Filed: 7/5/2022 7:48 PM

IN THE
INDIANA COURT OF APPEALS

Case No. 22A-EX-00187

NIPSCO INDUSTRIAL GROUP and OFFICE OF THE UTILITY CONSUMER COUNSELOR, Appellants, v. NORTHERN INDIANA PUBLIC SERVICE CO., Appellee.	Appeal from the Indiana Utility Regulatory Commission Cause No. 45557 Hon. James F. Huston, Chair Hon. Sarah E. Freeman, Hon. Stefanie Krevda, Hon. David L. Ober, Hon. David E. Ziegner, Commissioners Hon. David Veleta, Chief Administrative Law Judge

BRIEF OF APPELLEE NORTHERN INDIANA PUBLIC SERVICE CO. LLC

Robert E Heidorn, #14264-49
Bryan Michael Likins, #29996-49
NISOURCE, INC.
150 West Market Street
Indianapolis, IN 46204
P: 317-684-4922
F: 317-684-4918
E: RHeidorn@NiSource.com
BLikins@NiSource.com

Brian J. Paul, #22501-29
FAEGRE DRINKER BIDDLE & REATH LLP
300 North Meridian Street, Suite 2500
Indianapolis, IN 46204
P: (317) 237-0300
F: (317) 237-1000
E: Brian.Paul@FaegreDrinker.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATE STATUTES

STATEMENT OF ISSUES

1. Before the Utility Regulatory Commission approves a utility's TDSIC plan, the Commission must determine—among several other things—that "the estimated costs of the eligible improvements included in the plan are justified by incremental benefits attributable to the plan." Ind. Code § 8-1-39-10(b)(3). The Commission held that this requires it to compare the costs and incremental benefits of a proposed plan as a whole, not of individual projects or categories of projects within the plan. Was that interpretation of the TDSIC statute correct, or at least reasonable?

2. If the statutory cost-benefit analysis applies not to a TDSIC plan as a whole but to each project or category of projects in the plan, did NIPSCO present sufficient evidence here to satisfy the cost-benefit analysis for its "System Deliverability" projects?

3. When the Commission assesses the benefits and reasonableness of a TDSIC plan as required by the statute, is the Commission required to completely ignore any positive effects that the spending proposed in the plan will have on the general economy?

4. Appellants contend that the Commission erred by taking one paragraph of its 68-page Order to observe that NIPSCO's proposed TDSIC spending would benefit the general economy, even while noting in the same paragraph that other evidence also supports approval of the TDSIC Plan. Have Appellants carried their burden under the

harmless-error doctrine to show that this passing discussion was material to the Commission's ultimate approval of the Plan?

STATEMENT OF THE CASE

Appellee NIPSCO filed a petition with the Indiana Utility Regulatory Commission pursuant to Ind. Code § 8-1-39-10, seeking approval of a TDSIC plan for eligible transmission, distribution, and storage improvements to NIPSCO's electric system. (App. Vol II at 74 *et seq.*) Appellant Office of Utility Consumer Counselor represented the public, and (as is relevant to this appeal) opposed approval of NIPSCO's plan. (App. Vol II at 228 *et seq.*, Vol. III at 2 *et seq.*) Appellant NIPSCO Industrial Group intervened before the Commission (*id.* at 101 *et seq.*) and also opposed approval. As pertinent here, Appellants argued that: (1) certain of NIPSCO's projects did not satisfy the statutory cost-benefit analysis required for approval of the plan, and (2) the Commission should not consider certain evidence NIPSCO offered regarding the overall economic benefits from its proposed TDSIC spending. (*See generally id.* at 228 *et seq.*; *id.* Vol. III at 2 *et seq.*)

After a hearing, the Commission found that NIPSCO had satisfied the standards set forth by the TDSIC statute, rejected Appellants' arguments, and approved NIPSCO's plan. (*See* Comm'n Order, Attachment to Appellants' Brief.) The Commission found Appellants' cost-benefit arguments to be inapposite, because it held that the TDSIC statute applies the cost-benefit analysis to the TDSIC plan as a whole, whereas Appellant challenged only certain specific projects and did not question that NIPSCO's

plan as a whole passes the cost-benefit test. (*Id.* at 60.) The Commission also briefly held that NIPSCO's economic evidence was "relevant," but was "not the only evidence offered by NIPSCO to support overall Plan approval." (*Id.*)

STATEMENT OF FACTS

I. The TDSIC Statute Creates A More Predictable Method For Matching Utility Rates With Costs.

This case is about Indiana's statutory scheme governing how utilities recover the costs of repairs and improvements to their systems. "Under traditional rate regulation, an energy utility must first make improvements to its infrastructure before it can recover their cost through regulator-approved rate increases to customers." *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 100 N.E.3d 234, 236-37 (Ind. 2018), *modified on reh'g* (Sept. 25, 2018). These after-the-fact rate increases are accomplished "through periodic rate cases, which are expensive, time consuming, and sometimes result in large, sudden rate hikes for customers." *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 31 N.E.3d 1, 4 (Ind. Ct. App. 2015). This arrangement also can leave utilities hesitant to incur the expense of large projects, even when they are needed, because of the risk that the Commission will later deem part or all of the expenses unrecoverable.

Therefore, in certain circumstances, the legislature has by statute "authorized utilities to obtain regulatory preapproval for designated improvements," before the utility engages in the work:

> The TDSIC Statute, I.C. ch. 8–1–39, enacted in 2013, is one such procedure. It encourages energy utilities to replace their aging infrastructure by modernizing electric or gas transmission, distribution, and storage projects. This TDSIC procedure, pronounced "tee-DEE-zick", is a process for utilities to assess a distinct charge—a Transmission, Distribution, and Storage System Improvement Charge—for completed projects deemed eligible improvements under the Statute. In contrast to traditional ratemaking, the TDSIC procedure permits a utility to seek preapproval of designated capital improvements to the utility's infrastructure ….

NIPSCO Indus. Grp., 100 N.E.3d at 236, 238–39 (cleaned up). "Presumably understanding that these modernization projects require significant investments of time and money, the legislature drafted the TDSIC Statute to allow utilities to first petition the Commission for approval of a multi-year TDSIC plan and then petition the Commission for periodic rate adjustments based on [the approved plan's] progress." *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.,* 125 N.E.3d 617, 624 (Ind. 2019).

The result is that "[e]veryone reaps a benefit." *Id.* at 619. "[U]tilities," for their part, "can count on recouping their investment in upgraded infrastructure," because the Commission approves the recoupment before the utility engages in the work. *Id.* And

> [o]n the consumers' side, the statute requires the Commission to make [advance] determinations regarding the public convenience, necessity, and reasonableness of planned projects before approving a plan to complete them. This process protects both suppliers and consumers of electric and gas services, improves the stability of the provision of these services, and increases the predictability of costs associated with providing and using these services.

Id. at 619.

II. TDSIC Plan Approval Requires The Commission To Make Multiple Findings Justifying The Plan.

"To gain approval" from the Commission, the TDSIC statute requires that a "plan must satisfy certain enumerated statutory criteria." *IPL Indus. Grp. v. Indianapolis Power & Light Co.*, 159 N.E.3d 617, 621 (Ind. Ct. App. 2020). "[T]he burden of showing a project's eligibility for TDSIC treatment" is on the utility. *NIPSCO Indus. Grp.,* 31 N.E.3d at 9.

As Appellants explain in their brief (at 10), this appeal directly involves only one of the TDSIC approval criteria: whether the costs of the improvements in the plan are justified by the incremental benefits attributable to the plan. But understanding that criterion requires understanding its context, and how the other TDSIC criteria support it.

First, the TDSIC statute requires that a utility's plan include only "eligible … improvements." Ind. Code § 8-1-39-7.8. And by statutory definition, improvements are not TDSIC-eligible unless they are "undertake[n] for purposes of safety, reliability, system modernization, or economic development." Ind. Code § 8-1-39-2(a)(1). The threshold requirement for getting a TDSIC plan approved, therefore, is that a utility must persuade the Commission that its plan serves one or more of those purposes. Here, as the Commission noted, no party "challenge[d] the TDSIC Plan on the basis that the projects are not 'eligible improvements' under applicable law," and the

Commission affirmatively found "that the proposed projects are 'eligible improvements.'" (Order at 55.) Thus, the Appellants conceded that all projects included in NIPSCO's approved TDSIC Plan, including the System Deliverability projects, are "eligible improvements."

Second, the TDSIC statute requires the Commission to make "[a] determination whether public convenience and necessity require or will require the eligible improvements included in the plan." Ind. Code 8-1-39-10(b)(2). In Appellants' words, this requires the Commission to find that the work "is no more ('convenience') and no less ('necessity') than warranted by the interests of the … public." (Br. at 43.) Again, a utility cannot get a TDSIC plan approved unless it persuades the Commission that this is true. And again, in this case, NIPSCO offered extensive evidence of how its plan serves the public convenience and necessity, "[n]o party offered [contrary] evidence," and the Commission found that NIPSCO satisfied this criterion. (Order at 58.)

Third, once the Commission has found that improvements are eligible and necessary, the statute additionally requires it to make "[a] finding of the best estimate of the cost of the eligible improvements included in the plan." Ind. Code § 8-1-39-10(b)(1). The statute gives bite to this "best estimate" cost requirement in two different ways. First, because the burden of proof lies on the utility, a utility cannot simply propose whatever costs it wishes to the Commission—it must instead persuade the Commission that the cost it proposes to recover in its TDSIC plan is actually the "best estimate,"

and not inflated or an over-estimate of the expense of the work. Ind. Code § 8-1-39-10(b)(1). Second, once the TDSIC Plan is approved and the utility starts incurring costs, it may adjust its rates *only* to recover the approved costs, not anything more. Ind. Code § 8-1-39-9(a). If the utility overruns that cost estimate, it must return to the Commission and offer additional, specific justification for the additional costs before it can change its rates to reflect them. Ind. Code § 8-1-39-9(g).

Once again, if a utility fails to make this "best estimate" showing, its plan cannot be approved. And once again, this criterion is not disputed in this case: the Commission expressly found that NIPSCO's "total, estimated cost of [its] Plan … rests on a sound factual and analytical foundation," and is "the best estimate of the cost of the eligible improvements included in the Plan" (Order at 58), and Appellants do not question this finding.

The final steps of the TDSIC approval analysis, therefore, are the only ones at issue in this case (and even then only as to a subset of projects in the plan).[1] The Commission must "determin[e] whether the estimated costs of the eligible improvements included in the plan are justified by incremental benefits attributable to the plan." Ind.

[1] A separate section of the TDSIC statute requires that a plan not increase the proposing utility's revenues by more than 2% per year. Ind. Code § 8-1-39-14(a). That requirement also is not directly at issue here.

Code § 8-1-39-10(b)(3). We discuss this element further below. Finally, the Commission must decide whether the overall plan is "reasonable." *Id.* § 8-1-39-10(b).

III. NIPSCO Seeks TDSIC Approval From The Commission.

As the Commission explained, for ease of comprehension, NIPSCO divided its proposed TDSIC Plan here into "three segments" of work:

> (1) Aging Infrastructure projects, aimed at maintaining safe and reliable performance [and] replacing aging, high risk equipment …; (2) System Deliverability projects, aimed at maintaining adequate system capacity to reliably serve customer loads; and (3) Grid Modernization projects, [to install] technologies that support improved reliability [and] asset health … and prepare for future customer expectations.

(Order at 55.) As Appellants explain (Br. at 47), the issues on appeal principally involve projects in the second category, "System Deliverability."

NIPSCO also explained to the Commission, however, that these categories are not completely separate from each other. Rather, as is customary in utility planning, NIPSCO "combined projects or project categories for efficiency." (Order at 11.) Thus, when the "age and condition" of one piece of equipment require replacement, for efficiency and cost-effectiveness purposes, NIPSCO often proposes to update other adjacent components as well to modernize the grid, because "[t]his consolidation process … reduce[s] mobilization, overhead, and labor costs." (Order at 8.)

Because Appellants challenge the Commission's conclusions only as to certain "System Deliverability" projects, we focus here on the evidence and proceedings

relevant to those projects. System Deliverability projects are ones undertaken for the purpose of "maintaining adequate system capacity to reliably serve customer loads." (Order at 7.) More specifically, NIPSCO's deliverability planning has "three primary goals": first, to make sure that the "distribution system … adequately serves all existing customers and can accommodate … customer load growth"; second, to make the system "robust" enough to "provid[e] continuity of customer services during abnormal or emergency system operating conditions"; and third, to identify "capital needs and operating costs" that will further those two goals while also "provid[ing] good customer value." (Supp. App. Vol. II 88.) That is, System Deliverability projects relate directly to a utility's core mandate to ensure its system has adequate capacity to provide reliable service to its current and future customers.

Nationwide, public utilities have had increasing need for this type of spending in recent years. (Supp. App. Vol. III 215-218) () NIPSCO is no exception. NIPSCO needs to conduct system deliverability work to further its goals of reliability and robustness, because it has been experiencing "increasing customer demand" and "load demands becom[ing] more diverse." (*Id.* Vol. III 65.) This diversity includes, for instance, the need to power "evolving customer technologies, such as electric vehicle charging." (Supp. App. Vol. II 19-20.) Simultaneously, NIPSCO is required to transmit power from "changing generation portfolios," which increasingly include "renewably generated power." (Supp. App. Vol. II (*Id.* at 67.)

Most specifically, as NIPSCO explained to the Commission, it "has realized an unexpected, sudden increase in electric demand in the eastern part of its service territory caused by the recent increase in new manufacturing facilities." (Order at 8.) As NIPSCO told the Commission, this is a "positive development for NIPSCO and the State of Indiana," but it also "presents challenges for NIPSCO" in terms of "plan[ning] to address current and future load growth". (Supp. App. Vol. III 70-71.) In the face of this growth, "[d]eliverability investments" are needed to "decrease the likelihood [of] outages caused by demand greater than a distribution or transmission system is capable of providing." (Supp. App. Vol. II 20.) System Deliverability work therefore is "essential in protecting the integrity, safety, and reliable operation of the system—not only for NIPSCO's customers, but also for the bulk electric system as a whole." (Order at 4.)

A. NIPSCO Described The Benefits Of System Deliverability Work At Length.

NIPSCO presented extensive evidence of the need for, and benefits of, its System Deliverability work as a category. As an initial matter, NIPSCO presented extensive testimony on the accuracy of its cost estimates, including an explanation of the meticulous cost-estimate process that NIPSCO had applied to many individual projects. (Order at 13-14.)

With respect to the benefits of System Deliverability work, NIPSCO first explained generally that this work is a basic requirement of continuing to provide electric

service: "not performing [System Deliverability] work would prohibit NIPSCO from fulfilling its obligation to serve its customers, which is simply not an option." (Order at 46.) NIPSCO explained to the Commission that "the benefit to NIPSCO's customers from … System Deliverability investments cannot be easily calculated in an actuarial calculation" (Order at 12), because "the value [of] life and property" affected by these projects "is too high to realistically contemplate." (Supp. App. Vol. III 88.) But NIPSCO presented extensive testimony on the costs and *qualitative* benefits of System Deliverability work, both as a category and with respect to specific projects.

NIPSCO detailed to the Commission how NIPSCO identifies which System Deliverability work is necessary and worth the cost, by applying rigorous "reliability planning criteria and assessment practices." (Order at 16.) To clarify for the Commission the scope and nature of the proposed System Deliverability work, NIPSCO divided it into two subcategories: "Transmission" work and "Distribution" work. (Supp. App. Vol. III 133-34.) (Each subcategory included sub-sub-categories: breaker and relay upgrades, transformer upgrades, substation construction or rebuilding, and circuit construction or rebuilding. (*Id.*)) For each of these subcategories, NIPSCO uses well-established and detailed planning criteria to identify the highest-priority work. "For the transmission system, NIPSCO's planning criteria [are] aligned with the North American Electric Reliability Corporation ("NERC") Reliability Standards, which **** ensure a transmission system that will … remain resilient through multiple outages without

causing cascading outages or widespread load loss and can accommodate … customer load growth." (Order at 16-17.) NIPSCO's transmission planning models are "[d]eveloped through NERC Eastern Interconnection Reliability Assessment Group," which "develop[]s joint models that [multiple] utilities use in local transmission planning analyses." (Supp. App. Vol. III 136.)

Similarly, "[f]or the distribution system, changes in electric demand associated with current and future customer growth often[]times require … expanded, upgraded, or additional facilities," which "ensure sufficient system capacity … under peak load conditions." (Order at 17.) NIPSCO applies these criteria through "annual system assessments," conducted with "industry recognized power system modeling and analysis software" and using "data collected by NIPSCO on a routine cycle." (Supp. App. Vol. III 136.) The analysis simulates "scenarios [of] current and future projected conditions including load growth assumptions," considering both "normal … conditions" and "emergenc[ies]." (*Id.*)

NIPSCO described its System Deliverability evaluation criteria to the Commission in great detail. (Supp. App. Vol. II 88-97.) We here present only a short summary. NIPSCO assesses its actual experience with its facilities, and also runs simulations to assess their likely performance, under normal and emergency conditions. The simulated emergencies are not far-fetched catastrophes; rather they are "N-1" simulations that assume only one component of a system has failed. (Supp. App. Vol. II 90.) When

experience or simulations show that system overload is likely in a particular area, NIPSCO then assesses what must be done to continue providing service to that area. NIPSCO's first option is not to build any infrastructure, but instead to use switching to simply transfer some of the excess electrical load to other adjacent substations or circuits. (*Id.* at 92, 97.) Sometimes, however, this transfer of load would create a new set of operating deficiencies—simply moving the problem from one place to another. In that situation, NIPSCO must add some kind of infrastructure to continue providing reliable service, and so it assesses the most cost-effective solution. NIPSCO's first preference is the lowest-cost option of upgrading existing transformers or power lines to handle additional load. (*Id.* at 92, 97.) But if that is not enough to address the problem, then NIPSCO considers the medium-to-high-cost options of installing new or larger transformers, or rebuilding power lines. (*Id.*) And if even that is not enough to allow continued electrical service, then NIPSCO considers the high-cost options of building new substations or power lines. (*Id.*)

In this case, NIPSCO applied these criteria to draw up a specific list of System Deliverability work items that it presented to the Commission for approval. For the first two years of the TDSIC Plan, work in the "Transmission" category includes rebuilding two 69kV power-line circuits, and extending another circuit to a new distribution substation. (Order at 17.) Work in the "Distribution" category includes building a new distribution substation, adding two new power transformers at existing

substations, replacing another transformer with a larger one, installing two new sets of switchgear, rebuilding four 12 kV circuits, and reconfiguring several other 12 kV circuits to accommodate the substation upgrades. (*Id.*) In later years of the TDSIC Plan, NIPSCO anticipates building additional substations and power-line circuits—but it intends to provide the Commission with the details in future plan updates. (*Id.*) Such projects will again be reviewed by the Commission under Ind. Code § 8-1-39-9.

B. NIPSCO Presented Detailed Evidence Of The Benefits Of Multiple Specific System Deliverability Projects.

For two large segments of System Deliverability work, NIPSCO described the project benefits in even greater detail. Consider first the Marktown substation project. As the Commission explained, NIPSCO presented evidence "that the Marktown substation is one of the most important substations in NIPSCO's entire system," because "it provides electricity to several large industrial facilities … including … the largest refinery in the Midwest." (Order at 48.) The refinery's daily production is "around 10 million gallons of gasoline, 4 million gallons of diesel, and 2 million gallons of jet fuel." (Supp. App. Vol. III 233-234.) Moreover, NIPSCO presented evidence of the urgent need for replacing the substation to provide these facilities with electricity: the substation is over 90 years old "and the average asset age is 37 years old," which causes "significant challenges … such as difficulty in obtaining clearances, the inability to take certain assets out of service, the lack of redundancy, and the absence of modern breaker

schemes and relaying capabilities." (Order at 48.) In light of the scale of those challenges and the benefits of maintaining this critical substantial, NIPSCO proposed to build a new substation and move its transmission lines as part of its System Deliverability work. (Supp. App. Vol. III 234.)

NIPSCO offered perhaps even more detail as to System Deliverability work that it proposes in the Nappanee area. This work illustrates well the need for both the distribution- and the transmission-related System Deliverability investment. On the distribution side, NIPSCO explained to the Commission that its Nappanee substation currently has three transformers, two of which are 44 years old and one of which is 59 years old. (Supp. App. Vol. II 94.) Even under normal usage conditions, the oldest transformer currently must operate at 99% of its rated capacity. (*Id.*) If one of the three transformers were to go out of service, even temporarily, the other two would have to run at 175% of capacity in order to serve existing demand. (*Id.*) Similar challenges exist on the transmission side. Failures of even a single component take Nappanee's existing power lines well over 100% of their capacity even at current levels of demand. (*Id.* at 100.)

And the demand for electricity in this area is very likely to increase significantly in coming years. NIPSCO explained to the Commission that the service area of the Nappanee substation has been growing by up to 26% annually. (*Id.* at 94.) That trend is set to continue, with the result that the local government "is strongly concerned" about

"NIPSCO's ability to meet new growth," and "commercial and industrial customers" are complaining about power outages. (*Id.* at 94-95.)

The need for new electric infrastructure in Nappanee therefore is clear. The existing infrastructure can barely keep up with current electricity use, and even small problems cause it to overload. If the area continues to grow, as is very likely, then at some point relatively soon the existing infrastructure simply would not be enough to provide electricity to everyone who wants it. Of course, NIPSCO will not allow that to happen: this is why it invests in System Deliverability projects.

To address these problems in the Nappanee region, therefore, NIPSCO explained to the Commission that it will rebuild its Nappanee substation with newer, higher-capacity transformers, and replace the switchgear. (*Id.* at 94-95.) This work falls into NIPSCO's medium-to-high-cost distribution category of "station rebuilds." (*Id.*) It will approximately triple the capacity of the substation, which will eliminate the existing problems and allow NIPSCO to meet the needs of future growth. (*Id.*) On the transmission side, NIPSCO proposes to upgrade its switchgear in the area, to allow for six circuits of power lines rather than the current five, with a new circuit "on the west side of Nappanee" running out to the industrial park. (*Id.* at 100.)

Thus, although NIPSCO did not state the benefits of these kinds of projects in terms of dollars, it *did* explain the benefits in terms of the ability to continue to provide

reliable service to customers, support area growth, and avoid large outages and system impacts that would be expensive and damaging for both customers and NIPSCO.

IV. The Commission Rejects Appellants' Arguments And Finds That NIPSCO's Plan Merits TDSIC Approval.

Appellants made two basic arguments to the Commission that are relevant to this appeal. First, they argued that NIPSCO's "System Deliverability" projects—or at least most of them—did not satisfy the statutory cost-benefit analysis. Second, they argued that the Commission was not allowed to consider evidence of the general economic impact of the proposed TDSIC spending. The Commission rejected both arguments and approved the TDSIC plan.

Considering Appellants' cost-benefit arguments against the System Deliverability projects, the Commission first held that the statute requires it to compare the costs and benefits of the entire TDSIC plan, not to examine individual parts of the plan such as the "System Deliverability" segment. The Commission noted that Appellants' witness "did [not] … challenge the overall cost of NIPSCO's entire Plan as related to expected benefit," but instead "narrowly focused on and challenged 12 specific projects." (Order at 61.) The Commission found this to be improper as a matter of law, because analyzing individual TDSIC projects or groups of projects "is not the evaluation we are required to undertake under Section 10(b)(3) of the TDSIC Statute." (*Id.*) The Commission held that the statute "plainly directs the Commission to evaluate 'costs of the eligible

improvements included in the plan' and determine if they are 'justified by incremental benefits attributable to the plan.'" (*Id.*) Accordingly, the Commission concluded that "NIPSCO is not and should not be required to justify each-and-every project on a project-by-project basis" under the statutory cost-benefit requirement, as Appellants demanded. (*Id.*)

Although this interpretation of the statute disposed of Appellants' challenges to the System Deliverability projects, the Commission also noted at length the substantial evidence that NIPSCO presented of the costs and benefits attributable specifically to the System Deliverability category, and even to individual projects within that category such as the Marktown substation work. *See supra* at 15-22.

The Commission also rejected Appellants' challenges to the admissibility of general economic evidence. NIPSCO had presented the Commission with an expert report that gave an overview of the general economic impact of NIPSCO's proposed TDSIC spending. (Supp. App. Vol. III 2 *et seq.*) The report explained that the TDSIC Plan likely would create or sustain about 11,000 jobs in Indiana, which on average would pay $68,000 per year, and about 7,000 jobs elsewhere in the United States, paying on average $71,000. (*Id.* at 11.) The plan was projected to increase Indiana's GDP by $1.28 billion, and the GDP of the rest of the United States by about $816 million. (*Id.* at 12) Total economic output from the Plan would be $2.61 billion in Indiana and $1.57 billion in the rest of the United States. (*Id.*) The entire economic report was simply an explanation

of how those numbers were derived, along with some breakdowns of those numbers into individual categories of projects or individual industry sections.

Before NIPSCO even offered the economic report in evidence, Appellants moved to strike it as not based on a witness's personal knowledge and as irrelevant. The Commission denied that motion as premature. (App. Vol. II at 138.) The Commission also briefly addressed Appellants' relevance concerns, noting that while the "Report … is relevant," if NIPSCO offered it "we can give [it] the appropriate weight." (*Id.*) After NIPSCO offered the report in evidence (through a different witness who Appellants did not question could testify to its contents), Appellants renewed their relevance challenge, and the Commission again rejected it in its final order, finding that the report was "relevant to our consideration of the overall benefits attributable to the Plan, as well as how the Plan serves the public convenience and necessity." (Order at 60.)

Although the Commission found the report relevant, it engaged in no substantive analysis or discussion of the report's contents. The Commission's entire analysis of the report consisted of a single, five-sentence paragraph in its 68-page Order, and was largely limited to finding that the report is relevant. (*Id.*) In conclusion, the Commission emphasized that, "while the report is an important piece of evidence to consider, it is not the only evidence offered by NIPSCO to support overall Plan approval." (*Id.*)

This appeal followed.

SUMMARY OF ARGUMENT

The Court can dispose of this appeal by reaching two basic conclusions: first, that the TDSIC statute's requirement of a cost-benefit analysis is satisfied by NIPSCO's evidence here; and second, that the Commission's consideration of relevant economic effects was appropriate, or at minimum not reversible error.

As to the cost-benefit issue, the Commission's Order should be affirmed for either (or both) of two alternative reasons. First, the Court should affirm the Commission's interpretation of the TDSIC statute as requiring a cost-benefit analysis of the Plan as a whole, rather than of individual projects or categories of projects as Appellants contend. That is what the plain language and structure of the TDSIC statute require, and Appellants present no sound reason to depart from them. At the very least, the Commission rendered a reasonable interpretation of a statute that it administers, and so the Court should accept that interpretation under established principles of agency deference. Since Appellants do not question that NIPSCO's Plan satisfies the cost-benefit analysis when considered as a whole, affirming the Commission's statutory interpretation in this regard can end the Court's analysis of the cost-benefit issue.

Second, however, even if some more granular cost-benefit analysis were required, NIPSCO presented detailed evidence of the costs and benefits both of the "System Deliverability" category as a whole and of major projects within that category. Moreover, Appellants' argument that a project's revenue-generating potential

automatically disqualifies it from TDSIC approval finds no footing in the statute or in good sense (and requires factual speculation about revenue potential). So even if the cost-benefit analysis applied to individual projects or project categories, the Commission's order should still be affirmed.

As to the economic-impacts argument, the Court again can affirm for two alternative reasons. First, the Commission's treatment of economic-impact evidence was plainly correct under the TDSIC statute. The statute requires the Commission to consider the "benefits" and reasonableness of the proposed TDSIC work, without limitation. The Commission here fulfilled that command by focusing on the direct ways that NIPSCO's plan would benefit its customers, while also noting the Plan's more general economic benefits. Appellants offer no persuasive reason to find this was error. Second, even if Appellants had made a colorable argument of error, it was harmless as a matter of law. Although the Commission considered NIPSCO's economic evidence, it said very little about it, and it expressly noted that NIPSCO offered other evidence supporting plan approval. Thus, Appellants have not carried their burden on appeal to show that any arguable error caused them any prejudice.

The Commission's Order should be affirmed in full.

STANDARD OF REVIEW

Several of Appellants' arguments find fault with the Commission's interpretations of the TDSIC statute. They argue that the TDSIC statute requires the Commission to conduct a cost-benefit analysis of each individual project or category of projects in a proposed plan (Section I.A below), that the TDSIC cost-benefit requirement categorically disqualifies any work that could in the future result in a utility providing more service to more customers (Section I.B.1 below), and that the TDSIC public-interest and cost-benefit requirements prohibit the Commission from even considering the benefits a TDSIC plan will offer to anyone other than the proposing utility's customers. (Section II.A below.) When an agency interprets a statute it administers, the question on judicial review is whether "the agency's interpretation is reasonable." *Moriarity v. Indiana Dept. of Nat. Res.,* 113 N.E.3d 614, 620 (Ind. 2019) (cleaned up). If it is, the interpretation is entitled to deference, and the courts "stop our analysis and need not move forward with any other proposed interpretation." *Id.* For purposes of completeness, however, and because there is controversy over whether the Indiana Supreme Court should change this rule, this brief also explains why the Commission's interpretation of the TDSIC statute is correct even under *de novo* review. *Indiana Off. of Util. Consumer Couns. v. Duke Energy Ind., LLC*, 183 N.E.3d 266, 268 (Ind. 2022).

In arguing that the Commission erroneously admitted and considered certain evidence, Appellants additionally bear the burden of persuading the Court that the error

was not harmless and affected their substantial rights. *Sibbing v. Cave*, 922 N.E.2d 594, 598 (Ind. 2010); *Cunningham v. Cunningham*, 430 N.E.21d 809, 813 (Ind. Ct. App. 1982); *see* Section II.B below.

Appellants' other arguments challenge the factual basis for the Commission's decision. They argue that NIPSCO did not adequately prove that the statutory cost-benefit analysis is satisfied by either the "Systems Deliverability" category of projects as a whole (Section I.B.2 below) or by the individual projects in that category (Section I.B.3). The Court reviews an agency's findings of basic fact to determine whether they are supported by substantial evidence in light of the whole record. *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1016 (Ind. 2009). Such determinations will stand unless no substantial evidence supports them. *Id.* "In substantial evidence review, the appellate court neither reweighs the evidence nor assesses the credibility of witnesses and considers only the evidence most favorable to the Board's findings." *Id.* (cleaned up and citation omitted). The Court reviews an agency's findings of ultimate fact for "reasonableness." *Id.* "Insofar as the order involves a subject within the Commission's special competence, courts should give it greater deference. If the subject is outside the Commission's expertise, courts give it less deference. In either case courts may examine the logic of inferences drawn and any rule of law that may drive the result." *Id.* (internal citations omitted).

ARGUMENT

I. The Commission's Treatment Of The Cost-Benefit Analysis Was Correct.

Appellants' principal argument on appeal consists of two parts, one legal and one primarily factual. They contend that (1) as a matter of law, the TDSIC statute requires the Commission to conduct a cost-benefit analysis of every individual project or category of projects in a proposed TDSIC plan, and (2) as a matter of fact, NIPSCO's evidence did not satisfy that granular cost-benefit requirement for "System Deliverability" projects in this case.

For Appellants' argument to work, they must prevail on both of those points: if the Commission is legally correct that the statutory cost-benefit analysis applies to the TDSIC plan as a whole, then Appellants do not argue that there was any infirmity in *how* the Commission did that analysis here. As the Commission noted, Appellants' witnesses "did not … challenge the overall cost of NIPSCO's entire Plan as related to expected benefit," but "narrowly focused on and challenged … specific projects" that NIPSCO described as "System Deliverability" projects. (Order at 60.) Likewise, on appeal, Appellants challenge the Commission's "cost-justification" analysis only "for the System Deliverability category of the Plan" (Br. at 7, Question Presented 1). (Indeed, they even make an exception for one significant System Deliverability project. (*See* Br. at 48.)) Thus, if Appellants are wrong about either one of those two points—that the statute allegedly requires the Commission to conduct a project-by-project cost-benefit

analysis, ***or*** that NIPSCO failed to satisfy the cost-benefit analysis as to certain projects here—then their argument fails, and there is no need for the Court to consider the other point.

In fact, Appellants are wrong on both points. Part A below explains why the Commission's interpretation of the TDSIC statute is legally correct: the statute's language, structure, and purpose all direct a cost-benefit analysis of the plan as a whole, not of individual projects or project categories. Part B below explains why, even if a project-by-project analysis were required, NIPSCO carried its factual burden of proof as to the "System Deliverability" projects at issue here. Either reason alone is sufficient for the Court to affirm the Commission on this point.

A. The Commission Correctly Concluded That The TDSIC Statute Requires A Cost-Benefit Analysis Of A Plan As A Whole.

When Appellants argued that NIPSCO had not carried its burden of proof to show that "System Deliverability" projects passed the cost-benefit test, the Commission's primary response was to hold that "this is not the evaluation we are required to undertake under Section 10(b)(3) of the TDSIC Statute." (Order at 60.) The Commission concluded that Section 10(b)(3) requires it instead to assess "the overall cost of NIPSCO's entire Plan as related to expected benefit." (*Id.*) Most specifically, the Commission held that "[t]he plain language of this section directs [us] to focus on NIPSCO's

TDSIC Plan and its estimated costs and incremental benefits. It does not … require an evaluation of or justification of each project or project category." (*Id.* at 62.)

Subpart 1 below explains that this conclusion was correct as a matter of law: it reflects the statutory text and structure, and comports with the statutory purpose. But if there were any doubt about the correct interpretation of the statute, subpart 2 below explains that established principles of agency deference require the Court to defer to the Commission's reasonable interpretation of a statute it administers.

1. The TDSIC statute requires comparing costs and benefits of "the plan."

a. Statutory text.

Appellants' chief legal contention is that the Commission cannot approve a TDSIC plan without first finding that every "major project[]," or at least every "category" of projects, in the plan is "cost-justified." (Appellants' Brief, Issue Presented 2.)[2] But as the Commission noted, this contradicts the express statutory text: "[t]he language of" Section 10 "plainly directs the Commission to evaluate 'costs of the eligible improvements included in the plan' and determine if they are 'justified by incremental benefits attributable to the plan." (Order at 61.) Thus, the Commission is required to

[2] NIPSCO refers to the inquiry required by Section 10(b)(3) as a "cost-benefit analysis." Appellants have called it a "cost-justification" requirement. Although both phrases refer to the same test, NIPSCO believes that "cost-benefit analysis" is a more accurate descriptor because the phrase "cost-justification" may imply, incorrectly, that the statute says the benefits of TDSIC work must be quantified.

consider the costs and benefits of "**the plan**" as a whole, and to decide whether it is worthwhile. Section 10 makes no mention of any calculation or consideration of the benefits attributable to each individual project.

It does not help Appellants, therefore, to point to Section 10's reference to the "costs of the eligible improvements included in the plan." Even taken in isolation, this language is at best ambiguous: Appellants would like it to refer to the individual cost of each project in the plan, but it could equally refer to the *total* costs of *all* improvements in the plan. And when this language is considered in the context of the entire statutory sentence, that latter interpretation proves clearly to be the right one. The entire sentence requires the commission to "determin[e] whether the estimated costs of the eligible improvements included in the plan are justified **by incremental benefits attributable to the plan."** (Order at 61). This statutory reference to benefits—which must be compared to costs—cannot be construed to refer to the benefit of any individual project; it unambiguously refers to the overall benefits of the whole plan. Since it would be nonsense to compare the costs of each individual project to the benefits of the plan as a whole, it is plain that the statute instead requires comparing the plan's *overall* costs with its *overall* benefits.

Indeed, if the General Assembly had *wanted* to require more granular cost-benefit analyses, it certainly knew how to say so. The very next section of the statute, Section 11, expressly provides that if a utility seeks to *add* certain projects to a TDSIC plan after

the initial approval (which NIPSCO is not seeking to do here), the Commission must hold additional proceedings to "determin[e] whether the estimated costs **of the new projects or improvements** are justified by incremental benefits **attributable to the new projects or improvements**." (*Id.* at 61). Thus, the language of Section 11 expressly directs the Commission to conduct a cost-benefit analysis of a subset of projects for a TDSIC plan, while Section 10 instead directs cost-benefit analysis of an entire TDSIC plan. "[I]n … interpreting statutes … differences in language" normally "convey differences in meaning," *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, 1723 (2017); *cf. Lewis v. Atkins,* 105 N.E.2d 183, 186 (Ind. Ct. App. 1952) ("[I]f different words are employed with reference to a given subject matter, it will be assumed that the testator intended a different meaning when he employed such different expressions." (citation omitted)); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, Can. 25 ("a material variation in terms suggests a variation in meaning"). So too here: the General Assembly's choice to use more general language in Section 10 than in Section 11 strongly suggests that it intended for the Commission's focus under Section 10 to be not on any subset of projects, but on the TDSIC plan as a whole.

b. Statutory structure.

The overall structure of the TDSIC statute confirms that the General Assembly intended a cost-benefit analysis of the plan, not of individual projects or categories of projects. Although the statute sometimes refers to TDSIC work as "projects," it

contains no definition or criteria for determining what qualifies as a "project" in a TDSIC plan. It is not likely that the General Assembly would have directed the Commission to examine individual projects without also saying what a project *is*. That would be an invitation to endless disputes. Consider just a simple example: suppose an electric substation consists of 20 adjoining assets, each of which is made up of 20 components. (For example, a single substation may have multiple power transformers, current transformers, potential transformers, fuses, breakers, switchgear, poles, arresters, and other components.) If the utility wants to replace the entire substation at once, is it proposing one "project," or 20, or 400, each of which (according to Appellants) must be separately "cost-justified"? The fact that the General Assembly gave not a hint of how to answer this question strongly suggests that it did not mean for the Commission to address it. This is even more true of Appellants' contention that at least "major projects" or "categories [of projects]" must be analyzed separately. (Question Presented 2.) The TDSIC statute does not even use these phrases at all, let alone define them.

To be sure, NIPSCO here tried to help the Commission understand its proposal by dividing its TDSIC work into many individual "projects." But what qualified as a "project" for these purposes was a pragmatic determination, not a legal one—and if a utility's division of a TDSIC plan into "projects" suddenly took on legal significance, it would quickly cease to be an aid to understanding and become simply an additional point of legal wrangling.

The same is true of the "categories" of TDSIC work that NIPSCO presented here. Although NIPSCO tried, for the Commission's and stakeholders' convenience, to use "categories" that roughly parallel the statutory TDSIC eligibility criteria, nothing in the statute requires either a utility or the Commission to assign one (and only one) specific eligibility criterion to each individual project. (Appellants recognize this: they admit that the categories in NIPSCO's plan were not mandated by the statute, but instead that "***NIPSCO*** divided the proposed TDSIC plan into three project categories." Br. at 10 (emphasis added).) Thus, if the courts were to require the Commission to do that in order to conduct a cost-benefit analysis of each "category" of projects, it would double the legal wrangling: first the parties would dispute what qualifies as each "project," and ***then*** they would dispute which project falls within which category—all without any clear guidance from the statute.

Appellants' brief here offers a preview: they argue at length that one major System Deliverability project, the Marktown Substation, was not *really* System Deliverability work but should be re-categorized as an Aging Infrastructure project. *See* Br. at 32-35. Appellants appear to believe that they have to make this argument in order to show that the System Deliverability category as a whole does not satisfy the cost-benefit requirement. If the Court were to confirm that this kind of categorization has legal ramifications, then every TDSIC proceeding could present dozens or even hundreds of disputes like that. That cannot be what the General Assembly envisioned.

c. Statutory purpose.

Finally, we note that it furthers the statutory purpose for the Commission to conduct a holistic cost-benefit analysis of an entire TDSIC plan, rather than a blinkered analysis of each individual "project." With any kind of infrastructure improvements, even when it may be possible to do different pieces of work separately and to label them separate "projects," these projects often complement each other—so that the benefit of the whole is greater than the sum of its parts considered separately.[3] This is certainly true of electric utility work and TDSIC plans. To give an obvious example, an electric utility must maintain both substations to distribute electricity and power lines to transmit it. If a given geographical area is at risk of outages because both its substation and its transmission lines are near capacity, then upgrading either the substation or the transmission lines individually would provide only a small benefit—but doing ***both*** of those projects together could completely solve the problem. A cramped project-by-project analysis, of the kind advocated by Appellants, would be blind to these synergistic benefits—and thus could result in the Commission denying approval for work that would greatly benefit customers and the public.

[3] It is not hard to think of examples from everyday life: replacing things as a set may involve more upfront cost, but that still may be better in the long run than replacing just part of the set and then dealing with ongoing compatibility issues from the mismatch. This can be true of everything from living-room furniture to car tires to office computer software. It only makes sense that the same can be true of electric infrastructure equipment.

Nor are Appellants correct to suggest that analyzing the costs and benefits of a TDSIC plan as a whole is somehow giving the utility a blank check to engage in wasteful spending. As described above, the TDSIC statute requires the Commission to make several other findings before it even considers costs and benefits: the Commission must conclude that the work in a TDSIC Plan is undertaken for (as relevant here) "purposes of safety, reliability, [or] system modernization," and that the work is or will be required for "the public convenience and necessity." *See supra* at 10-11. Moreover, the Commission may not approve whatever cost the utility requests for such work, but must make findings as to the actual, realistic cost, which caps the utility's recovery. *Supra* at 11. Only ***after*** the Commission has reached all those conclusions does it proceed to the cost-benefit analysis. So while that analysis is of course an important step, there is no need to inflate its importance beyond the statutory text and structure, as Appellants seek to do, in order to control the risk of wasteful spending. The General Assembly designed the TDSIC statute better than that. If Appellants believe that all these safeguards *still* leave some realistic risk of "unnecessary or overpriced projects" "that would not survive a traditional prudence review" sneaking into a TDSIC plan (Br. at 36, 38), their proper remedy is to ask the General Assembly to write additional safeguards into the statute—not to ask the Commission or the courts to invent additional safeguards from whole cloth.

Appellants are unable to substantiate their assertion (Br. at 17, 38) that the Commission's interpretation of the statute would allow "unnecessary or excessively costly [TDSIC] projects" that "would be subject to disallowance in a traditional prudence review." Appellants cite no cases suggesting that the Commission typically conducts cost-benefit analyses of individual projects in the course of a rate case, or that not doing so leads to wasteful spending. The general rate-case statutory scheme allows the Commission plenty of authority to ensure responsible rate-setting without normally requiring analysis at that level of detail. Similarly, the overall TDSIC regulatory scheme imposes several criteria for eligibility, public convenience and necessity, and a realistically frugal cost estimate. Appellants give no reason to think these requirements are inadequate to ensure effective Commission oversight of TDSIC plans.

2. At the very least, the Commission's interpretation of the TDSIC statute is reasonable and entitled to deference.

For the reasons just explained, the Commission's interpretation of the TDSIC statute was plainly correct, and the Court should affirm on that basis. But if for any reason the Court is not prepared to hold that the Commission's interpretation is correct, it should at least hold that it is a ***reasonable*** interpretation, and therefore entitled to deference from the courts.

For decades, it has been settled Indiana law that the "[a]n interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is

entitled to great weight" as long as it is not "inconsistent with the statute itself," and that "if the agency's interpretation is reasonable, we stop our analysis and need not move forward with any other proposed interpretation." *Moriarity v. Ind. Dept. of Nat. Res.,* 113 N.E.3d 614, 620 (Ind. 2019) (cleaned up) (citing many Indiana Supreme Court precedents).[4] Although the Indiana Supreme Court in 2018 said (in a case involving the same parties as this one) that there is no "'tie-goes-to-the-agency' standard," *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 100 N.E.3d 234, 241 (Ind. 2018), *modified on reh'g* (Sept. 25, 2018), it was mere months later that the Court clarified that this principle applies only when the courts consider whether an "agency's interpretation [is] contrary to the statute itself and, thus, necessarily unreasonable." *Moriarity*, 113 N.E.3d at 609. Under *Moriarity*, once a court has determined (*de novo*) that the case involves a "reasonable agency interpretation[]," *id.* at 620, it must defer to that interpretation.

We acknowledge that there is ongoing debate about agency deference. Appellants cite, for instance, a recent case in which the Indiana Supreme Court found the Commission to have violated a statute under *de novo* review. *Indiana Off. of Util. Consumer Couns. v. Duke Energy Ind., LLC*, 183 N.E.3d 266, 268 (Ind. 2022). But the Court's opinion in that case did not decide or even consider whether the agency's decision might have qualified for *Moriarity* deference. Indeed, it did not discuss *Moriarity* or similar

[4] In reviewing agency decisions, courts apply *de novo* review to *other* questions of law—that is, ones that do not qualify for *Moriarity* deference. (*See* Appellants' Br. at 19-20.)

precedents, let alone overrule them. Unless and until the Supreme Court decides to do that, *Moriarity* remains the law that this Court must—and does—apply. In recent years, this Court has repeatedly followed *Moriarty* and deferred to agencies' reasonable interpretations of their respective statutes.[5] Indeed, this Court has deferred to a reasonable statutory interpretation by the Utility Regulatory Commission—and the Indiana Supreme Court has denied transfer. *Indiana Off. of Util. Consumer Couns. v. Citizens Wastewater of Westfield, LLC,* 177 N.E.3d 449, 459 (Ind. Ct. App. 2021) ("[W]e conclude that the Commission's interpretation of Sections 8-1-2-6 and 8-1-30.3-5 is reasonable, and therefore we stop our analysis."), *trans. denied*, 180 N.E.3d 928 (Ind. 2022).

Here, that requires deferring to the Commission's interpretation of the TDSIC statute, as both elements for *Moriarity* deference are satisfied. First, it is indisputable that the Commission is charged with administering the TDSIC statute. Second, the Commission's interpretation of the statute—that Section 10(b)(3) requires the Commission to consider "the overall cost of NIPSCO's entire Plan as related to expected benefit" (Order at 61)—is plainly a reasonable one that does not conflict with the statute. As explained above, the statutory language does not refer to the benefits of any individual project; it refers only to "incremental benefits attributable ***to the plan***" (emphasis

[5] *E.g., Indiana Bureau of Motor Vehicles v. McClung,* 138 N.E.3d 303, 308 (Ind. Ct. App. 2019); *Indiana Fam. & Soc. Servs. Admin. v. Patterson*, 119 N.E.3d 99, 105, 109-10 (Ind. Ct. App. 2019).

added), and directs the Commission to determine whether those benefits justify the "costs"—plural—"of the eligible improvements"—again plural—"included in the plan." (*Id.*) At the barest minimum, it does not conflict with the statute to conclude that this refers to the costs and benefits of the whole plan. Therefore, the Commission's interpretation is reasonable and should be affirmed on this basis as well.

B. Even If The Statute Required A More Granular Cost-Benefit Analysis, NIPSCO Satisfied That Requirement As To The System Deliverability "Category" As Well As Many Individual Projects.

Because Appellants are wrong to say that the TDSIC statute requires a cost-benefit analysis of individual projects or categories, they must lose on their contention that the Commission did not properly evaluate certain System Deliverability projects. But even if Appellants' statutory interpretation had some merit, that would be only half their battle—they would still have to show that NIPSCO had not carried its burden of proof under that standard. Appellants have not done and cannot do that.

1. System deliverability costs are proper TDSIC expenses.

First, we address Appellants' unfounded assertion that the TDSIC cost-benefit analysis somehow categorically disqualifies investments that will allow NIPSCO to meet increasing demand. (Br. at 17, 29-31.) Appellants first object that TDSIC recovery would allow the utility "to retain all added revenue" from the increased demand "while forcing ratepayers to fund the system costs" of meeting that demand "through the TDSIC tracker." (Br. at 17.) Taken at face value, this argument does not make sense.

Of course a utility must pay for its system costs by charging its customers rates that reflect those costs—including the costs of expanding the utility's capacity to meet increased demand. How else could the utility pay for its operations? Indeed, Appellants acknowledge (Br. at 30) that a utility may (indeed must) recoup the costs of expanding its capacity in a regular rate case. And the whole point of a TDSIC proceeding is simply to allow the utility to do that sooner, for investments that meet the statutory criteria. As the Commission correctly noted, "[t]here is nothing in the TDSIC statute that requires" any kind of "offset" for additional revenue. (Order at 66.)

Appellants' real argument, it seems, is that it should be presumptively unnecessary to adjust a utility's rates to pay for "[s]ystem work associated with increases in load and new customers," because such work "essentially pays for itself, by providing added revenue [in the form of increased sales] along with added costs." (Br. at 29.) But that argument conflicts with both the TDSIC statute and with reality. First, far from suggesting that TDSIC work must be revenue-neutral, the statute does the opposite: it expressly *allows* for TDSIC projects to "result in an average aggregate increase in a public utility's total retail revenues of" up to "two percent (2%) in a twelve (12) month period." Ind. Code § 8-1-39-14(a). (Notably, this permitted increase in revenue applies only to TDSIC work that, like NIPSCO's plan here, is *not* "a targeted economic development project." *Id.*)

Second, that statutory treatment makes good sense in light of the practical reality that there is no factual reason to think that capacity expansions will normally "pay for themselves." A utility's pre-existing rates reflect the costs per kilowatt-hour of maintaining its pre-existing capacity. There is no reason to think that the cost of *building new* capacity will be the same or less. In addition, it is a fallacy to assume that all new capacity translates immediately into new revenue. To the contrary, even when it is clear that increased demand is coming, its precise timing and amount may be very uncertain—forcing a utility to spend money to expand its capacity even when the immediate prospects for new revenue from that capacity are limited or nonexistent.

To be sure, if and when a utility *does* wind up generating additional revenue as a result of expanding its capacity, it certainly must account for that revenue in its rates. As the Commission noted, the statutory scheme already provides for this: to any extent that TDSIC plan rates underestimate the additional revenue the plan generates, that must "be recognized in the required base rate case." (Order at 66.) Indeed, the TDSIC statute itself *requires* a utility, "before the expiration of the public utility's approved TDSIC plan," to also seek full Commission "review and approval of the public utility's basic rates and charges" in a base rate proceeding. Ind. Code § 8-1-39-9(e). When this occurs, the Commission will consider all costs, expenses, *and revenues* associated with the utility's assets—including all in-service TDISC projects—when setting the appropriate customer rates and utility return on its investments. Thus, if Appellants are concerned

about some sort of windfall or double recovery for utilities, their fears are already addressed by the statute. There is no need to address them by reading an extra-statutory requirement into TDSIC proceedings.

Appellants object that, even if the statute does not say whether or how increased revenues must be accounted for in a TDSIC proceeding, that "does not answer the question whether the [projects are] cost-justified and reasonable." (Br. at 29.) But it is not clear why, or how, Appellants think that an otherwise-qualified investment's potential for revenue generation should change the cost-benefit analysis. The statute does not say that it should, and there is no clear reason why it should. The fact that a project may increase a utility's revenue clearly has no direct relevance to how much the project costs. And the fact that customers must pay for electric service surely does not affect the benefits achieved when a utility can provide more service to more customers in areas that need it.

Thus, the only rule that makes sense is also the one that plainly is required by the TDSIC statute: the potential for a utility to generate additional revenue from a TDSIC plan (or any individual TDSIC investment) certainly may be relevant to the utility's rates, but clearly does not disqualify the potential revenue-generating work from inclusion in the plan.

2. NIPSCO easily showed that the System Deliverability "category" passes the cost-benefit test.

Second, even if NIPSCO was required to present evidence that the "category" of System Deliverability projects passes a cost-benefit analysis, it has amply done so.

Appellants do not challenge that the Commission made an accurate assessment of the System Deliverability project ***costs.*** (*See* Order at 35.) And as explained above, NIPSCO also presented detailed evidence to the Commission of why the work is necessary. NIPSCO explained how it has collected data, and run simulations, showing specific areas where customers' demand for power will cause NIPSCO's systems to exceed their capacity if just one component fails—or even (in some instances) under normal operating conditions. *See supra* at 17-19. Appellants do not dispute this factual evidence offered by NIPSCO. Therefore, NIPSCO was required to take ***some*** action to prevent its customers from suffering service losses.

NIPSCO further showed that it carefully and responsibly decided ***what*** action to take. As it explained to the Commission, NIPSCO decided on specific System Deliverability work by following careful decisionmaking protocols to ensure the lowest-cost solutions. *Supra* at 17-18. NIPSCO avoided doing any System Deliverability work at all in situations where it could shift some of the excessive load to different infrastructure. When it was not possible to do that, NIPSCO carefully chose the lowest-cost

option that would allow it to avoid outages to customers—favoring equipment upgrades over replacements, and replacements over entirely new constructions. *See id.*

In light of all these detailed criteria and data-driven considerations, Appellants' assertion that NIPSCO simply asked the Commission to defer to NIPSCO's "operational expertise and input from experienced personnel when selecting projects" (Br. at 25) is so oversimplified as to be misleading. NIPSCO did not just invoke its "experience" as a talisman. It explained in great detail to the Commission the concrete criteria and data-driven analysis that it used to decide which deliverability problems it must address, why it is necessary to conduct infrastructure work to address some of them, and how it determined the lowest-cost available means to do so.

And the Commission agreed. It noted NIPSCO's evidence that its System Deliverability planning "criteria" are calibrated to avoid "cascading outages or widespread load loss," to "accommodate near- and long-term customer load growth," and "to ensure sufficient system capacity … under peak load conditions." (Order at 16-17.) And when the Commission explained the importance of considering "the operational expertise of the utility in determining high priority projects," it made clear that it was referring to NIPSCO's detailed "TDSIC Risk Model" and "optimization methodology." (Order at 61.)

In short, there was ample evidence before the Commission that NIPSCO's System Deliverability work will prevent serious and intolerable problems, and will do so in

the least costly manner available. So even if NIPSCO were required to satisfy a cost-benefit analysis just for the System Deliverability category, it has done so here.

3. NIPSCO also satisfied the cost-benefit analysis as to multiple individual projects.

In light of the strong cost-benefit showing that NIPSCO made with respect to the overall System Deliverability category, it is not surprising that NIPSCO made a similarly strong cost-benefit showing as to individual pieces of work in that category.

With respect to the Marktown substation, Appellants do not even contest that NIPSCO has satisfied the statutory cost-benefit analysis. (*E.g.,* Br. at 32-35.) That of course is correct, since NIPSCO described in great detail the problems that this work will avoid and the benefits it will achieve. Although Appellants object that the Marktown work is justified only on an "aging infrastructure" rationale rather than as a "system deliverability" project (*id.*), that is beside the point here—the TDSIC statute prescribes the same cost-benefit analysis for any project, regardless of the rationale. So the point is simply that NIPSCO undisputedly identified the costs and benefits of the Marktown substation work in sufficient detail to satisfy the statute.

But Appellants fail to acknowledge that NIPSCO described the need for other System Deliverability projects in similar or even greater detail. That is especially true of NIPSCO's multiple proposed System Deliverability projects in the Nappanee area. *See supra* at 20-21. NIPSCO presented the Commission with a detailed explanation of how

this proposed work would eliminate the growing mismatch between the equipment it has in Nappanee and the demand for electricity in the area. *Id.* This is a perfect illustration of the need for System Deliverability work: NIPSCO's current distribution and transmission infrastructure are at or near capacity under normal conditions, are well past capacity under conditions of stress, and simply cannot accommodate the additional demand that is coming in the area. NIPSCO's proposed improvements squarely address and correct the problem. Appellants say not a word to explain how this was an insufficient explanation of the benefits of the work.

At the very least, then, the Commission was correct to approve the Marktown and Nappanee System Deliverability work.

II. The Commission Is Not Required To Completely Ignore The General Economic Effects Of A TDSIC Plan.

Finally, Appellants argue more briefly that the Commission should not have considered how NIPSCO's TDSIC plan would affect the Indiana and national economies. Appellants argue that, when the Commission conducts its cost-benefit analysis, it must completely ignore all benefits of a TDSIC plan that accrue to anyone other than the proposing utility's own customers. But as Part A below explains, nothing in the statute suggests that, and common sense tells against it. The Commission here simply made a brief reference to the broader economic benefits of NIPSCO's Plan, and there is nothing improper about that. Even if there were, however, Part B explains that the error

would at most be harmless—since the Commission expressly noted that its decision also was supported by other evidence, and Appellants make no showing that its consideration of the economic report actually made any difference.

A. The Commission's Recognition Of Overall Economic Effects Was Entirely Proper.

As noted above, the TDSIC statute requires the Commission to decide "whether public convenience and necessity require or will require the eligible improvements included in the plan," to determine whether the plan is "reasonable," and to compare "the estimated costs of the eligible improvements included in the plan" with the "incremental benefits attributable to the plan." Ind. Code § 8-1-39-10(b)(2), (3). The statute says nothing to list or limit which benefits or whose convenience the Commission should consider. The natural meaning of this language is that the Commission should consider ***all*** the "incremental benefits" from the plan, and the convenience of ***all*** of the public.

Here, the Commission recognized the public benefits flowing from the overall economic effects of NIPSCO's proposed TDSIC spending as part of its finding of plan benefits. In one five-sentence paragraph of its 68-page Order, the Commission simply concluded that the Economic Impact Report submitted by NIPSCO was "relevant to our consideration of the [Plan's] overall benefits" and of "the public convenience and necessity." (Order at 60.) The Commission further observed that, "while the report is

an important piece of evidence to consider, it is not the only evidence offered by NIPSCO to support overall Plan approval." (*Id.*)

Appellants' attempts to generate error out of these anodyne remarks fall flat. Appellants do not dispute that NIPSCO's TDSIC spending will indeed generate a public benefit in the form of economic effects. So instead, Appellants are forced to argue that the TDSIC statute uses the words "public" and "benefits" in an extraordinarily constricted and non-standard way—requiring the Commission to ignore benefits to, and the convenience of, anyone other than the proposing utility's own customers. (*See* Br. at 42, 43-44.) Appellants point to no caselaw reaching that awkward conclusion, and common sense shows that it cannot be correct. There are many kinds of benefits from utility infrastructure work that accrue to the public generally (rather than only to the utility's specific ratepayers), and it would plainly be nonsense to require the Commission to ignore these benefits to the public as a whole. For just a few examples, consider the environmental benefits of utility work that reduces air pollution; or the benefits of equipment that allows a utility to share power with neighboring utilities in case of shortage or emergency; or the national-security benefits of avoiding the purchase of energy or essential equipment from hostile powers. Under Appellants' distorted interpretation of "public" and "benefits," the Commission would be forced to artificially truncate its analysis by considering only the small portions of those benefits that accrue to a utility's

own ratepayers. The result would be a horrible distortion of the decision-making process in a way that the General Assembly could not possibly have intended.

Of course this does not mean, as Appellants suggest (Br. at 41-42), that the Commission could approve a TDSIC plan simply as a means of general economic stimulus. Although the TDSIC statute contemplates that the Commission will ***consider*** all the benefits from a plan, it does not say that the Commission must, or should, always give equal ***weight*** to the interests of non-ratepayers, or to benefits that are only indirectly connected to the proposed plan or to the provision of utility service. In many circumstances, the Commission likely has discretion to treat those benefits as comparatively less weighty, or as a complementary part of its review of other benefits, like system reliability. And that is what the Commission did here: it simply acknowledged the broader economic benefits of the plan, noted briefly that they tell in favor of approval, and then resumed its much lengthier analysis of the more direct benefits that the plan will provide directly to ratepayers.

For these reasons, although Appellants make much of the Commission describing the Economic Impact Report as "important" (*see* Br. at 15, 16, 18, 39, 40, 44, 45), they can do so only by shifting focus to that sentence and thereby ignoring the remaining Commission findings. The word appeared in the last of the Commission's five sentences analyzing the report. That sentence stated, in full: "Additionally, while the report is an important piece of evidence to consider, it is not the only evidence offered

by NIPSCO to support overall Plan approval." (Order at 60.) That context shows that, in the course of turning its attention back to what it regarded as more significant evidence, the Commission called the report "important" merely to show that it had given it due consideration as being of benefit.

Thus, there simply is no indication that the Commission's analysis here neglected or slighted the interests of ratepayers in the way that Appellants suggest. If the record in a future case suggests that the Commission has improperly shifted focus from utilities regulation to macroeconomic management, the Court could address the situation at that time. But that is not remotely what happened here. The Commission had detailed evidence related to TDSIC plan benefits, as well as the system benefits of the System Deliverability projects, when it rendered its finding on incremental benefits. The Commission simply followed the statutory direction to consider all the "benefits" of NIPSCO's proposed plan, while appropriately focusing on those benefits that flow most directly from the Plan.

Appellants' other arguments about the economic report fare no better. They point out (Br. at 42-43; *see also id.* at 30-31) that the work proposed in NIPSCO's Plan here does not meet the "economic development" criteria set forth in the TDSIC statute. But that argument is inapposite because it arises under the wrong part of the statute. The TDSIC statute provides that, if work has been "approved as a targeted economic development project under section 11 of this chapter," then it does not have to be

separately "described in the public utility's TDSIC plan" in order to qualify as "eligible" for TDSIC treatment. Ind. Code § 8-1-39-2(a)(3)(A), (C); *see id.* § 8-1-39-10(c). But Appellants have never questioned that NIPSCO has adequately described the proposed work; indeed Appellants do not question that NIPSCO has satisfied the threshold "eligibility" criterion. (Order at 55.) The dispute here arises, instead, at later steps in the Commission's TDSIC inquiry—the public-interest and costs-benefit analyses required by a separate provision of the statute. *See* Ind. Code § 8-1-39-10. When the TDSIC statute sets forth those steps, it places no limits on what kinds of economic effects the Commission may consider. *Id.*[6]

Finally, Appellants are wholly wrong to accuse the Commission of assessing the economic "benefit" of TDSIC spending "without balancing the corresponding cost." (Br. at 41.) To the contrary, the Commission recognized that NIPSCO's economic-impact evidence was relevant only to "the overall benefits attributable to the Plan," and that the costs of the Plan had to be analyzed separately. (Order at 60.) Nowhere did the Commission say or suggest that the Plan could be approved based solely on its benefits,

[6] Appellants could not plausibly argue that, if evidence is relevant to the statutory "eligibility" criteria, the Commission is somehow barred from considering it again as a factor in the later "public convenience" or cost-benefit stages. That would make nonsense of the TDSIC statute. The statutory eligibility criteria include broad factors such as "safety" and "reliability," Ind. Code § 8-1-39-2, which likely will be the principal benefits offered by the proposed improvements. It is not plausible that the General Assembly meant to mandate a cost-benefit or public-convenience analysis that ignored those central benefits.

without comparing them to its costs as the statute requires. To the contrary, the Commission made detailed separate findings as to the costs of the Plan, and found them to be justified by its benefits. (Order at 58, 61.)

B. Any Error In This Respect Was Harmless.

In the alternative, the Court should reject Appellants' arguments about economic impact because any error the Commission may have committed in this regard was harmless. The Commission gave only passing attention to the Economic Impact Report, and there is no indication that excluding it would have changed the Commission's decision.

The harmless-error doctrine holds that, in order to demonstrate reversible error, the complaining party must show "both an erroneous ruling and prejudice resulting therefrom." *Cunningham v. Cunningham*, 430 N.E.2d 809, 813 (Ind. Ct. App. 1982). "[E]rrors in the admission of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party." *Sibbing v. Cave*, 922 N.E.2d 594, 598 (Ind. 2010) (cleaned up).

Moreover, "[t]here is no question that the harmless error doctrine applies to the judicial review of administrative hearings." *Indiana State Bd. of Embalmers & Funeral Dirs. v. Kaufman*, 463 N.E.2d 513, 520 (Ind. Ct. App. 1984). "The harmless error doctrine applies to judicial review of administrative hearings," and "[a]n appellant has the burden of showing reversible error." *Swingle v. State Emps'. Appeal Comm'n*, 452 N.E.2d 178, 181 (Ind. Ct. App. 1983). In particular, if an agency "made findings and conclusions which

were extraneous," that "does not invalidate their decision" where it "in fact is supported by the evidence" on other grounds. *Stoner v. Rev. Bd. of Ind. Dep't of Emp. & Training Servs.*, 571 N.E.2d 296, 297 (Ind. 1991). Even the erroneous admission of directly relevant evidence is harmless error where ample other evidence supports the decision. *See State Highway Comm'n v. Indiana Civ. Rights Comm'n*, 424 N.E.2d 1024, 1034 (Ind. Ct. App. 1981) (in a sex-discrimination proceeding, the agency's admission of "testimony … that [an official] had been instructed to hire only a man … was harmless error" in light of the other record evidence).

That is precisely the situation here. In finding Appellants' initial relevance objection to be premature, the Commission promised it would "give … the appropriate weight" to economic impact evidence. (App. Vol. II at 138.) And when the time came, the Commission's Order analyzed the economic-impact report in only five sentences of its 68 pages—and the concluding sentence expressly noted that other evidence supported NIPSCO's petition. (Order at 60.) The rest of the Order examined that other evidence in detail and determined that it warranted approval of the Plan.

In these circumstances, it does not matter whether the Commission's consideration of economic-impact evidence was erroneous, because Appellants have not carried (and cannot carry) their burden of showing that excluding the evidence would have changed anything. Their only attempt to do so is their out-of-context effort, described above, to stress the Commission's use of the word "important" in connection with the

Economic Impact Report. That does not suffice. The Commission merely said, in the course of emphasizing the other evidence supporting the Plan, that the report was "an important piece of evidence ***to consider***." (Order at 60) (emphasis added).

In short, even if the Commission should not have admitted evidence of the general economic effects of TDSIC spending, Appellants have not shown that this prejudiced them. All indications are that the Commission would have reached the same decision even if it had not considered general economic effects at all. Therefore, the harmless-error doctrine requires affirmance.

CONCLUSION

The Order of the Commission should be affirmed.

Respectfully submitted,

/s/Brian J. Paul
Brian J. Paul, #22501-29
FAEGRE DRINKER BIDDLE & REATH LLP
300 North Meridian Street, Suite 2500
Indianapolis, IN 46204
P: (317) 237-0300
F: (317) 237-1000
E: Brian.Paul@FaegreDrinker.com

Robert E Heidorn, #14264-49
Bryan Michael Likins, #29996-49
NISOURCE, INC.
150 West Market Street
Indianapolis, IN 46204
P: 317-995-4036
F: 317-684-4918
E: RHeidorn@NiSource.com
BLikins@NiSource.com

Counsel for Appellee
Northern Indiana Public Service Co. LLC

WORD COUNT CERTIFICATE

I verify that this brief contains no more than 14,000 words.

/s/ Brian J. Paul

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 5th day of July, 2022, the foregoing was filed with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court via the Indiana E-Filing System.

I also certify that on this 5th day of July, 2022, the foregoing was served upon the following counsel of record via the Indiana E-Filing System:

Joseph P. Rompala
Todd Arthur Richardson
LEWIS & KAPPES, P.C.
One American Square, Suite 2500
Indianapolis, IN 46282-0003
JRompala@Lewis-Kappes.com
TRichardson@Lewis-Kappes.com

William I. Fine
Randall C. Helmen
Jeffrey M. Reed
OFFICE OF UTILITY CONSUMER COUNSELOR
115 West Washington Street, Suite 1500 South
Indianapolis, IN 46204
wfine@oucc.in.gov
rhelmen@oucc.in.gov
jreed@oucc.in.gov
infomgt@oucc.in.gov

Jennifer A. Washburn
CITIZENS ACTION COALITION
1915 West 18th Street, Suite C
Indianapolis, IN 46204
jwashburn@citact.org
rkurtz@citact.org

Beth Heline
Jeremy Comeau
Bradford Hines
INDIANA REGULATORY COMMISSION
PNC Center
101 West Washington Street, Ste, 1500 East
Indianapolis, IN 46204
bheline@urc.in.gov
jcomeau@urc.in.gov
bhines@urc.in.gov

Angela N. Sanchez
Benjamin M. L. Jones
OFFICE OF THE ATTORNEY GENERAL
AGCS, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2794
Angela.Sanchez@atg.in.gov
Benjamin.Jones@atg.in.gov

/s/ Brian J. Paul