong, p. 7.) Mr. Inskeep offers a summary of the *Duke* opinion and states that "[w]hile the Court did not interpret the Federal Mandates Statute in the case, it did suggest that Federal Mandate Statute's use of future tense also likely implied that it barred retroactive ratemaking." (Inskeep, p. 11.)

The facts do not support the OUCC and CAC's interpretation and application of the *Duke* decision, nor the argument that NIPSCO's factual circumstances are "the same scenario as DEI's." (Armstrong, p. 7.) In *Duke*, the utility's depreciation rates for the cost of decommissioning its plant assets, including coal ash costs, were set in its 2004 rate order. Duke sought to re-adjudicate the recovery of its coal ash costs, which were governed by its prior rate order, in its rate case filed 15 years later. In this proceeding, NIPSCO is not attempting to re-adjudicate recoverable costs incurred during a period governed by its existing base rates set in Cause No. 45159, or any prior rate case order.[10] Importantly, NIPSCO's Cause No. 45159 depreciation study proposed rates that explicitly excluded the costs to comply with CCR regulations. As a result, NIPSCO's Cause No. 45159 testimony explained that the closure costs were estimated, and as for all estimated costs of removal in the future, are constantly being updated at each rate case to account for improved information. This type of updating is a fundamental part of conducting depreciation studies, as costs are updated based on known and expected changes over time. As a result, all parties were put on notice that NIPSCO's proposed revenue requirement was reduced to the benefit of customers, and as NIPSCO pointed out, no party in Cause No. 45159 objected to the exclusion of these costs from NIPSCO's depreciation study or, ultimately, in its rates. NIPSCO also put parties on notice that once it was prepared to recover those costs, it would consider a filing under the Federal Mandate Statute as it has in this case.

Given this history, we conclude that the RCRA pond closure costs are therefore not "unforeseen past losses" for which recovery in this Cause would be prohibited on the basis of retroactive ratemaking. With respect to the costs associated with the CCR ponds, NIPSCO intentionally and openly excluded these costs from recovery in Cause No. 45159. No party to that Cause contended that NIPSCO's proposal was incorrect or argued that rates should be higher than those proposed by NIPSCO so as to recover such CCR costs. Because of this, there is no prior Commission order governing the CCR-related costs, as was the case in *Duke*. Approving cost recovery for NIPSCO's CCR-related ash pond closure costs in this Cause will not undo, cancel or

[10] In its rebuttal testimony, NIPSCO reduced its cost estimate by $2.9 million to reflect estimate closure costs embedded in and collected through depreciation rates commencing with NIPSCO's Cause No. 43969 rate case. (Gode Rebuttal at p. 2.)

otherwise fix a previously established rate; therefore, NIPSCO's request does not run afoul of Ind. Code § 8-1-2-68.

OUCC and CAC also argue that the Federal Mandate Statute requires utilities to obtain pre-approval of an eligible investment before incurring costs that could be timely recovered in an FMCA tracker. Mr. Inskeep states that the "plain language of the future-tense usage" in the Federal Mandate Statute "indicates … that the federally mandated projects are to provide future benefits." (Inskeep, p. 10.) Ms. Armstrong asserts that, through its dicta, the *Duke* Court "indicated Commission approval was a pre-requisite to recover federally mandated costs, and that the statute is 'framed in future tense and speaks of 'projected' costs for 'proposed' projects." (Armstrong, p. 6.)

We note at the outset that we have already rejected the notion that the *Duke* decision has bearing on requests brought under the Federal Mandate Statute:

> Although the Supreme Court indicated what the Federal Mandate Statute seems to require for Commission approval, the Court specifically stated they have not yet interpreted the Federal Mandate Statute. Because the Court did not rely on those observations concerning the Federal Mandate Statute for its decision, such statements are dicta. Thus, the Supreme Court Decision does not provide a legal basis for disallowing any of the costs authorized under the Federal Mandate Statute. (Cause No. 42061 ECR-37, September 21, 2022, Order at p. 9, citations omitted, appeal pending.)

Indeed, in this Cause, in denying the Joint Motion for Judgment on the Evidence, we concluded that Joint Movants' reliance upon the *Duke* opinion was "questionable because that decision addressed cost recovery under traditional ratemaking authority, not under the federal mandate statute, Ind. Code ch. 8-1-8.4, or the Alternative Utility Regulatory statute, Ind. Code ch. 8-1-2.5." (Cause No. 45700, Presiding Officers' October 21, 2022 docket entry, p. 2.)

The Federal Mandate Statute does not require that the only recoverable costs within an FMCA tracker are those incurred for activities after an order is issued. The Indiana General Assembly has decided to say this when it wants to. *See, e.g.*, Ind. Code § 8-1-8.5-2, which states "[A] public utility may not begin the construction, purchase, or lease of any steam, water, or other facility for the generation of electricity to be directly or indirectly used for the furnishing of public utility service, even though the facility is for furnishing the service already being rendered, without first obtaining from the commission a certificate…." Indiana's Clean Coal Technology Act states "a public utility may not use clean coal technology at a new or existing electric generating facilities without first applying for *and obtaining* from the commission a certificate." Ind. Code § 8-1-8.7-3(a) (emphasis added). If the General Assembly intended for the Federal Mandate Statute to limit recovery to costs that are incurred after the Commission's issuance of an order, it would have said so.

While certain sections of the Federal Mandate Statute make use of future tense language, this use of verb tense does not mean that pre-order costs are ineligible. Sections 6 and 7 of the

~~Federal Mandate Statute use future tense and require the Commission to make a finding that the public convenience and necessity "will be served" by a compliance project and that the compliance project "will allow the energy utility to comply." We disagree with the OUCC and CAC's argument that this future tense language limits a utility's ability to recover necessary compliance costs simply because they have been incurred prior to the date of an order. As we found above, NIPSCO's Ash Pond Compliance Project "will" serve the public convenience and necessity from the day that it is completed and for many years in the future. The Project also "will allow" NIPSCO the comply with the RCRA and CCR federal mandates. Moreover, the Federal Mandate Statute does not universally use future tense, and its usage of present and past tense in other sections is inconsistent with the Intervenors' arguments. For instance, "federally mandated costs" are defined in Ind. Code § 8-1-8.4-4 as "costs that an energy utility incurs in connection with a compliance project" (subpart (a)) and "does not include fines or penalties assessed against or imposed on an energy utility" (subpart (b)). If the legislature intended Sections 6 and 7 of the Federal Mandate Statute to mean that costs incurred before an order were ineligible, then Section 4, subpart (a) would be phrased in future tense as well, and there would be no need for subpart (b). Section 6(b)(1)(B) references "projected federally mandated costs" as a component of what an energy utility must "set forth in [its] application." Consistent with this provision, NIPSCO's Project cost estimate was a projection for the cost to complete the Project when it filed its petition, and it continues to be a projection, as the work is not yet complete.~~

~~We are obligated to read statutes holistically. (*See Park 100 Dev. Comp. v. Ind. Dept. of State*, 429 N.E.2d 220, 223 (Ind. Sup. Ct. 1981) "When a court is called upon to construe words in a single section of a statute, it must construe them with due regard for all other sections of the act and with due regard for the intent of the legislature in order that the spirit and purpose of the statute be carried out.".) Based on a comprehensive reading of the Federal Mandate Statute, noting both what it says and what it does not say, we conclude that the plain language of the Statute does not prohibit recovery of federally mandated costs within the FMCA incurred before the issuance of an CPCN order.~~

~~This reading is also consistent with our prior considerations of how to apply the Federal Mandate Statute to federally mandated costs incurred on a federally mandated compliance project before the issuance of an order. *See* Cause No. 44791 (Petitioner received FMCA approval to recover compliance costs incurred beginning January 2017 with a petition filed August 3, 2017), Cause No. 45052, and Cause No. 44988. As opposed to the impractical, draconian standard put forward by the OUCC and CAC, we have permitted recovery of FMCA costs related to "pre-petition analysis, preparation, and plan development activities" which are necessary to submit the evidence required to obtain a CPCN. *Duke Energy Indiana LLC*, Cause No. 44367 FMCA 4 (IURC 12/4/2019) (Order on Reconsideration), pp. 2-3. In contrast, we have drawn a line at authorizing FMCA recovery of costs incurred years in the past without prior approval: "[b]y waiting more than six years to begin seeking cost recovery, completing the vegetation management projects in 2017 – 2018 without prior approval, and then seeking to recovery actual project costs, we find that DEI thwarted the Commission's opportunity to timely: (1) consider DEI's alternative plans …; and (2) provide direction to DEI on the most reasonable and prudent approach.") (*Id.* at 3.) The record in this Cause shows that NIPSCO received approval of closure plan in March 2021, issued an RFP for contractors in July 2021, awarded a contract in December 2021, and filed this Petition three months later, in March 2022. (Ridge at p. 7.) We, therefore, conclude that they are federally mandated costs, as defined in statute, that are recoverable.~~

Approving cost recovery of NIPSCO's request in this Cause is also consistent with the practical realities of developing federally mandated compliance projects. The OUCC agreed: (1) all five ponds must be closed; (2) that the Ash Pond Compliance Project is a federally mandated required; (3) with the closure alternative NIPSCO has selected; and (4) that the cost estimates are reasonable. (Wright at 5-7.) To claim now that such costs do not qualify for the Federal Mandate Statute because substantive work had to begin after the petition was filed but before this Order was issued is inconsistent with the purpose of the Federal Mandate Statute and elevates form over substance. To submit this case under the Federal Mandate Statute, NIPSCO had to demonstrate that it created a compliance plan that meets federally mandated RCRA and CCR Rule requirements and provide evidence supporting the cost estimate for this Project, which it has based on RFPs. NIPSCO also had to engage in engineering work to obtain estimated costs and consider alternative plans for compliance. Such costs have always been capitalized to projects per proper accounting. CAC and OUCC positions would potentially make it a requirement to complete an FMCA case before commencing any activity related to the mandated project. This is highly impractical and would risk both compliance with federal regulatory deadlines, as well as cost minimization. Disallowing any costs incurred pre-order or even pre-petition from FMCA recovery would make it impossible for a utility to comply with the requirements of the Statute without incurring the kinds of costs the Intervenors suggest must be disallowed as a matter of law.

Accordingly, we reject OUCC witness Armstrong's and CAC witness Inskeep's recommendations and approve accounting and ratemaking treatment for the Ash Pond Compliance Project as NIPSCO requested. Based on witness Gode's rebuttal testimony, NIPSCO is to collect approximately $37,144,000 million ($40,044,000 – $2,900,000) through its FMCA, based on actual incurred closure costs. NIPSCO is permitted to recover 80% of the approved federally mandated costs through its FMCA mechanism pursuant to Ind. Code § 8-1-8.4-7 and to defer 20% of the federally mandated costs and ongoing expenses incurred in connection with the Ash Pond Compliance Project for recovery in NIPSCO's next general rate case, where the deferred balance will be subject to a carrying charged based on the effective WACC on an interim basis until such costs are recognized for ratemaking purposes. NIPSCO is further permitted to recover any federally mandated costs incurred prior to and after approval of a Final Order in this proceeding to the extent such costs are reasonable and consistent with the scope of the Ash Pond Compliance Project pursuant to Ind. Code § 8-1-8.4-4.

Carrying Costs

IG witness Collins also recommended denial of NIPSCO's proposed 20% FMCA deferral and NIPSCO's proposal to amortize 80% of the cost of the Ash Pond Compliance Project through 2032, recommending instead that if any carrying charge is approved, it should reflect Petitioner's cost of debt only. (Collins Direct at p. 14.) NIPSCO witness Blissmer responded that Ind. Code § 8-1-8.4-7(c)(2) allows for 20% of approved federally mandated costs to be deferred and that carrying costs are to be based on the overall cost of capital most recently approved by the Commission, which compensates a utility for its cost of capital while waiting to collect the federally mandated costs it incurred. (Blissmer Rebuttal at p. 5.) We agree with Petitioner that the IG's recommendation is inconsistent with the Federal Mandate Statute and would unfairly burden NIPSCO while it performed the Ash Pond Compliance Project, which it is being required to do by RCRA and the CCR Rule.

Allocation Factors

There was also a dispute in this Cause regarding how NIPSCO's federally mandated costs should be allocated amongst the rate classes for purposes of structuring each class's FMCA rate. Through witness Blissmer, NIPSCO proposed that all federally mandated costs associated with the Ash Pond Compliance Project be allocated based on the demand allocators set forth in the Cost of Service Study from NIPSCO's most recent electric base rate case in Cause No. 45159. (Blissmer Direct, p. 11.) CAC witness Inskeep argued coal ash costs should be treated similarly to fuel costs, which are allocated on an energy basis, and testified that using NIPSCO's 4CP methodology creates a large cross-subsidy in rates, primarily benefitting large industrial customers taking service under NIPSCO's Rate 831. (Inskeep, pp. 24 -25.) NIPSCO witness Blissmer's rebuttal testimony explained that Petitioner's proposed allocation factors are the same as those that would have been used to allocate ash pond closure costs through base rates, and that the Commission has already approved NIPSCO's 4CP allocation methodology. He further testified that NIPSCO's proposal to allocate coal ash costs only to Rate 831's Tier 1 service is consistent with the Commission's finding in NIPSCO's most recent base rate case that Rate 831 customers do not use NIPSCO's production resources for their Tier 2 and 3 loads. (Blissmer Rebuttal, pp. 2-3.) IG witness Collins also offered cross-answering testimony in support of NIPSCO's proposed 4CP demand allocators, stating that coal ash pond costs are normally included in the production plant account, such as FERC Account 312, and that the costs of such fixed cost structures are appropriately allocated on a demand basis. He also explained that Rate 831 is a cost-based rate, and Rate 831 Tier 2 customers are not reliant upon NIPSCO's generation portfolio and do not receive the fuel cost benefits associated with that portfolio; therefore, there is no subsidy or "windfall" for Rate 831 Tier 2 under NIPSCO's demand allocation proposal. (Collins Cross-Answering at pp. 4 -5.)

We agree with NIPSCO and the IG that coal ash costs are properly allocated on a demand basis as they are associated with NIPSCO's production facilities. We find that CAC witness Inskeep's proposal does not conform to the cost of service-based allocation we found reasonable in NIPSCO's most recent base rate case and decline to approve it. As such, we approve NIPSCO's proposed 4CP demand allocation factors for costs associated with the Ash Pond Compliance Project.

C. Consideration of NIPSCO's Proposed Alternative Regulatory Plan ("ARP"). NIPSCO seeks approval of an ARP and elects to become subject to Ind. Code § 8-1-2.5-6 to the extent additional relief is necessary from the requirements of the Federal Mandate Statute or traditional accounting and ratemaking rules to allow for the requested accounting and ratemaking treatment and to support recovery of all federally mandated costs incurred in connection with the Ash Pond Compliance Project. Such an alternative request is understandable given the timing of the *Duke* decision in relation to when work had to commence on the Ash Pond Compliance Project and the position of the Intervenors in this and other cases concerning the applicability of the Federal Mandate Statute to costs incurred prior to issuance of the CPCN. We agree with NIPSCO's position concerning depreciation and cost of removal accounting and ratemaking and the eligibility for recovery of costs incurred prior to the issuance of a CPCN. Because the application of the Federal Mandate Statute to the recovery of NIPSCO's ash pond closure costs has been put at issue, we will consider NIPSCO's alternative request to support cost recovery in this case.

Indiana Code § 8-1-2.5-6(a)(1) authorizes the Commission to adopt alternative regulatory practices, procedures, and mechanisms that are in the public interest and that enhance

~~or maintain the value of NIPSCO's retail energy services or property. Our consideration of the public interest is to be guided by our review of the factors set forth in Ind. Code § 8-1-2.5-5(b):~~

~~(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 service of equipment.~~

~~The unique factual and legal circumstances presented in this Cause informs our evaluation under Ind. Code § 8-1-2.5-5(b)(1) and (2) and our ultimate conclusion that NIPSCO's ARP is approved to the extent required to support its recovery of costs. As described in its testimony, NIPSCO relied upon the long-standing regulatory environment in place when it excluded ash pond closure costs from its Cause No. 45159 depreciation rates. For transparency, NIPSCO detailed that it knew CCR compliance costs were forthcoming and included an alternative revenue requirement that reflected preliminary compliance cost estimates in the event its proposal to exclude these costs was unacceptable. No party in that case objected to the subsequent recovery of those costs, and consistent with that recommendation, NIPSCO was planning to address ash pond closure costs in its next rate case.[11] Unlike Duke, NIPSCO did not create a regulatory asset for its ash pond closure costs, which made relying upon the Commission's approval of Duke's rate case request all the more reasonable. However, on the eve of the need to initiate ash pond closure work at Michigan City, the *Duke* opinion was issued, including the Federal Mandate Statute *dicta* upon which the OUCC and CAC rely in this Cause. It was at this eleventh hour that the long-standing regulatory environment was potentially thrown into a state of flux.~~

~~A stable regulatory environment is beneficial to the energy utility, its customers, and the state. The value of utility service in the state is diminished when a utility has relied on Commission precedent and must now incur costs to comply with federal mandates and be at risk that those costs will not be timely recovered because the Commission precedent has been upset. To the extent NIPSCO's cost of removal ratemaking through the FMCA is not directly contemplated within the Federal Mandate Statute, we also find that NIPSCO's ARP seeking relief from that portion of the Statute is consistent with the ARP statute. NIPSCO is following proper accounting practices and has recognized its future estimated liability as it interpreted the federal RCRA and CCR Rule regulations that it would be required to comply with as set forth in this case. It would further be unnecessary or wasteful for the Commission to deny FMCA tracker recovery of these costs as NIPSCO made this filing before any substantial work on the Project had started and without the substantial delay that was at play in Duke's request. Moreover, when NIPSCO filed its last rate case, it excluded these estimated compliance costs from depreciation rates, it did so in reliance on accepted accounting principles and on the Federal Mandate Statute as it has been interpreted at~~

~~[11] NIPSCO filed an electric rate case on September 19, 2022 in Cause No. 45772.~~

~~that time. From a timing standpoint, the legal and factual circumstances, including the positions raised by the opposing parties, are unique, which supports the need for an alternative regulatory mechanism to assure recovery of reasonable compliance costs.~~

~~In conclusion, we find, after considering the factors set forth in Ind. Code § 8-1-2.5-5, that NIPSCO's proposed ARP is in the public interest and that it will enhance or maintain the value of NIPSCO's energy retail services and property. We therefore find that NIPSCO's proposed ARP as outlined above should be approved.~~

~~**D. Ongoing Review.** In an effort to keep the Commission informed about the Compliance Projects, NIPSCO proposed to submit progress reports and any revisions in the cost estimates as part of its semi-annual FMCA proceedings. None of the parties opposed this proposal. The Commission finds the proposed ongoing review process is reasonable and should be approved.~~

7. Confidentiality. Industrial Group filed a Motion for Protection and Nondisclosure of Confidential and Proprietary Information on September 7, 2022, which was supported by NIPSCO's affidavit filed September 28, 2022, showing information to be submitted to the Commission were trade secret information within the scope of Ind. Code§§ 5-14-3-4(a)(4), (9), and 24-2-3-2. The Presiding Officers issued a Docket Entry on October 3, 2022, finding such information to be preliminarily confidential, after which such information was submitted under seal. We find all the information is confidential pursuant to Ind. Code § 5-14-3-4 and Ind. Code § 24-2-3-2, is exempt from public access and disclosure by Indiana law, and shall continue to be held confidential and protected from public access and disclosure by the Commission.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

~~1. NIPSCO's proposed closure, post-closure and coal ash related compliance projects detailed in the testimony in this proceeding constitute "federally mandated compliance projects" as defined by Indiana Code § 8-1-8.4-2.~~

~~2.~~1. NIPSCO's ~~is issued~~request for a Certificate of Public Convenience and Necessity for the for the Ash Pond Compliance Project pursuant to Ind. Code §§ 8-1-8.4-6 and -7 is denied. ~~This order constitutes the Certificate.~~

~~3.~~2. NIPSCO's request to recover ~~For purposes of Ind. Code § 8-1-8.4-7(c), NIPSCO's estimated total cost of the~~ Ash Pond Compliance Project costs in the amount of $40,044,000, ~~is approved, and NIPSCO is authorized to recover its compliance-related costs presented in this proceeding,~~ less $2,900,000 already collected, is denied ~~consistent with Ind. Code § 8-1-8.4~~.

~~4.~~3. ~~NIPSCO's cost recovery in accordance with Ind. Code § 8-1-8.4-7(c) is approved. NIPSCO is authorized to timely recover 80% of the federally mandated costs, including carrying costs, through Rider 887 – Federally Mandated Cost Adjustment Rider and Appendix I – FMCA Factors and to defer the remaining 20% of the federally mandated costs incurred in connection with the Ash Pond Compliance Project for recovery in NIPSCO's next general rate case.~~ NIPSCO's request for the specific ratemaking accounting authority to implement this cost recovery as described within this Order is ~~approved~~denied.

~~5.~~4. NIPSCO's requested ARP is rejected as not being in the public interest, and not establishing rates and charges that are designed to promote efficiency in the rendering of retail service, or otherwise in conformity with the purposes of Indiana Code ch. 8-1-2.4.~~as outlined in Paragraph 4(C) of this Order is approved~~.

~~6.~~5. The Confidential Information filed under seal in this Cause shall continue to be treated by the Commission as confidential and not subject to public disclosure under Indiana Code § 24-2-3-2 and Indiana Code § 5-14-3-4.

~~7.~~6. This Order shall be effective on and after the date of its approval.

HUSTON, FREEMAN, KREVDA, VELETA, AND ZIEGNER CONCUR:
APPROVED:

I hereby certify that the above is a true
and correct copy of the Order as approved.

_____

Dana Kosco,
Secretary of the Commission

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

VERIFIED PETITION OF NORTHERN INDIANA PUBLIC SERVICE COMPANY LLC FOR (1) APPROVAL OF AND A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR A FEDERALLY MANDATED ASH POND COMPLIANCE PROJECT; (2) AUTHORITY TO RECOVER FEDERALLY MANDATED COSTS INCURRED IN CONNECTION WITH THE ASH POND COMPLIANCE PROJECT; (3) APPROVAL OF THE ESTIMATED FEDERALLY MANDATED COSTS ASSOCIATED WITH THE ASH POND COMPLIANCE PROJECT; (4) AUTHORITY FOR THE TIMELY RECOVERY OF 80% OF THE FEDERALLY MANDATED COSTS THROUGH RIDER 887 – ADJUSTMENT OF FEDERALLY MANDATED COSTS AND APPENDIX I – FEDERALLY MANDATED COST ADJUSTMENT FACTOR ("FMCA MECHANISM"); (5) AUTHORITY TO DEFER 20% OF THE FEDERALLY MANDATED COSTS FOR RECOVERY IN NIPSCO'S NEXT GENERAL RATE CASE; (6) APPROVAL OF SPECIFIC RATEMAKING AND ACCOUNTING TREATMENT; (7) APPROVAL TO AMORTIZE THE ASH POND COMPLIANCE PROJECT COSTS THROUGH 2032; (8) APPROVAL OF ONGOING REVIEW OF THE ASH POND COMPLIANCE PROJECT; ALL PURSUANT TO IND. CODE § 8-1-8.4-1 *ET SEQ.*, § 8-1-2-19, § 8-1-2-23, AND § 8-1-2-42; AND, TO THE EXTENT NECESSARY, APPROVAL OF AN ALTERNATIVE REGULATORY PLAN PURSUANT TO IND. CODE § 8-1-2.5-6.	)	**CAUSE NO. 45700**

ORDER OF THE COMMISSION

Presiding Officers:
James F. Huston, Chairman
Loraine L. Seyfried, Chief Administrative Law Judge

On March 30, 2022, Northern Indiana Public Service Company LLC ("Petitioner" or "NIPSCO") filed its Verified Petition initiating this Cause and its direct testimony and attachments on May 2, 2022.[1]

[1] NIPSCO filed Attachment 1-B (Certificate of Publication of Legal Notices) on November 10, 2022.

Petitions to intervene were filed by Citizens Action Coalition of Indiana, Inc. ("CAC") on April 6, 2022, and NIPSCO Industrial Group[2] ("Industrial Group") on May 26, 2022. The Presiding Officers granted the petitions to intervene by docket entry on April 18, 2022 and June 7, 2022, respectively.

On August 1, 2022, the Indiana Utility Regulatory Commission ("Commission") conducted a public field hearing at 6:00 p.m. in the City Hall Chamber, 100 East Michigan Boulevard, Michigan City, Indiana.

On September 7, 2022, the Indiana Office of Utility Consumer Counselor ("OUCC"), CAC, and Industrial Group filed their respective direct testimony and attachments. On September 9, 2022, the OUCC filed corrected testimony of witness Brian Wright[3] and OUCC Consumer Comments. Industrial Group filed cross-answering testimony of witness Brian Collins on September 27, 2022. On September 27, 2022, NIPSCO filed its rebuttal testimony and attachments.

On September 7, 2022, the OUCC, Industrial Group, and CAC filed a Joint Motion for Judgment on the Evidence ("Joint Motion"), to which NIPSCO responded on September 19, 2022, and the joint movants replied on September 26, 2022. The Presiding Officers denied the Joint Motion by docket entry on October 21, 2022.

A public evidentiary hearing was initially convened on November 2, 2022, and continued to November 10, 2022, at which time the prefiled evidence of NIPSCO, the OUCC, CAC, and Industrial Group, was admitted into the record without objection.

Based upon the applicable law and evidence presented, the Commission finds:

1. Notice and Jurisdiction. Due, legal and timely notice of the hearing in this Cause was given and published as required by law. Petitioner is a "public utility" as defined in Ind. Code § 8-1-2-1(a) and an "energy utility" as defined in Ind. Code §§ 8-1-2.5-2 and 8-1-8.4-3. Under Ind. Code § 8-1-8.4-6 and -7, the Commission has authority to issue a certificate of public convenience and necessity ("CPCN") and to approve cost recovery for projects necessary to comply with federally mandated requirements. Accordingly, the Commission has jurisdiction over Petitioner and the subject matter of this proceeding.

2. Petitioner's Characteristics. NIPSCO is a public utility limited liability company organized and existing under the laws of the State of Indiana with its principal office and place of business at 801 East 86th Avenue, Merrillville, Indiana. Petitioner is engaged in rendering electric utility service in the State of Indiana. NIPSCO renders retail electric utility service to approximately 470,000 retail customers located in all or part of Benton, Carroll, DeKalb, Elkhart, Fulton, Jasper, Kosciusko, LaGrange, Lake, LaPorte, Marshall, Newton, Noble, Porter, Pulaski, Saint Joseph, Starke, Steuben, Warren and White Counties in northern Indiana. NIPSCO owns, operates, manages and controls plant and equipment within the State of Indiana that is in service

[2] The companies that comprise the NIPSCO Industrial Group in this Cause are Cleveland-Cliffs Steel LLC, Linde, Inc., NLMK Indiana, Marathon Petroleum Company, and USG Corporation.

[3] The only change to Mr. Wright's testimony was to the exhibit reference in the header of the testimony.

and used and useful in the generation, transmission, distribution and furnishing of such service to the public.

3. Requested Relief. NIPSCO requested (1) approval of and a CPCN for a federally mandated Ash Pond Compliance Plan (referred to herein as the "Compliance Project"); (2) authority to recover federally mandated costs incurred in connection with the Compliance Project; (3) approval of the estimated federally mandated costs associated with the Compliance Project; (4) authority for the timely recovery of 80% of the federally mandated costs through Rider 887 – Federally Mandated Cost Adjustment Rider and Appendix I – FMCA Factors (the "FMCA Mechanism"); (5) authority to defer 20% of the federally mandated costs incurred in connection with the Compliance Project for recovery in NIPSCO's next general rate case; (6) approval of the specific ratemaking and accounting treatment described herein; and (7) approval of ongoing review of the Compliance Project; all pursuant to Ind. Code § 8-1-8.4-1 *et seq.*, § 8-1-2-19, § 8-1-2-23 and § 8-1-2-42.

The Ash Pond Compliance Project will close five ponds at NIPSCO's Michigan City Generating Station ("Michigan City"), including dewatering and excavation of as much of the coal combustion residual ("CCR") material as possible, and once removed, backfilled with clean fill, a cover system and topsoil. The federal mandate driving the Ash Pond Compliance Project is the CCR rule (40 C.F.R. Parts 257 and 261) promulgated by the Environmental Protection Agency ("EPA") under Subtitle D of the Resource Conservation & Recovery Act ("RCRA") (42 U.S.C. §6901) (the "CCR Rule").

4. Summary of Evidence of the Parties. NIPSCO, the OUCC, and Intervenors each submitted evidence in this Cause, which is summarized below.

A. NIPSCO's Case-in-Chief.

(1) Overview and Costs of Compliance Projects. Alison M. Becker, Manager of Regulatory Policy for NIPSCO, described NIPSCO's request for a CPCN for federally mandated projects associated with NIPSCO's proposed Compliance Project to comply with federally mandated requirements under Ind. Code 8-1-8.4-5 for recovery through NIPSCO's FMCA Mechanism. Ms. Becker testified concerning the statutory authority pursuant to which NIPSCO requests relief, testified that NIPSCO's requested relief is appropriate and will serve the public interest, and further testified concerning NIPSCO's proposed alternative regulatory plan. Ms. Becker also testified that the public convenience and necessity will be served by NIPSCO's compliance with the RCRA and CCR Rule. She stated the Compliance Project is in the public interest since it will enable the Company to comply with the RCRA and CCR Rule and do so in an appropriate manner. She stated Indiana Code ch. 8-1-8.4 defines eligible projects as those that are federally mandated, including those mandated by the EPA. She testified that NIPSCO seeks relief within the bounds provided by the General Assembly in the enabling statute consistent with public policy and serves the public interest. She testified that NIPSCO's approach to compliance with the RCRA and CCR Rule is sound and reasonable, and that the requested Compliance Project is appropriate.

Ms. Becker testified that to the extent additional relief is necessary from the requirements of the Federal Mandate Statute or traditional accounting and ratemaking rules to allow for the requested accounting and ratemaking treatment and to support recovery of all federally mandated costs incurred in connection with the Compliance Project, NIPSCO seeks approval of an

alternative regulatory plan and elects to become subject to Ind. Code § 8-1-2.5-6. She stated that just prior to the filing of its Verified Petition, the Indiana Supreme Court issued a decision related to Duke Energy Indiana which reversed the Commission and found that Duke should have obtained pre-approval from the Commission before recording certain environmental remediation costs as a regulatory asset on its books. She stated that in that case, it appears that the Order approving recovery of such costs was issued approximately ten (10) years after Duke created that entry on its books. She testified that while this proceeding involves a request for the recovery of federally mandated compliance costs pursuant to Indiana statute providing for such recovery, and that NIPSCO therefore believes is different in terms of the applicable law and the timely nature of NIPSCO's request for cost recovery, given the potential uncertainty related to the interpretation of this recent court decision, NIPSCO has included this request for approval of an alternative regulatory plan to confirm that its federally mandated costs, which include costs that must be incurred throughout most of 2022 related to compliance requirements, are authorized to be recovered. She testified that recovery of the federally mandated costs as proposed by NIPSCO is in the public interest and enhances and maintains the value of NIPSCO's utility service and is beneficial to NIPSCO, its customers, and the State of Indiana for NIPSCO to recover its federally mandated costs of the Compliance Project.

Mr. Robert Ridge, Manager of Project Engineering for NIPSCO, explained NIPSCO's commercial and project execution activities related to the Compliance Project, and the alternatives NIPSCO considered, NIPSCO's cost estimate for the Compliance Project, and its execution timing to achieve compliance. He described that the Compliance Project is closing five ponds at Michigan City, which includes dewatering and excavation of CCR material. He explained that removed CCR material will primarily be transported to the CCR-permitted landfill at NIPSCO's R.M. Schahfer Generating Station ("Schahfer") and that after CCR material is removed, the ponds will be backfilled with clean fill, a cover system and topsoil to allow vegetation to grow and future storm water to shed off the closed ponds. He testified the earliest compliance date for closure of the ash ponds is November 10, 2023. He explained that the Compliance Project involves several scopes of work. One of the first steps of the project includes installation of a dewatering system to lower groundwater elevations to facilitate safe excavation of CCR at deeper elevations. A water treatment system will be installed to treat, as needed, contact water, interstitial water, and water generated during groundwater extraction activities. Excavation activities will be completed utilizing equipment such as excavators, dozers, and front end loaders. CCR will be loaded into on-road dump trucks for offsite disposal. It is estimated that approximately 170,600 cubic yards of material will be removed from the ponds. The majority of the CCR removed from the ponds will be transported to Schahfer for disposal in NIPSCO's existing, permitted landfill. Material that meets the requirements for beneficial reuse will be transported to a local facility for this purpose. After CCR removal is complete for each pond, the pond will be backfilled with clean fill obtained from an offsite borrow location. It is estimated that approximately 164,100 cubic yards of offsite material will be utilized to backfill the ponds. As the ponds are backfilled, stormwater features will be installed, and vegetation will be established to allow future stormwater to shed off of the closed ponds. Mr. Ridge explained that NIPSCO began engineering work in 2017 to start developing the Closure/Post-Closure Plan which was submitted to IDEM for review. Engineering continued to progress as NIPSCO received feedback from IDEM during the review and approval process. After awarding the RFP, some initial preparation work began on March 1, 2022 and has continued over the next couple months. He explained that undertaking this kind of work was necessary, because a delayed project start would potentially cause NIPSCO to: (1) lose critical subcontracted resources with a limited ability to secure other qualified workers; (2) push excavation activities into the

winter season which can slow progress and add additional costs; and (3) expand dewatering activities beyond the time allowed in the dewatering approval provided by IDEM. He stated that ultimately, had NIPSCO waited to do any site work until after filing the petition in this proceeding, it would have put NIPSCO at increased risk of missing the compliance deadline. He explained that there is also similarly scoped CCR pond work required at Schahfer and the Bailly Generating Station ("Bailly"). He testified that completing the Compliance Project in 2022 reduces potential impacts to the schedule and associated compliance dates for the work that will be performed at Schahfer and Bailly, as attempting to complete work at multiple locations simultaneously places constraints on subcontracted resources available in the area, as well as logistics concerns when offloading material into the landfill at Schahfer.

Mr. Ridge described that excavation work began on April 27, 2022, with workers having been onsite since February 2022 to support mobilization (all the preparatory work necessary before formal excavation begins). He stated that in the first few weeks of work, NIPSCO has also installed stormwater pollution prevention measures and truck washes and has completed a dewatering and water treatment pilot test.

Mr. Ridge explained problems that could occur if construction were pushed into the winter season beyond the December 9, 2022 targeted completion date, most of which stem from the northern Indiana winter weather, which often becomes more impactful given the work site is located along Lake Michigan. He described that frozen ground makes work difficult and snow, ice, and wind can prohibit workers from traveling to the work site and limit the hours available for safe work to occur. He stated that because the Compliance Project involves extensive trucking activity, icy road conditions can slow or halt progress and use large amounts of fuel and winter storms can affect the work site and work equipment, increasing costs and slowing progress. He also explained that freezing conditions can also lead to increased cost and complications for the dewatering and water treatment system that will be used to support the project.

Mr. Ridge testified that to ensure all aspects of the Compliance Project are executed in compliance with all requirements, NIPSCO submitted a Construction Quality Assurance ("CQA") Plan to IDEM with the Closure/Post-Closure Plan, which was approved on March 10, 2021. He said an updated CQA Plan was also submitted to IDEM after award of the construction contract to Charah. He explained NIPSCO has employed a fulltime, third party CQA contractor to ensure work is being performed in accordance with the CQA Plan and Closure/Post-Closure Plan.

Mr. Ridge testified that the current estimated total cost of the Compliance Project is $40,044,000 ($36,112,000 in direct costs and $3,932,000 in indirect costs). Mr. Ridge discussed how the cost estimate was developed and testified that the estimated cost for the Compliance Project is reasonable. He testified the cost estimate is the result of updates from the CBR estimate prepared by Wood from 2019 based on the final design of the closure and requirements in the approved Closure/Post-Closure Plan. He said the current cost estimate includes owner's costs, contingency, and reflects actual contract amounts, most notably from NIPSCO's construction contractor (Charah) to perform the work. This estimate is considered to be a Class 2 estimate. He explained the contract was awarded primarily utilizing firm unit prices for the work to be performed and that the contract also includes liquidated damages to help ensure the project is completed within the defined project schedule but does include provisions to account for fluctuations in unit quantities, as well as fuel costs. Mr. Ridge testified the Compliance Project is not intended to "extend" the useful life of Michigan City or other NIPSCO facilities but is instead

intended to allow NIPSCO to comply with the requirements of the RCRA and CCR Rule, which was promulgated under RCRA, by closing five ponds at Michigan City.[4] He did note that achieving compliance with these requirements does preserve NIPSCO's ability to use the site for generation.

(2) Federal Mandates. Maureen Turman, Director of Environmental Policy & Sustainability for NiSource Corporate Services Company ("NCSC"), testified concerning the federally mandated requirements and associated compliance deadline related to the Compliance Project. Ms. Turman testified concerning the federally mandated requirements, how NIPSCO believes these federally mandated requirements are driving the pond closure activities related to the Compliance Project, as well as affecting the closure alternatives considered and ultimately rejected.

Ms. Turman testified that all five ash ponds at Michigan City are subject to RCRA, as well as the Agreed Order.[5] Two of the ash ponds are also regulated by the CCR Rule. These five ponds are generally referred to as (1) West Primary Fly Ash Basin (Primary #1 Pond), (2) West Secondary Fly Ash Basin East (Secondary #1 Pond), and (3) Secondary Fly Ash Basin (Secondary #2 Pond) (collectively, the ("RCRA ash ponds"), and (4) Primary Fly Ash Basin East (Primary #2 Pond), and (5) Bottom Ash Settling Pond and Storage Area (Boiler Slag Pond) (collectively, the "CCR ash ponds").

Ms. Turman testified that for the CCR ash ponds, in 2018, NIPSCO made operational changes that caused operations to cease receipt of CCR materials to those ponds. The requirements of the CCR Rule mandate closure within 5 years of closure being initiated, by ceasing receipts or otherwise.[6] The Michigan City CCR ash ponds ceased receipt of waste on October 11, 2018 and April 15, 2019, resulting in a compliance date for closure of the ash ponds of November 11, 2023 and May 15, 2024, respectively.

Ms. Turman testified as to NIPSCO's belief that the RCRA ash ponds are not regulated under the CCR Rule because, as of the CCR Rule's effective date, they had been filled in with material and could not impound water.[7] She stated that under the Agreed Order, NIPSCO was required to submit closure and post-closure plans to IDEM for the three RCRA ash ponds no later than December 31, 2018. IDEM agreed to closing the three RCRA ash ponds in combination with the two CCR ash ponds in a combined IDEM closure application, approved by IDEM and received by NIPSCO on March 10, 2021. Ms. Turman testified that the closure date for the RCRA ash ponds is not stipulated in the Agreed Order however, due to the configuration of the ponds on the

[4] The federally mandated requirements contained in RCRA and the CCR Rule and NIPSCO's compliance therewith is further discussed by NIPSCO witness Turman.

[5] A Corrective Action Agreed Order approved by the Indiana Department of Environmental Management ("IDEM") (Cause H-13872) on October 21, 2013), including all amendments thereto ("Agreed Order").

[6] Once closure has been initiated, as it was for the two CCR ash ponds, the unit must commence closure no longer than 30 days after the date on which the unit receives the known final receipt of waste.

[7] By entering into the Agreed Order and keeping the RCRA ash ponds only subject to RCRA, NIPSCO was provided more flexibility in potential closure methods.

Michigan City property, it was necessary to close the ash ponds as part of one project, which necessitates that the entire project be complete by November 11, 2023.

Ms. Turman testified as to the allowable closure methods – closure by removal and closure in place. She stated the closure by removal entails dewatering of the free liquids within/on top of the ash, followed by excavation of all ash within the pond limits, including the liner (if one is present), which is then properly managed, and the pond can then be backfilled and graded. The closure in place entails the removal of the free liquids within and on top of the pond as well as free liquids in materials placed in the pond (to make a stable base for the engineered capping system). Once the pond is dewatered, the remaining CCRs must be graded, and, in most circumstances, have additional fill materials brought in to provide a suitable base for the cap. The CCRs are then capped with soil, clay, and/or an engineered barrier, then mulched and seeded with a vegetative cover.

She testified NIPSCO evaluated closing the five ponds via closure in place, as this had the potential to be the most cost-effective option; however, IDEM indicated that a slurry wall and hydraulic controls would be necessary if CCRs remained in contact with the groundwater, which would have made that method the most costly option. She stated NIPSCO also evaluated closing all five ponds via closure by removal. In addition to the potential cost savings (since no slurry wall or hydraulic controls would be required), that method also provided more compliance and cost certainty and would also involve removal of the ash as a potential source of impact to groundwater quality, thereby potentially reducing the cost of groundwater corrective measures and post-closure care. Therefore, NIPSCO determined that removal of the majority of the ash was the most appropriate method for closure.She testified that after the CCR materials are removed, NIPSCO's position is that the five ponds must be "capped" – meaning the ponds must be backfilled with clean fill, a cover system and topsoil applied to allow vegetation to grow and future storm water to shed off the closed. Under the CCR Rule, 40 C.F.R. § 257.102(c), Ms. Turman explained that it must be demonstrated that the underlying native materials are decontaminated, and that NIPSCO believes this cannot be done if the underlying groundwater is impacted, as is the case at Michigan City. Therefore, according to Ms. Turman, NIPSCO believes that it is appropriate to place a cap on the contaminated soil underneath the removed ash, per the CCR Rule, 40 C.F.R. § 257.102(d).

(3) Estimated Federally Mandated Costs. Mr. Ridge testified that the estimated total cost of the Compliance Project is $40 million ($36 million in direct costs and $4 in indirect costs). Mr. Ridge discussed how the cost estimate was developed and testified that the estimated cost for the Compliance Project is reasonable.

(4) Accounting and Ratemaking. Kevin J. Blissmer, Manager of Regulatory for NCSC, explained NIPSCO's proposed recovery of the Compliance Project through the FMCA Mechanism. Mr. Blissmer provided (1) a description of the cost recovery provided for under the Federal Mandate Statute; (2) an overview of the FMCA Mechanism and its related ratemaking treatment; (3) an explanation of how the deferred federally mandated costs will be reflected in NIPSCO's FMCA Mechanism tracker filings; and (4) a description of NIPSCO's proposed allocators to allocate the various components of the FMCA Mechanism. He explained NIPSCO's requests to (1) recover 80% of the approved federally mandated costs[8] incurred in

[8] This includes a return on the actual project retirement costs using NIPSCO's effective WACC plus amortization both for the 80% and the 20% deferral.

connection with the Compliance Project through NIPSCO's FMCA Mechanism pursuant to Ind. Code § 8-1-8.4-7, and (2) defer 20% of the federally mandated costs and ongoing expenses incurred in connection with the Compliance Project for recovery in NIPSCO's next general rate case, where the deferred balance will be subject to a carrying charge based on the effective weighted average cost of capital ("WACC") on an interim basis until such costs are recognized for ratemaking purposes in its next general rate case; (3) recover any federally mandated costs, including but not limited to federally mandated costs incurred prior to and after approval of a Final Order in this proceeding to the extent such costs are reasonable and consistent with the scope of the Compliance Project, and (4) utilize the proposed factors to allocate between rate classes.

Mr. Blissmer described that NIPSCO seeks authorization for recovery of a return on and of the Compliance Project. He explained that because the Compliance Project relates to the federally mandated closure of a capital asset, the federally mandated costs associated with the project will be captured on a retirement work order and recorded as a reduction to accumulated depreciation. He testified that NIPSCO therefore proposes recovery based upon the incremental effect of the Compliance Project costs on NIPSCO's net original cost rate base, with 80% of that total amount timely recovered through the FMCA Mechanism, with the other 20% being deferred to a future electric base rate case. He stated that rather than amortizing the federally mandated costs associated with the Compliance Project over the period during which they are projected to be incurred, which would be over a period of less than 12 months, upon project completion NIPSCO proposes to amortize the costs associated with the Compliance Project through 2032. Mr. Blissmer testified that NIPSCO is proposing to recover carrying costs only on the 20% portion of federally mandated costs that is deferred for recovery in a future rate case. He explained that while authorized under the Federal Mandate Statute, NIPSCO is not seeking recovery of carrying costs on federally mandated costs for the period between when the Compliance Project is initiated and when such costs are included for recovery through the FMCA Mechanism. He testified there are no operations and maintenance ("O&M") expenses associated with the Compliance Project, and no property taxes to be incurred. The federally mandated costs associated with this Project include the actual costs incurred to complete the project (recovered through amortization of that investment), the financing costs associated with the investment in net original cost rate base (NIPSCO's WACC as applied to the costs of the project), associated federal and state income taxes and the public utility fee, which will be the annual calculation of federally mandated costs. He described that when NIPSCO has completed the Project, NIPSCO will file for recovery of 80% of this annual calculation and will defer 20%. Each ensuing year, NIPSCO's filing will reflect that one year of the total investment has been amortized.

Mr. Blissmer stated NIPSCO proposes that all federally mandated costs associated with the Compliance Project be allocated based on the demand allocators set forth in the Cost of Service Study from NIPSCO's most recent electric base rate case in Cause No. 45159 and reflect the significant migration of customers amongst the various rates to prevent any unintended consequences of the migration of customers between rates and to properly allocate their share of the revenue requirement in its FMCA semi-annual tracker filings. He explained that in accordance with Ind. Code § 8-1-8.4-7(c)(1), NIPSCO will include the operating income associated with the Compliance Project in the total electric Comparison of Electric Operating Income for purposes of the Ind. Code § 8-1-2-42(d) earnings test.

Gunnar J. Gode, Vice President and Chief Accounting Officer for NCSC, provided an explanation of how NIPSCO will account for the deferred federally mandated costs, which then

leads to how the costs will be reflected in NIPSCO's FMCA Mechanism tracker filings, and a description of the amortization rate NIPSCO proposes for the federally mandated projects included in the Compliance Project.

B. <u>OUCC's Case-in-Chief.</u> Cynthia M. Armstrong, Chief Technical Advisor in the OUCC's Electric Division, presented the OUCC's review of NIPSCO's proposed environmental compliance plan and discussed the CCR Rule driving NIPSCO's stated need for the Compliance Project. While the OUCC agrees the Compliance Project is necessary to comply with federal environmental rules and it appears NIPSCO has selected the most reasonable option for compliance, Ms. Armstrong testified that NIPSCO did not meet the requirements for cost recovery under the Federal Mandate Statute, as it will incur the majority of the costs before it receives a CPCN for the Project. She explained that NIPSCO recognized these costs in past base rates via Asset Retirement Obligations ("AROs") but removed them from its most recent rate case in Cause No. 45159. She stated that if NIPSCO has under-recovered CCR closure costs due to this omission, then allowing NIPSCO to recovery any such loss incurred prior to the Commission issues a CPCN constitutes retroactive ratemaking. She stated that NIPSCO's request disregards any costs recovered through past rates and could lead to NIPSCO partially recovering these costs from customers twice. She testified that allowing NIPSCO to by-pass the pre-approval requirements of the Federal Mandate Statute with the ARP Statute is inappropriate and NIPSCO's request for an ARP and associated recovery should be denied.

She stated that should the Commission issue a CPCN for the Compliance Project and grant NIPSCO's request for an ARP for costs incurred prior to the Commission issuing a final order in this Cause, the OUCC recommends cost recovery be structured in a manner that mitigates costs to consumers, including crediting any ash pond closure costs NIPSCO recovered through past rates, requiring the Company to conduct a comprehensive analysis of all current and past insurance policies and filing reimbursement claims under each applicable policy, to treat these costs as expenses, not capital projects, and therefore only allow a return "of" but not a return "on" costs. She explained that any costs included in "owner's costs" that include NIPSCO employee time, benefits and the like should also be removed, as NIPSCO already receives recovery through base rates to avoid double recovery.

Ms. Armstrong also discussed the Indiana Supreme Court's decision in *Ind. Off. Of Util. Consumer Couns. v. Duke Energy Ind., LLC,* 183 N.E.3d 266 (Ind. 2022). She noted that while Ms. Becker attempted to differentiate between Duke and what NIPSCO is requesting, the Project's costs are being incurred under the same scenario as DEI's past closure costs. In NIPSCO's most recent rate case, Cause No. 45159, NIPSCO removed CCR closure costs from the decommissioning costs used to calculate net salvage value for the purposes of determining depreciation rates. However, ash pond closure costs were accounted for in depreciation rates proposed and approved in rate cases Cause Nos. 43969 and 44688.

Ms. Armstrong noted that NIPSCO could have requested recovery of CCR closure costs by including them in its calculation of depreciation rates, but NIPSCO chose to exclude these costs from its most recent depreciation study. She stated that NIPSCO cannot change depreciation rates or expense between rate cases, so seeking recovery of them now would constitute retroactive ratemaking. She pointed out that as the Supreme Court indicated in its decision, I.C. ch. 8-1-8.4 offered an alternative route to recover these types of costs if they were found to be "federally mandated." However, both the Indiana Supreme Court and Commission noted that the statute

requires the Commission to approve the utility's compliance plan *prior* to their recovery. Since NIPSCO has not yet received approval for the Project under I.C. § 8-1-8.4-6, and most of the Project's costs will be incurred before the Commission can approve them, they are disqualified from recovery under I.C. § 8-1-8.4-7(c).

Ms. Armstrong also discussed NIPSCO's request for an ARP. She stated that the plain language of the ARP statute involves the Commission declining to exercise its jurisdiction over a utility because it will be selling wholesale power, offering a voluntary retail service or program, or offering a retail service that is ill-suited for traditional regulation. She therefore concluded that it is not intended to be used by utilities to obtain special ratemaking treatment afforded in other statutes while circumventing their requirements or caselaw prohibiting retroactive ratemaking.

Ms. Armstrong discussed the previous amounts recovered by NIPSCO for remediation, pointing out that NIPSCO recovered costs for ash pond remediation in its rate cases in Cause Nos. 43969 and 44688. She stated it becomes complicated to cleanly separate these costs into a tracked federally mandated compliance project because it is difficult to know how demolition costs factored into previous Commission base rate case decisions for determining the utility's overall revenue requirement. The OUCC recommends the Commission deny NIPSCO's request for an ARP for the Project and its associated cost recovery. The ARP statute does not and should not apply to CCR closure costs. The OUCC further recommends the Commission deny Project costs incurred prior to a final Commission order approving a CPCN for the Project, as NIPSCO's request does not meet the requirements of pre-approval pursuant to I.C. § 8-1-8.4-6(a) and would allow NIPSCO to retroactively recover costs outside the confines of a base rate case that should have been accounted for in accumulated depreciation.

Brian A. Wright, a Utility Analyst II in the OUCC's Electric Division, discussed the environmental regulatory history and requirements leading to the Compliance Project, the compliance alternatives NIPSCO considered, and the reasonableness of the Compliance Project's cost estimate.

Kaleb G. Lantrip, a Utility Analyst in the OUCC's Electric Division, discussed NIPSCO's proposed ratemaking treatment and recovery of the Compliance Project's costs. Mr. Lantrip stated the Compliance Project costs are for the removal of coal ash from NIPSCO's ash ponds; as costs are incurred, they are charged to the Accumulated Depreciation account. This increases NIPSCO's rate base, less any salvage costs, plus the effects on the Accumulated Depreciation account, leading to increases in depreciation rates to cover future removal costs. The entries for cost of removal are include in a base rate case where they impact rate base and depreciation rates for all removal costs incurred between the last rate case to the next. NIPSCO did not account for coal ash pond closure costs in its last rate case and is requesting recover the effect of the ash pond removal cost with a charge to Accumulated Depreciation ("Account 108"), and then include this cost effect in rate base in the FMCA mechanism to earn a return "on" and a return "of" as if this cost was an investment in plant or asset. As discussed further below, this is not the appropriate cost recovery mechanism under the circumstances.

NIPSCO's current request creates a risk of double recovery at the time of its next rate case because its Accumulated Depreciation account must be adjusted to remove ash pond removal costs from rate base and depreciation rate calculations. Failing to do so would result in NIPSCO double-charging these costs in base rates and in the FMCA. NIPSCO acknowledges that it will have to

adjust depreciation rate calculations to prevent the FMCA cost recovery of removal from impacting base rate assessment of depreciation rates. NIPSCO also admits it could seek recovery of these costs in its next base rate case.

Mr. Lantrip noted that NIPSCO did not seek to use regulatory asset accounting because it did not seek the Commission's pre-approval, recognizing that the Supreme Court had denied Duke relief on those grounds. Mr. Lantrip recommended that in the alternative, NIPSCO could include these costs of removal as part of its depreciation study in its upcoming base rate case as it has done in previous rate cases (Cause Nos. 43526, 43969, and 44688). Therefore, Mr. Lantrip concluded that NIPSCO should offset its $40.044 million estimated request using previously collected ash pond closure costs from prior rate cases. NIPSCO did not show that its request to recover costs of CCR removal had been reduced for any previously collected accumulated depreciation. NIPSCO also included internal resources in its estimate of the Owner's Costs ($3.488 million) and Indirect Costs ($3.932 million) portions of the Compliance Project, and Mr. Lantrip recommended that the Compliance Project costs should be reduced by the amounts already included in base rates for these categories. Mr. Lantrip stated that it is the OUCC's position that indirect costs of removal do not qualify as capital costs.

Mr. Lantrip recommended that the Commission dismiss NIPSCO's petition for an ARP approval for recovery through an FMCA Rider, as this recovery can be addressed as part of its base rate case. Further if the Commission grants Petitioner's request for recovery of these Compliance Project costs, the Commission should order NIPSCO to make compliance Project Costs net of any recovered coal ash pond closure costs through depreciation rates accrued through the effective period of base rate cases prior to the current rates, which have omitted CCR-based recovery. Further, he recommended that the Commission make Compliance Project costs recovered under the FMCA mechanism limited to "return of"; that it exclude double recovery of indirect overhead and internal labor; and eliminate the ash pond removal cost effect from the FMCA in the next base rate case and credit any amortization of the removal costs in the FMCA to accumulated depreciation.

C. <u>CAC's Case-in-Chief.</u> Benjamin Inskeep, Program Director at CAC, recommended that the Commission (1) encourage NIPSCO to fully clean up its Michigan City site of coal ash and constituents, including coal ash fill, as requested by NIPSCO's customers at the Field Hearing and as is necessary for NIPSCO to provide safe electricity service to its customers and to best situate itself to meet federal requirements; (2) deny cost recovery of all Ash Pond Compliance Project costs previously incurred that would contravene Indiana's statutory prohibitions on retroactive ratemaking; (3) deny cost recovery for all Ash pond Compliance Project costs that are not federally mandated and therefore cannot be recovered under the Federal Mandate Statute; (4) deny cost recovery for all Ash Pond Compliance Project costs associated with NIPSCO's cleanup of its CCR ponds that does not comply with the plain language requirements in the CCR Rule; and (5) deny NIPSCO's proposed cost allocation using adjusted demand allocators and instead approve cost allocation based on NIPSCO's adjusted energy allocators for any Ash Pond Compliance Project costs approved in this proceeding (and future proceeding proposals for coal ash project cost recovery).

In support of these recommendations, Mr. Inskeep testified that NIPSCO has not put forth any plan to fully clean up the Michigan City site in the future that would mitigate the significant risk to human health and the environment by leaving the large quantity of CCR fill at

the site in place. According to Mr. Inskeep, the Commission should deny cost recovery for projects related to the closure of the "RCRA ponds." Mr. Inskeep testified that, because there is no provision of RCRA that mandates those pond closures, their closure costs are not "federally mandated" within the meaning of the Federal Mandate Statute. The only RCRA provision that NIPSCO is able to point to as relevant is a provision that requires corrective action for hazardous waste releases, but NIPSCO does not even concede that there have been any releases at the site for which corrective action is required, let alone that closure of the RCRA ponds would qualify as a corrective action measure. Nor is NIPSCO able to identify any other RCRA provisions that would require closure of the RCRA ponds. Therefore, Mr. Inskeep testified, "NIPSCO is trying to have its cake and eat it too" by seeking to recover costs that it claims are federally mandated while not actually complying with the relevant federal mandates.

Similarly, Mr. Inskeep also testified that NIPSCO's proposed method of closure for the impoundments that it acknowledges are covered by the CCR Rule is not consistent with the CCR Rule's requirements. As noted by Mr. Inskeep, the CCR Rule at 40 C.F.R. Section 257.102(c)-(d) requires utilities to close impoundments *either* by removal of coal ash *and* decontamination of affected areas, *or* by capping the ash in place if the utility can demonstrate that water will not continue to infiltrate the ash. NIPSCO's proposed closure method is not consistent with these requirements, because NIPSCO proposes to remove the ash *without* decontaminating affected areas, as required by 40 C.F.R. Section 257.102(c), and then cap the contaminated areas in place without cleaning them up. As Mr. Inskeep points out, the mere fact that IDEM approved NIPSCO's closure plans does not absolve them from enforcement liability, including by enforcement actions by U.S. EPA or federal enforcement litigation brought by private citizens. NIPSCO also is subject to a separate CCR Rule requirement, pursuant to 40 C.F.R. Sections 257.90-257.98, to conduct corrective actions to clean up contaminated groundwater. Therefore, Mr. Inskeep concludes, NIPSCO's proposed costs of capping contaminated areas in place rather than cleaning them up do not comply with "federally mandated requirements" under the Federal Mandate Statute, and the Commission should reject cost recovery for those costs.

Concerning the retroactive ratemaking issue, Mr. Inskeep testified that the Indiana Supreme Court's recent decision in *Duke Energy* barred cost recovery for any costs incurred prior to the Commission's final order in this proceeding, to avoid retroactive ratemaking.

Mr. Inskeep also testified that NIPSCO's demand allocators are based on each customer class's contribution to coincident peak ("CP") demand during the four summer months of June-September, referred to as the 4CP [coincident peak] methodology. Mr. Inskeep explained that CAC is extremely concerned with this cost allocation methodology because it allocates costs on the basis of demand even though the costs are clearly energy-related costs. He explained that coal ash is generated as a function of energy generation, that is, the more coal that is burned to generate electricity, the more coal ash that is created, which in turn results in additional coal ash disposal costs. He noted that the amount of coal ash created is not related to capacity nor for meeting NIPSCO's capacity obligations. He went on to detail how the 4CP methodology is particularly egregious and inappropriate in this instance because coal ash is generated in all months of the year in proportion to the amount of electricity that is generated by the plant, whereas the 4CP methodology, only considers a customer class's contribution to the peak demand in four summer months when allocating costs to customer classes.

Mr. Inskeep calculated that Rate 831 industrial customers would receive a cross-subsidy of $8.6 million in reduced revenue requirements under the 4CP methodology—the costs of which would be shifted to other rate classes—compared to his recommendation to use NIPSCO's adjusted energy allocators for these energy-related costs. Mr. Inskeep calculated that NIPSCO's cost proposal would unfairly allocate approximately $14.2 million (35.34%) of the total $40.0 million in costs to residential customers, when these customers should have only been allocated $9.6 million (23.92%) of the costs based on the proportion of energy used (and, by extension, the proportion of coal ash created). Mr. Inskeep concluded that the 4CP methodology produces unjust and unreasonable rates that harm some customer classes, including residential customers, and create windfall rate subsidies to other customer classes, and that the adjusted energy allocators would be appropriate to use instead.

D. Industrial Group's Case-in-Chief. Brian C. Collins, Managing Principal with the firm of Brubaker & Associates, Inc., recommended that (1) the $40 million proposed cost recovery for the Ash Pond Compliance Project be denied as NIPSCO failed to provide evidence identifying any incremental amount of costs that should be recovered from ratepayers for the Ash Pond Compliance Project and instead use the $22.1 million adjusted Ash Pond Compliance Project costs, with offsets for previous closure costs collected from customers as depreciation expense in base rates, if any, would be the appropriate amount for cost recovery; and (2) if the Commission approves NIPSCO's proposal to amortize a large portion of the cost recovery, the amortization should not include a carrying cost at NIPSCO's WACC, in order to minimize the long term impact on customers and instead proposed that if any carrying charge is approved, it should reflect NIPSCO's cost of debt, which would be more appropriately recognize the costs incurred by NIPSCO over the 10-year period it proposes to amortize the regulatory asset that it effectively proposed to create. Brian C. Collins, a Managing Principal of Brubaker & Associates, Inc., testified on behalf of the NIPSCO Industrial Group. Mr. Collins recommended that the Commission deny NIPSCO's request to recover $40 million of ash pond compliance costs for its Michigan City Generation Station.

Mr. Collins testified that NIPSCO had not demonstrated that the proposed $40 million in Compliance Project cost were incremental to the costs above those already built into NIPSCO's rates for normal and ongoing expenses. Mr. Collins testified that in the absence of such a showing, recovery was inappropriate. IG Ex. 1 at 9.

More specifically, Mr. Collins testified that NIPSCO provided no evidence that existing base rates were inadequate to cover the costs of the Compliance Project. He also testified that NIPSCO had incurred Compliance Project costs in the years predating the case, without seeking approval for recover, and that it was incurring costs during 2022 and the pendency of the case. IG Ex. 1 at 9-10. Mr. Collins, referring to NIPSCO's responses in discovery which he included as attachments to his testimony, testified that NIPSCO had incurred approximately $14.8 million in engineering, construction, and owner's costs as of July 31, 2022, with "approximately" $8.226 million in construction costs having been incurred by that time. IG Ex. 1 at 10. Mr. Collins testified that the Company has not provided evidence that the costs it seeks to recover from customers for the same categories of expenses (e.g., engineering costs, owner's costs, and indirect costs) are incremental to the costs it recovers through base rates for operating Michigan City. IG Ex. 1 at 10-11.

Mr. Collins testified that NIPSCO had not identified any prior Commission order authorizing deferred accounting for Compliance Project costs and provided evidence, produced in discovery, that NIPSCO had been incurring compliances costs years prior the filing of the case. IG Ex. 1C at 11, Confidential Attachment BCC-3. He reiterated that NIPSCO did not demonstrate that its base rates during a period prior to the filing of this proceeding and during its pendency were insufficient to recover these costs. IG Ex. 1C. at 11.

Mr. Collins then noted that NIPSCO could have collected costs for the ash ponds prior to the new depreciation rates set in 2011, as closure costs for the ash ponds likely would have been included as part of the depreciation expense approved for the Michigan City generation station built into base rates prior to 2011. IG Ex 1 at 12-13. Mr. Collins testified that approximately $3 million in ash pond closure costs that have already been recovered from ratepayers through depreciation rates. IG Ex. 1 at 13. Mr. Collins testified that this approximately $3 million should be removed from any approved recovery so that ratepayers do not pay twice for the costs of the Compliance Project – once through depreciation rates and then through the FMCA. IG Ex. 1 at 13.

Mr. Collins further testified in addition to removing the costs which NIPSCO had not shown to be incremental to those embedded in base rates ($2.7 million in engineering, $3.5 million in owners' costs, $3.3 million in contingency costs, and $3.9 million in indirect costs) the remaining incremental amount, if any, would be $26.7 million. IG Ex. 1 at 8, 12. Mr. Collins objected, however, to the recovery of an additional $4.5 million in contingency costs which he testified should be removed as they were unknown and unmeasurable. IG Ex 1 at 12. With these adjustments, not including the previously incurred $8.226 million in construction costs identified as already having been incurred or the approximately $3 million in depreciation expense recovered in base rates, would reduce any potential recovery $22.1 million. IG Ex. 1 at 12. Given that Mr. Collins did not take any position as to retroactive recovery, this figure necessarily includes costs incurred in 2022 while this case was pending. IG Ex. 1 at 4-5, IG Ex 1C at Confidential Attachment BCC-3. Mr. Collins was clear, however, that NIPSCO should not have its proposed recovery approved. IG Ex. 1 at 16.

Mr. Collins also expressed concern about NIPSCO's proposed cost recovery. He noted that the Company is proposing to deviate from the terms of the Federal Mandate Statute, and recovery the costs of the Compliance Project, together with carrying charges, over a 10 year period, which will increase costs to customers. IG Ex. 1 at 15. Mr. Collins also testified that NIPSCO's proposed recovery mechanism would leave customers responsible for costs long into the future – until 2032 – for an asset that is effectively retired. IG Ex. 1 at 15. Mr. Collins recommended that if the Commission approves any recovery with carrying charge, the return should reflect the Company's cost of debt, which would more appropriately recognize the incurrence of costs over the 10 year recovery period proposed by the Company. IG Ex. 1 at 16.

He noted that the Company proposes to allocate the Compliance Project costs to classes based on demand allocators noted in a filing in NIPSCO's electric case in Cause No. 45159 which he did not disagree with. Mr. Collins recommended, however, that new, approved, demand allocators from NIPSCO's pending rate case, should be used to allocate the costs of the Compliance Project in the future. IG Ex. 1 at 16.

E. Industrial Group's Cross-Answering Testimony. In his cross-testimony, Mr. Collins responded to Mr. Inskeep's direct testimony on behalf of Citizens Action Coalition ("CAC"). Mr. Collins recommended that the Commission deny Mr. Inskeep's recommendation to allocate coal ash pond compliance costs on an adjusted energy allocator, including an allocation to Rate 831 Tier 2 customers. Mr. Collins testified that it is appropriate to allocate any approved Compliance Costs on a demand basis as the ash ponds are fixed cost structure associated with production plant, and typically allocated to FERC accounts for production plant. IG Ex. 2 at 3. He testified that such plant needs to be sized to meet demand, and that it is appropriate to allocate production plant on a demand basis. IG Ex. 2 at 3-4. He noted that this was the manner in which the Commission allocated production plant in NIPSCO's last base rate case. IG Ex. 2 at 4.

Mr. Collins also noted that NIPSCO's Commission approved tariff does not allocate FMCA charges to Rate 831 Tier 2 and explained the cost justification for this. Specifically, he testified that Tier 2 capacity is subject to curtailment by NIPSCO unless it is firmed up through the PRA or a third-party contract, meaning it is an interruptible level of service that allows NIPSCO to avoid building generation plant to serve that load. IG Ex. 2 at 4-5. He also testified that Rate 831 Tier 2 energy is priced at LMP, removing Tier 2 energy from the fuel costs benefits of NIPSCO's generation and purchased power portfolio, and instead exposing customers to market pricing risk. IG Ex. 2 at 5. Mr. Collins recommended that no costs should be allocated to Rate 831 Tier 2 customers and that they are not, as asserted by Mr. Inskeep, receiving a "windfall" or subsidy under NIPSCO's proposed allocation methodology for the reasons he explained. IG Ex 2 at 5.

F. NIPSCO's Rebuttal.

(1) NIPSCO Witness Gode. In rebuttal, Mr. Gode testified how NIPSCO will account for the Compliance Project costs and clarified that, except for approximately $2.9 million (as of December 31, 2021) of estimated general pond closure costs embedded in and collected through depreciation commencing with NIPSCO's Cause No. 43969 rate case, NIPSCO's prior and existing base rates do not include recovery for any of the Compliance Project costs. He explained that as a result, NIPSCO will reduce the Compliance Project costs to be collected through the FMCA mechanism by $2.9 million. He noted that this estimated collection amount will be updated at the time the project is completed and collection begins in the tracker.

Mr. Gode supported NIPSCO's proposed ratemaking treatment as reasonable and appropriate, refuting the Intervenors' assertion that incurred, actual Compliance Project costs recovered through the FMCA should not include indirect, owner's, engineering, or design costs. He also responded to the Intervenors' arguments regarding a return "on" component for the Compliance Project.

Finally, Mr. Gode reiterated his testimony as to why the FMCA mechanism is appropriate for recovery of costs for the Compliance Project, explaining that these costs were not included in NIPSCO's last rate case, where it was proposed and accepted that the costs would be presented to the Commission for approval in a future case.

(2) NIPSCO Witness Turman. In response to Mr. Inskeep's testimony that certain costs are not federally mandated, Ms. Turman testified that all the costs associated with the closure of the ponds subject to this proceeding are subject to RCRA. She also testified that

RCRA authority being delegated to IDEM by the US EPA does not negate a federal mandate designation. Finally, she stated that, contrary to Mr. Inskeep's testimony, NIPSCO's proposed Ash Pond Compliance Project ("Compliance Project") complies with the CCR Rule (a RCRA regulation).

(3) NIPSCO Witness Blissmer. Mr. Blissmer responded to Mr. Inskeep's recommended denial of NIPSCO's proposed demand allocators and 4 coincident peak ("4 CP") methodology to allocate the costs of the proposed Ash Pond Compliance Project. He testified that NIPSCO's proposed allocation factors are the same as those that would have been used to allocate ash pond closure costs through base rates and are consistent with how costs were to be allocated under the FMCA Tracker pursuant to NIPSCO's last base rate case. He stated that it is appropriate to allocate the Ash Pond Compliance Project costs using demand allocators as opposed to energy allocators. He explained that prior FMCAs have delineated allocation of costs between fixed and variable costs, with fixed costs being allocated on a demand basis and variable costs on an energy basis. He explained that since only the first tier of Rate 831's service is firm service and backed by NIPSCO's production assets, Mr. Inskeep's recommendation to allocate the costs of NIPSCO's Ash Pond Compliance Project on an energy basis is inconsistent with how fixed FMCA costs have been allocated in the past and ignores the fact that the ash ponds are associated with NIPSCO's production facilities, which are designed to meet the demands of NIPSCO's customers.

Mr. Blissmer noted that although Mr. Collins supports NIPSCO's proposed allocation factors, he recommended to apply only the Company's cost of debt to NIPSCO's 20% deferral. He testified that NIPSCO's 4 CP methodology has been approved by the Commission for purposes of allocating costs in setting its base rates, and NIPSCO is proposing to use the same methodology to allocate costs to set its FMCA rates for this Project.

Mr. Blissmer disagreed with Mr. Collins' recommendation to reduce the carrying charge to 20% deferral to solely the Company's cost of debt. He testified that Indiana Code § 8-1-8.4-7(c)(2) allows for 20% of the approved federally mandated costs, including depreciation, allowance for funds used during construction, and–importantly, for this issue–post in service carrying costs based on the overall cost of capital most recently approved by the Commission to be deferred and recovered in a future general rate case. He stated the statute specifically allows for this to compensate utilities for its cost of capital while it is waiting to collect the federally mandated costs it incurred. He explained that NIPSCO funds its capital projects through a combination of debt and equity and, as such, should recover its fully weighted average cost of capital when recovery expands over multiple year.

(4) NIPSCO Witness Becker. Ms. Becker responded to Intervenors' incorrect claims that the Federal Mandate Statute does not apply to costs that are incurred before an order is issued. She stated that the two critical findings the Commission must make are that the public convenience and necessity "will be served" by a compliance project and that the compliance project "will allow the energy utility to comply." She testified NIPSCO's project "will" serve the public convenience and necessity from the day that it is completed and for many years in the future and "will allow" NIPSCO to comply with the federal mandate. She stated that whether costs have already been incurred has no impact on these findings.

Ms. Becker also explained that the provision in Ind. Code § 8-1-8.4-6(b)(1)(B) concerning "projected federally mandated costs" is information the statute requires an energy utility "set forth in [its] application." She pointed out that it must therefore be a projection as of the date of the petition. She testified NIPSCO's cost estimate was a projection for the cost to complete the project when it filed its petition, and it continues to be a projection, since the work is not yet complete. She stated such a projection can include project costs incurred prior to and during the proceeding, especially when, as is often the case with compliance projects, there are mandated compliance deadlines that must be met and costs must be incurred prior to the petition date in order to meet those deadlines. She also pointed out the multiple orders of the Commission authorizing recovery of federally mandated costs incurred on a federally mandated compliance project before the issuance of the order.

Ms. Becker testified that Intervenors' recommendation for disqualification of costs incurred before the order issuance relies upon use of future tense in selective phrases in the statute. She noted there really is no need to parse verb tense because when the General Assembly intends for nothing to be done before an Order is issued, it knows how to say so.

Ms. Becker discussed why inclusion of contingency is appropriate as part of a best estimate. She explained that NIPSCO's proposed Compliance Project includes $3.3 million of contingency costs. She noted that based on her review of Mr. Collins' testimony, it appears he refers to the approximate $4.5 million of contingency, which is the amount of contingency that was calculated at the time of the estimate dated November 27, 2019. She explained that approximately $3.3 million of contingency was included to cover contingency items known at the time of the filing. She testified that since NIPSCO will not seek recovery of the federally mandated costs until the project is complete, any contingency included in the estimate will only be sought for recovery if actually incurred.

In response to Mr. Collins' recommendation that NIPSCO's $3.3 million contingency allowance be denied because it is "not prudent and [] not known and measurable" she stated the $3.3 million contingency allowance is primarily calculated based off the contracting structure for the Ash Pond Compliance Project. She explained that contingency was assigned (1) for unit quantity fluctuations since the construction contract is largely composed of unit price line items that are subject to change based on the amount of work completed, (2) to dewatering and water treatment costs due to potential variability in groundwater conditions based on weather and soil conditions, and (3) for variability in NIPSCO's owner's costs since most of these costs are based on time and expense contracts. She stated that through the FMCA tracker, NIPSCO will only recover actual federally mandated costs it incurs; therefore, if it does not incur all of the contingency allowance included in its Compliance Project estimate those costs would not be recovered through the FMCA tracker.

She also explained that in making this recommendation, Mr. Collins ignores prior Commission decisions that have approved contingencies for similar construction projects. She stated that in NIPSCO's most recent TDSIC Plan case, Cause No. 45557, the Commission denied Mr. Collins' request to remove contingency because it was "unnecessary" finding that excluding contingency would be unreasonable and would result in the TDSIC cost estimates to not be a "best estimate" as required by statute and that the Commission also found that "including contingency costs in the cost estimate is consistent with the AACE system and with industry practice." Cause

No. 45557 Order at 56. Ms. Becker testified that NIPSCO's contingency allowances in this Cause serve a similar purpose to that in its TDSIC Plan and should be approved.

4. Commission Discussion and Findings.

We view this case in light of the decision in *Office of Utility Consumer Counselor v. Duke Energy Indiana, LLC*, 183 N.E.3d 266 (Ind. 2022) in which the Indiana Supreme Court reaffirmed Indiana's longstanding prohibition on retroactive ratemaking. We consider that case controlling in this matter. In *Duke Energy*, the Court explained that the prohibition on retroactive ratemaking is grounded in the Commission's statutory authority as reflected in Indiana Code § 8-1-2-68, which permits us to set only rates to be followed "in the future." *Duke Energy*, 183 N.E.3d at 268.

The decision in *Duke Energy* made clear that the dividing line for purposes of determining whether rates are retroactive, and therefore unlawful, and those which are prospective, and therefore lawful (provided they are just and reasonable), lies at the date of the Commission's order, not at the date of the utility's initiation of the case. *See Id*. at 268 and 270. The Court's decision in *Duke Energy* reversed that portion of our order in Cause No. 45253 permitting Duke to recover environmental costs incurred between rate cases, and prior to the date of our final order, which authorized adjustment of Duke's base rates to permit recovery of those costs from ratepayers. Conforming our decision here to the Supreme Court's holding in *Duke Energy*, we must reject NIPSCO's request to recover costs associated with the Compliance Project incurred prior to the date of this order.

For purposes of this analysis, we acknowledge NIPSCO's assertion that under traditional ratemaking, it could have sought recovery for the costs of the Compliance Project through depreciation rates set in a base rate case. If NIPSCO proposed depreciation rates reflecting the compliance project costs, and the Commission had the opportunity to determine the resulting base rates were just and reasonable and that the costs had not been incurred prior to adjustment of the base rates, would have resulted in an order that was prospective in nature, and therefore lawful. But, NIPSCO did not do so.

Instead NIPSCO testified, in its last rate case, the Company voluntarily proposed not to adjust its depreciation rates to reflect future costs associated with the Compliance Project, and instead proposed to seek recovery of such costs in its next rate case or under the terms of the Federal Mandate Statute, Indiana Code ch. 8-1-8.4. That the other parties to the settlement which resolved NIPSCO's revenue requirement in Cause No. 45159 agreed to NIPSCO's proposal has no bearing on our analysis. Having undertaken to proceed under the Federal Mandate Statute, and having itself agreed to do so as part of the resolution of Cause No. 45159, NIPSCO is obliged to conform to the terms of the statute in order to obtain any relief.

Indeed, on this point we fundamentally disagree with NIPSCO's assertion that if we do not permit recovery of these costs through the Federal Mandate Statute, then "NIPSCO would not be barred recovery of these costs as part of its *next* depreciation study." (NIPSCO's Proposed Order at 19 (emphasis added)). What NIPSCO suggests is the very essence of retroactive ratemaking – the establishment of a new rate to recover costs incurred by the utility in the past. *See Public Service Commission v. City of Indianapolis*, 235 Ind. 70, 88, 131 N.E.3d 308, 315 (1956) ("Past losses of a utility cannot be recovered from consumers nor can consumers claim a return of profits and earnings which may appear excessive."). We simply have no statutory authority to permit

such retroactive recovery. *See, e.g.*, *Indiana Telephone Co. v. Public Service Commission*, 131 Ind. App. 314,, 340, 171 N.E.2d 111, 124 (1960); *Indiana Bell Telephone Co. v. OUCC*, 717 N.E.2d 613, 625 (Ind. Ct. App. 1999); *Airco Industrial Gases v. I&M*, 614 N.E.2d 951, 953 (Ind. Ct. App. 1993). Under *Duke Energy*, it is clear that the only permissible rates must be prospective in orientation and cannot include retroactive recovery of costs incurred prior to the issuance of an order approving rate recovery. Accordingly, only if NIPSCO sought to include the costs of the Compliance Projects as part of its depreciation expense in a prior proceeding, seeking retirement obligation costs which had not yet been incurred, would it be entitled to include them in rates. As the costs here were specifically excluded, by NIPSCO's own choice, from rates, it cannot seek to recover them in base rates in any future proceeding.

The central question for this Commission to address, then, is whether NIPSCO has complied with Ind. Code ch. 8-1-8.4 by filing a request for recovery of Compliance Costs incurred both prior to, and contemporaneously with, the pendency of this case. (*See* Ind. Group Ex 1C at Confidential Attachment BCC-3) (showing compliance costs incurred years prior to and after the March, 2022 filing by NIPSCO)). Upon analysis of the Federal Mandate Statute we find that NIPSCO has not brought itself under the terms of that statute, and is instead seeking unlawful retroactive relief.

We reach this conclusion because the Supreme Court's decision in *Duke Energy* specifically addressed the terms of the Federal Mandate Statute. *Duke Energy*, 183 N.E.3d at 270. Indeed, in its opinion, the Court expressly stated that: "Although we have not yet interpreted the statute, we note it is framed in the future tense and speaks of 'projected' costs for 'projected' projects . . . which would seem to require commission approval before a utility incurs the costs." *Id*. (emphasis in original) (citing Ind. Code §§ 8-1-8.4-6(a), 6(b), 6(b)(1), 7(b)(1) and 7(b)(2)). There is no question that the statute only allows a utility to track compliance costs through a mechanism such as NIPSCO's FMCA after this Commission issues a CPCN allowing that treatment. Ind. Code § 8-1-8.4-6. The purpose of a CPCN proceeding is to determine whether a project and its projected costs are prudent before those costs are subsequently passed on to ratepayers. Only with prior authorization from this Commission, then, are costs subject to recovery through the FMCA.

In light of the unequivocal dividing line between impermissible retroactive and lawful prospective recovery established by the Indiana Supreme Court in *Duke Energy*, a statute drafted entirely in the future tense and dependent upon Commission issuance of a CPCN prior to recovery of costs, and explicit discussion by the Indiana Supreme Court of the Federal Mandate Statute, we conclude that the Supreme Court correctly construed Indiana Code Chapter 8-1-8.4 to require "commission approval before a utility incurs" mandated compliance costs. *Duke Energy*, 183 N.E.3d at 270. As NIPSCO has unquestionably incurred costs prior to not only a final order in this cause, but even prior to the submission of a petition in this case, we deny the requested relief.

In reaching this conclusion we are not persuaded that our prior decisions are incompatible with our decision here. NIPSCO cites several cases where we have allowed recovery of pre-filing or pre-order costs. (NIPSCO Proposed Order at 23.) We have reviewed those cases - which include Cause Nos. 44971, 45052, 44988, and 44367 FMCA4 - and find they are readily distinct from the case here. With the exception of Cause No. 44367 FMCA4, and the attending order on reconsideration, there was no indication that any challenge was raised regarding retroactive ratemaking. Further, Cause No. 44988 was resolved by a comprehensive settlement which also

resolved NIPSCO's request for recovery of costs through its FMCA in Cause No 45007, and is therefore of no precedential value. To the extent Cause No. 44367 FMCA4 addresses the recovery of previously incurred costs through the Federal Mandate Statute, we made plain that costs incurred prior to Commission approval is impermissible. (Original Order at 28-29). Insofar as we explained on Reconsideration that our initial decision was driven by the facts of the case, we also noted that prior instances, including Cause No. 44971 and 44367 FMCA 1, where we permitted recovery of substantial costs incurred prior to the issuance of an order were in the context of request "filed in a timely manner within the context of the [statute mandating compliance] and the utility's compliance request." (Cause No. 44367 FMCA4 Order on Reconsideration at 3).

Although NIPSCO tries to bring itself into that category of timely recovery, it fails to do so. In this instance, NIPSCO has known for years of the federal mandate and that compliance costs will be required to be incurred. In fact, it seeks recovery for costs incurred in periods prior to its last rate case. (Ind. Group Ex 1C at Confidential Attachment BCC-3). It could not have made the proposal in its 2018 Rate case to seek recovery through a proceeding under the Federal Mandate Statute instead of through increased depreciation expense if it had not known the costs would be incurred. Indeed, NIPSCO made an alternative calculation of estimated compliance costs for ratemaking purposes in the rate case. In other words, NIPSCO did not act in a timely manner to seek recovery of costs commensurate with the imposition of the compliance requirement by the federal government. NIPSCO is not, under the Federal Mandate Statute, entitled to automatic recovery of all costs associated with projects; only those which are pre-approved. Here, it had advance foreknowledge of the need for compliance and the ability to proactively seek recovery of projected costs, but it did not act. It is now left to the standards of traditional ratemaking, which preclude the retroactive recovery of such costs.

Finally, we note that part of NIPSCO's petition requested that the Commission consider relief under an Alternative Regulatory Plan expressly as a means to avoid the prohibition on retroactive ratemaking. (*See* NIPSCO Proposed Order at 25). The Alternative Utility Regulatory Act, Indiana Code ch. 8-1-2.5, was enacted in 1995 to provide the Commission with the statutory authority to approve alternatives to traditional regulation so that Indiana's energy utilities could address the "increasingly competitive environment for energy services. . . ." I.C. § 8-1-2.5-1(3). In other words, the AUR Act was meant to provide a means by which this Commission could review and approve flexible alternatives to traditional ratemaking in order to allow the state's energy utilities to remain competitive in a changing marketplace.

We note that like the Federal Mandate Statute, the AUR is framed in the future tense. A utility like NIPSCO seeking approval under Section 6 of the Act must "file with the commission an alternative regulatory plan *proposing* how the commission will approve retail energy services or just and reasonable rates and charges. . . ." I.C. 8-1-2.5-6(c) (emphasis added). Further, only after a "notice and a hearing" may this Commission "approve, reject, or modify the energy utility's proposed plan if the commission finds that such action is consistent with the public interest." *Id*. at §6(e). *Id*. at §4. In other words, the AUR Act speaks about the establishment of alternative and flexible plans to be implemented in the future; not as a means to ratify or rectify on a retroactive basis those actions taken in the past. Likewise, Section 4 of the Act makes clear that any relief under Section 6 is to be "limited to the approval of energy services or the establishment of rates and charges . . . ." Here too, the relief must be prospective in nature, via the "establishment" of rates and charges on a going forward basis; not the establishment to retroactive recovery of past costs or losses incurred by the utility.

We simply do not read the AUR Act, as NIPSCO would propose, as a means to circumvent the statutory prohibition on retroactive ratemaking. As noted, the statute is intended to promote flexible arrangements to assist Indiana utilities in remaining competitive on a prospective basis. That flexibility, however, must be exercised with the interests of the public in mind. *Id*. §§1(6), 5(b), 6(a)(1)(A). We fail to see how the public interest is served by undoing a longstanding legal principle which is, itself, designed to protect the public from being charged rates that allow a monopoly enterprise the ability to recover past losses through future rates. Indiana has long adhered to the basic regulatory principle that the "chance of loss or profit from operations is one of the risks" a utility "must take" so that the utility "must bear the loss and is entitled to the gain depending on the efficiency of its management and the economic uncertainties of the future after a rate is fixed." *City of Indianapolis*, 235 Ind. at 89, 131 N.E.2d at 315. Were we to read the AUR Act as NIPSCO proposes, we would not only undo the incentive for utilities to maximize efficiency, but wholly relieve utilities of the risk of any loss. Indeed, we would undo the very limitations imposed by the statutory prohibition on retroactive ratemaking found in I.C. 8-1-2-68. We do not believe the General Assembly intended that result, and will not interpret Ind. Code ch. 8-1-2.5 in a manner that completely undoes the underpinnings of regulation in a manner inconsistent with the purpose the AUR Act itself.

7. Confidentiality. Industrial Group filed a Motion for Protection and Nondisclosure of Confidential and Proprietary Information on September 7, 2022, which was supported by NIPSCO's affidavit filed September 28, 2022, showing information to be submitted to the Commission were trade secret information within the scope of Ind. Code§§ 5-14-3-4(a)(4), (9), and 24-2-3-2. The Presiding Officers issued a Docket Entry on October 3, 2022, finding such information to be preliminarily confidential, after which such information was submitted under seal. We find all the information is confidential pursuant to Ind. Code § 5-14-3-4 and Ind. Code § 24-2-3-2, is exempt from public access and disclosure by Indiana law, and shall continue to be held confidential and protected from public access and disclosure by the Commission.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. NIPSCO's request for a Certificate of Public Convenience and Necessity for the for the Ash Pond Compliance Project pursuant to Ind. Code §§ 8-1-8.4-6 and -7 is denied.

2. NIPSCO's request to recover Ash Pond Compliance Project costs in the amount of $40,044,000, less $2,900,000 already collected, is denied.

3. NIPSCO's request for the specific ratemaking accounting authority to implement this cost recovery as described within this Order is denied.

4. NIPSCO's requested ARP is rejected as not being in the public interest, and not establishing rates and charges that are designed to promote efficiency in the rendering of retail service, or otherwise in conformity with the purposes of Indiana Code ch. 8-1-2.4..

5. The Confidential Information filed under seal in this Cause shall continue to be treated by the Commission as confidential and not subject to public disclosure under Indiana Code § 24-2-3-2 and Indiana Code § 5-14-3-4.

6. This Order shall be effective on and after the date of its approval.

HUSTON, FREEMAN, KREVDA, VELETA, AND ZIEGNER CONCUR:
APPROVED:

I hereby certify that the above is a true and correct copy of the Order as approved.

_____

Dana Kosco,
Secretary of the Commission