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IN THE INDIANA COURT OF APPEALS
CAUSE NO. 18A-EX-141

Citizens Action Coalition of Indiana, Inc.,	)	
	)	
Appellant (Intervenor below),	)	**Appeal from the Indiana Utility Regulatory Commission**
	)	
v.	)	
	)	**Cause No. 43955 DSM 4**
Duke Energy Indiana, Inc.,	)	
	)	**The Hon. Sarah Freeman, Commissioner**
Appellee (Petitioner below)	)	
	)	
	)	**The Hon. David Veleta, Administrative Law Judge**
	)	
	)	
	)	
	)	

APPELLANT CAC'S BRIEF

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I. STATEMENT OF THE ISSUES

This case creates a paradox. At the same time the Indiana Utility Regulatory Commission's ("Commission" or "IURC") approves an artificially high rate, it approves an energy efficiency goal that is too low and fails in other respects. Both aspects of the approval harm ratepayers.

The Commission approved a rate proposal for the largest electric monopoly owned utility in the State to collect roughly $63.4 million from ratepayers to account for reduced energy sales due to energy efficiency groups. This lost revenue rate recovery is far in excess of what is needed when the actual cost of the energy efficiency programs themselves is roughly $110.2 million. The issues related to the approval of lost revenue rate on appeal include:

1. Whether the Commission's approval of the lost revenue rate recovery is just and reasonable;
2. Whether the Commission's Order ignores a critically material issue that unjustifiably deviates from past precedent;
3. Whether the Commission's approval of the lost revenue rate recovery is supported by substantial evidence; and
4. Whether the Commission's approval of the lost revenue rate recovery is consistent with Ind. Code § 8-1-8.5-10 (2015).

The Commission also approved an energy efficiency goal for the energy efficiency plan at levels lower than and with the same errors as the same utility's plan that the Commission previously rejected. The issue related to the approval of an energy efficiency goal on appeal is:

5. Whether the Commission's Approval of the Energy Efficiency Goal Is Improper Considering Its Failure to Address the Material Impeaching Evidence

II. STATEMENT OF THE CASE

On November 22, 2016, Duke filed an application requesting that the Commission approve its energy efficiency plan for program delivery for 2017-2019, including an energy efficiency goal and certain cost recovery. *In re Duke Energy Indiana*, Inc., IURC Cause No. 43955 DSM 4, 2017 WL 6804738 (Ind. Util. Reg. Comm'n, Dec. 28, 2017) [hereinafter "Order"].

Intervenors CAC, the Indiana Office of Utility Consumer Counselor ("OUCC"), and the Industrial Group, along with the applicant, Duke, filed multiple sets of testimony. (Order at 1). The Commission held one day of evidentiary hearings, which included cross-examination of Duke's witnesses. (*Id*. at 2). After post-hearing briefing, the Commission issued its final Order on December 28, 2017. (*Id*. at 1). CAC filed a notice of appeal on January 26, 2018. (App., vol. 2, at 10).

III. STATEMENT OF THE FACTS

A. Background

Duke is an investor-owned public utility that supplies electric service to approximately 810,000 customers located in 69 counties throughout Indiana. (App., vol. 2, at 60). Duke has a total installed net summer generation capability of 7,507 MW according to its latest Integrated Resource Plan. "This capacity consists of 4,765 MW of coal-fired steam capacity, 595 MW of syngas/natural gas combined cycle capacity, 285 MW of natural gas-fired combined cycle capacity, 45 MW of hydroelectric capacity, and 1,804 MW of natural gas-fired or oil-fired peaking capacity. Also included is a power purchase agreement with Benton County Wind Farm (100 MW, with 13 MW contribution to peak modeled)." (Tr., vol. 8, at 34).

Duke also has energy efficiency programs. Energy efficiency is a pro-consumer resource. The Commission has long valued investment in energy efficiency as a method by which to reduce energy use and to provide ratepayers with an opportunity to save money, both on an individual basis by investing in energy efficiency in their homes and businesses and on a system-wide basis by reducing the need to build expensive generation plants. *See, e.g*, IURC Cause No. 42693 (4/23/08), Phase 1 at 31 ("Given the growing need for new resources to meet demand in growth as forecasted by the State Utility Forecasting Group, expanding DSM efforts will provide an excellent opportunity to enhance the development of energy efficiency in Indiana while reducing the need to construct new generation in response to growing demand...effective DSM Programs act to reduce energy costs and can provide overall economic benefits...and lessen the costs associated with new or increased regulatory requirements regarding energy generation"); IURC Cause No. 42693 Phase II (12/9/09) at 30 ("While the Commission recognizes the need to approve additional generation capacity as necessary to meet the needs of customers and ensure Indiana's ongoing economic success, it also recognizes that an important component of long-term planning for Indiana's generation needs is the effective utilization of DSM programs by jurisdictional utilities that have a duty to serve their ratepayers in a cost effective manner. Saving energy is the most cost effective way of meeting future energy supply needs and has the corresponding benefit of reducing the need to build additional generation capacity."); *In re Investigation of DSM Program*s, Cause No. 42693 at 32, 2009 WL 4886392 (Ind. Util. Reg. Comm., Dec. 9, 2009) ("Accordingly, over time, reductions in sales will reduce participating customers' energy bills and defer the need for future generation. Utilities will also be required to fully demonstrate the effect of these DSM goals in their IRPs and determine the overall cost savings in delayed or deferred generation to customers."); Tr., vol. 10, at 88 ("Energy efficiency is one of the lowest-cost, cleanest, most reliable options available to utilities to meet customer demand.”).

Thus, after finding poor investment in energy efficiency by the investor owned monopoly electric utilities, the Commission directed the utilities to put energy savings goals in place for the benefit of consumers. *See*, *e.g*, IURC Cause No. 42693 (4/23/08), Phase 1 at 30 (finding that “Indiana lags well behind its neighboring states—and the nation as a whole—with respect to spending on DSM” and that “one percent of utility revenue is a likely ‘floor’ of needed funding for a statewide program that addresses available efficiency potential”).

In 2014, however, Senate Enrolled Act 340 (2014) (“SEA 340”) was enacted. SEA 340 started off as legislation to allow the opportunity for certain, larger customers to opt out of participating in an electric utility’s energy efficiency program on the theory that larger customers are investing in energy efficiency outside of the utility-sponsored energy efficiency programs as it is within their best interest to do so. On February 25, 2014, on second amendment reading in the Indiana House, SEA 340 was amended to roll back the Commission directive to require investor owned monopoly electric utilities to meet certain energy savings goals. (S.B. 340, 118th Gen. Assem., 2d Reg. Sess. (Ind. 2014)). It was codified as Ind. Code Section 8-1-8.5-9 (“Section 9”) on March 28, 2014.

Senate Enrolled Act 412 (“SEA 412”) was envisioned as a replacement to the Commission’s former directive requiring a certain amount of energy savings investment by each of the investor-owned electric utilities. In 2015, SEA 412 was codified as Indiana Code Section 8-1-8.5-10 (“Section 10”). Section 10 requires electricity suppliers, all of which are monopoly, investor-owned service providers, to submit energy efficiency plans once every (3) years for evaluation and approval by the Commission. Section 10 (h). It also requires that each plan have an energy efficiency goal, which is statutorily defined as all energy efficiency produced by cost effective plans that are (1) reasonably achievable; (2) consistent with an electricity supplier's integrated resource plan; and (3) designed to achieve an optimal balance of energy resources in an electricity supplier's service territory. Section 10(c).

An integrated resource plan, or IRP, is a utility plan for meeting forecasted annual peak and energy demand, plus some established reserve margin, through a combination of supply-side and demand-side resources over a specific future period. (170 IAC 4-7). These IRPs carry great significance in utilities' requests for authority to build power plants. With the enactment of Section 10, the State legislature put a greater emphasis on the consistency of a utility's energy efficiency plans with the utility's IRP (and the Commission's state energy analysis which has yet to be completed). *See* I.C. § 8-1-8.5-10(c), (j)(3). Section 10 also requires the Commission to adopt rules under I.C. 4-22-2 or guidelines.

When Section 10 was established, the Commission already had a revised version of the IRP rule at 170 IAC 4-7 *et seq*. in strawman form from 2012, so the Commission continued the development of this IRP rule and revised the Demand Side Management ("DSM," i.e., energy efficiency for purposes here) rules at 170 IAC 4-8 *et seq*., as well. The Notice of Intent regarding the IRP rules and DSM rules was published in the Indiana Register on March 14, 2018. 2018 IN REG TEXT 485976 (NS). In the interim, the investor-owned electric utilities, including Duke, agreed to follow the IRP Rules, particularly the IRP stakeholder process, despite it not yet being enacted. (Tr., Vol. 9, at 214).

The IRP stakeholder process allows for interested parties to participate in the development of a utility's IRP and provide comments on said IRP. *Id*. Then, the Commission's Director for these affairs reviews the comments submitted by the interested parties and the IRPs themselves and creates a draft report. Another round of comments is received by the Director on his or her draft report for use in the Director's final report. The proposed IRP Rule states that "The draft report and the final report shall: (1) be limited to commenting on the IRP's compliance with the requirements of this rule; (2) list the areas where the director believes the IRP fails to comply with the requirements of this rule; and (3) not comment on: (A) the desirability of the utility's preferred resource portfolio; or (B) a proposed resource action in the IRP." 170 IAC 4-7-2.2 (g).

In addition, the regulatory framework as contemplated for in Section 10, as well as the current and proposed DSM Rules, acknowledges the possibility of financial bias against investment in energy efficiency, recognizes the need to evaluate the extent of any bias, and provides ways for the Commission to eliminate any bias through adoption of reasonable cost recovery and incentive mechanisms designed to facilitate the use of energy efficiency to meet the long-term resource needs of customers. *See* I.C. §§ 8-1-8.5-10(g)(3), (j)(8), and (o).

B. Duke's 2016-2018 Section 10 Filing

Duke Energy Indiana, Indiana's largest investor-owned electric utility, filed its first Section 10 plan for energy efficiency deliver in 2016-2018 in a cause docketed as Cause No. 43955 DSM 3, but the Commission rejected it as not meeting the definition of "energy efficiency goal" and capped Duke's proposed lost revenue rate after granting Duke authority to still deliver the programs, but not under Section 10. (Tr., vol. 12, at 177, 179-81).

Duke requested a lost revenue rate for "the life of the measure or until revenues are updated in a subsequent retail base case", whichever is shorter. (*Id*. at 138). Duke said its proposal included a reconciliation of estimated lost revenues with actual lost revenues as verified by an evaluation, measurement, and verification ("EM&V") vendor with certain EM&V protocol. (*Id*. at 140).

But the Commission refused to approve Duke's "life of the measure" lost revenue rate and instead capped Duke's lost revenue recovery to the shorter of four years or the life of an energy efficiency measure based on the following rationale:

> Recovery of lost revenues is intended as a tool to remove the disincentive utilities would otherwise face as a result of promoting DSM in their territories. *Southern Ind. Gas &Elec. Co*., Cause No. 43938 at 40-41 (IURC 8/31/12*). In Indianapolis Power & Light*, Cause No. 43911 at 11 (IURC 11/4/10), we explained that one reason bias may exist is because a supply-side resource choice is primarily a capital expenditure while a demand-side resource choice is primarily an expense. Utility capital expenditures found to be used and useful provide both a return of and a return on such investments; whereas utility expenses that are authorized to be included in rates for recovery from customers provide only a return of the expenditure. This financial advantage of a traditional supply-side resource requires a base rate case proceeding before such recovery occurs while authority to recover specific demand-side program expenses is regularly approved in rate adjustment tracker proceedings in the intervals between base rate cases. We also noted that bias could result from what is known as the throughput incentive. The choice of a successful demand-side resource investment results in reduced throughput i.e., sales, which reduces the utility's revenue collections. The choice of a supply-side resource does not produce such an effect.
>
> ...
>
> This Commission has been clear that "the recovery of lost revenues is a tool to assist in removing the disincentive a utility may have in promoting DSM in its service territory." See In re Petition of NIPSCO, Cause No. 44496 (November 12,2014); see also, 170 IAC 4-8-6 (c) and In re Petition of Southern Ind. Gas& Elec. Co., Cause No. 43938, at pp. 40-41 (IURC August 31, 2011). We have also repeatedly explained that because the purpose of lost revenue recovery is to return the utility to the position it would have been in absent implementation of DSM, simply eliminating lost revenue recovery when sales are higher than the levels used to develop a utility's current base rates would be contrary to this purpose. See 44496 Order at pp. 21-22 and 43938 Order at p. 41.
>
> …
>
> The OUCC and CAC seem primarily concerned with what Ms. Mims termed the Pancake Effect, which occurs when lost revenues caused by energy efficiency investments indifferent years aggregate. For example, if the weighted average measure life is 10 years for an efficiency measure, then the utility company, assuming there is no rate case in the interim, would still be collecting lost revenues in 2025 for measures installed in 2016, along with lost revenues for measures installed during 2017-2025. It should be kept in mind that the

> cumulative lost revenues to be recovered in a year will tend to flatten out around a steady state level if there are no significant changes in kWh saved.
>
> The proposed annual EE budgets show lost revenue as a percentage of the total budget is approximately 40% for each year 2016-2018. CAC Witness Mims points out the lost revenue pancake effect for the Company has flattened out at approximately $25 million per year, with 2018 showing an absolute decline in lost revenues. However, she notes this reduction in lost revenue is caused by the Company pursuing less energy efficiency than it did in 2012 in GWh.
>
> Although we have previously approved lost revenues over a measure's life or until a utility's next base rate case, whichever is shorter, Ms. Mims' and the other parties' concerns with pancaking and the increased length of time between base rate cases for utilities in Indiana raise a valid concern. Clearly, pancaking of lost revenue is much less of an issue in an environment where a utility comes in regularly, i.e., every three to five years, for a base rate case. When the Commission's DSM Rules were adopted in the early 1990's, the previous twenty years was characterized by routine and sometimes almost back-to-back rate case filings where utilities' rates were reset on a regular basis. Consequently, recovery of lost revenues at that time was viewed as a tool of limited duration until the utility filed its next base rate case in the not too distant future. However, in the years after adoption of the DSM Rules, utilities have been staying out for ten or more years before filing for a rate case. *E.g.*, *Indianapolis Power & Light*, 19 years between Cause No. 38664 (IURC 8/23/95) and pending Cause No. 44576; *Southern Indiana Gas & Electric Co.*, 12 years between Cause No. 39871 (IURC 6/21/95) and Cause No. 43111 (IURC 8/15/07); *Duke Energy Indiana, Inc.*, last rate case was filed 13 years ago in Cause No. 42359 (IURC 5/18/04, rh'g denied 7/28/04).
>
> Because we believe the parties raise a valid concern, we find that Petitioner's lost revenue recovery should be limited to: (1) four years or the life of the measure, whichever is less, or (2) until rates are implemented pursuant to a final order in Petitioner's next base rate case, whichever occurs earlier.

(*Id*. at 179-81).

The Commission also rejected Duke's proposed energy efficiency goal as not compliant with Section 10 based on the following rationale:

> it stands to reason that an optimal balance can only result from a well-developed and reasoned IRP that evaluates the appropriate balance of new supply-side and demand-side resources taking account of risks and uncertainty. Petitioner's EE goals and plan are not based on an IRP as Petitioner acknowledges, instead the goals and EE plan were "informed" by the 2013 IRP. Petitioner's 2013 IRP developed three scenarios used to evaluate resource requirements and choices.

> However, in each scenario Petitioner assumed a given level of EE and then allowed the model to optimize the generation resource selection. In the 2013 IRP report Petitioner even explicitly refers to the "assumed" levels of EE. Thus the 2013 IRP cannot be said to have developed an optimal balance of energy resources.

(*Id*. at 177).

C. Duke's 2017-2019 Section 10 Filing

The following year, Duke filed again for a Section 10 Plan for program years 2017-2019, despite having alternative authority to deliver energy efficiency programs from 2016-2018.

1. Lost Revenue Rate

Duke's newly proposed Section 10 Plan also asked for lost revenue recovery with exactly the same methodology as was rejected by the Commission in Duke's previous year's filing. Specifically, Duke requested lost revenue recovery for the life of the measures of the programs approved in its Plan and again proposed to reconcile forecasted lost revenues with the most recent EM&V results that occur once after the completion of the program delivery. (Order at 5, 8). This lost revenue rate proposal asked for $63,448,839 for an energy efficiency plan that costs $110,233,151 to administer, provide customer incentives, and evaluate, i.e., $63.4 million in lost revenues for just $110.2 million in actual costs to deliver and evaluate the energy efficiency programs. (Tr., vol. 6, at 180; Tr., vol. 7, at 64; *see also* App., vol. 2, pp. 70-71).

As it relates to lost revenue recovery, CAC's expert witness "testified that [Duke's] plan does not meet the 'overall reasonableness' threshold with its asymmetrical proposal for lost revenue recovery. [CAC] recommended that recovery of lost revenues be limited to the amount associated with decreases in sales that are directly attributable to the implementation of Commission approved energy efficiency programs and only to the extent it impacts [Duke's] fixed cost recovery. [CAC] explained how [Duke] has not provided evidence that it will under recover fixed costs due to the impacts of its energy efficiency programs." (Order at 14). CAC again put forward the American Council for an Energy-Efficient Economy's ("ACEEE") recent lost revenue adjustment mechanism research that the Commission relied upon in other cases, (Tr., vol. 10, pp. 82-146), to illustrate the potential for a utility to over-earn if a LRAM is implemented without symmetry, or regard for the overall utility rate of return. (Order at 14).

CAC "explained that lost revenue recovery is meant to be a short-term solution to address revenue loss in between rate cases, which should be limited to three years or the life of the measure, whichever is shorter, to avoid the 'Pancake Effect' based on ACEEE's recent LRAM research...in which lost revenues for the life of the measure accumulate over a multiple-year period between rate cases." (*Id*.)

The Industrial Group's witness "testified that [Duke's] overall rates must be established at a level that allows [Duke] to recover its prudently incurred costs and also gives [Duke] an opportunity to earn a reasonable rate of return, while at the same time cannot be set so high as to be confiscatory to Duke's ratepayers. He opined that [Duke's] EE Plan is unjust and unreasonable due to its proposals for excessive and unreasonable recovery of lost revenues and performance incentives, and the overall costs of the program." (*Id*. at 18). The Industrial Group presented evidence and arguments against the pancaking effect, lost revenues associated with measures installed in past periods (also known as "legacy lost revenues") and how it relates to the overall revenue requirement associated with the Plan. (*Id*.)

The Industrial Group also "pointed out that [Duke's] sales have increased since the last rate case" and thus "lost revenue recovery is not justified when any decline in sales due to EE programs is offset by sales increases that result from other factors." The Industrial Group showed that "while a utility may experience a 'lost sale' due to the implementation of a DSM measure, that does not mean the utility has been deprived of a reasonable opportunity to earn its return, or even a reasonable opportunity to earn an amount in excess of its authorized return. Other changes, such as increased load growth, changes in operating expenses, managerial efficiency, and approval of other trackers all impact the utility's opportunity to earn its authorized return."

The Industrial Group showed that "given that [Duke's] last rate case used a test year ending in 2002 and that [Duke] does not expect to file a base rate case until the end of 2022", the lost revenue recovery is particularly unreasonable since "[a]ny 'uncapped' lost revenues would not be 'zeroed out' until new rates went into effect." (Order at 19). The Industrial Group witness presented and applied the "pancaking" effect that the Commission previously found to be the basis for restricting lost revenue recovery to a specific term of years. He showed that for measures installed between 2012 and 2016, Duke collected or forecasts collecting lost revenues that will accounts for "84% of the total $147.16 million" for those programs. The Industrial Group pointed out "that sheer scale of the recovery here illustrates how the life of the measure lost revenue recovery greatly reduces [Duke's] incentive to file a base rate case in the short term in which [Duke's] lost revenues could be reset to zero." (*Id*.)

The Industrial Group recommended "using a 'term of years' such as four years in order to preserve some balance between the utility and the ratepayer." The Industrial Group's exhibits labeled as Attachments MPG-A and MPG-C "illustrate, after about four years, the amount of lost revenue collected, or forecasted to be collected, for any particular vintage begins to decline. This suggests a four-year recovery effectively compensates the utility." (*Id*.) The Industrial Group "recommended that the cap be applied to legacy lost revenues as well, because such costs must be considered in evaluating whether rates are just and reasonable and because such a cap would have a minimal impact on Petitioner's requested revenue requirement." Alternatively, the Industrial Group "recommended imposing a hard cap to ensure recovery of lost revenues does not cause [Duke's] overall rates to increase in excess of a specified percentage." (*Id*.)

Finally, the Industrial Group's expert witness "testified that the costs of [Duke's] EE Plan are unjust and unreasonable because [Duke] proposes to spend more to save energy than that same energy actually costs the customer on a per unit basis…excluding legacy lost revenues, the Plan budget would cost about $0.24/ kwh saved,...[which] is more than double the Commission staff's calculation of the cost to serve Residential customers." (*Id*. at 20).

Duke's rebuttal generally consisted of their arguments that lost revenues requested in this filing are attributable to the results of customer participation in the programs after EM&V. (*Id*. at 23).

2. Energy Efficiency Goal

Despite Duke's testimony to the contrary, Duke's newly proposed Section 10 Plan for 2017-2019 asked for approval of an energy efficiency goal that is lower than the energy efficiency goal rejected by the Commission in Duke's previous year's filing. (*Cf*. Tr., Vol. 8, at 9, to Evid. Hr. Tr., vol. 2, at 150).

CAC "presented evidence on how much energy Petitioner is proposing to save in its 2017-2019 plan and...how it is not reasonable that Petitioner is proposing to reduce its efficiency goal in this application from DSM-3 to DSM-4." (Order at 13). CAC presented evidence on how Duke's "[Market Potential Study] identified more than twice as much efficiency that [Duke] could achieve than what it is proposing here." (*Id*.) CAC "noted that [Duke] is proposing to save just ~0.7% of 2015 retail sales each year in 2017-2019, while there are currently 16 states that are achieving energy efficiency savings of 1 % or more, and the leader is achieving nearly 3%." (*Id*. at 14).

Through the Commission's IRP stakeholder process, CAC provided an extensive analysis of Duke's 2015 IRP, (Tr., vol. 11, pp. 4-101; Confidential Tr., vol. 1, pp. 66-167), as well as the manner by which Duke translated energy efficiency figures from its IRP to its 2017-2019 Plan. (Order at 15).

Duke stated that its new energy efficiency goal and plan is based on its 2015 Integrated Resource Plan, and Duke argued that its 2015 IRP contained no constraints on any of the energy resources that were optimized in the IRP. Specifically, Duke argued that no available resource was limited or constrained in the 2015 IRP model. (Tr., vol. 10, at 28; Evid. Hr. Tr., vol. 2, at 103, lines 8-11). In other words, no resource was forced in insofar as that would mean said resource would not have been the chosen as a resource based on the economics. (Evid. Hr. Tr., vol. 2, at 103, lines 22-25).

However, Duke admitted at the hearing that not only did their modeling group have the ability to force in a resource should they decide to do so, (*id*., lines 13-21), but that Duke did indeed force in a resource. Specifically, Duke's IRP witness in this case admitted that Duke forced in a 448 megawatt natural gas combine cycle at year 2020 in its preferred, chosen plan from the IRP model, i.e. Duke did not allow the IRP model to economically select the natural gas combine cycle. (*Id*. at 81, l.6-82, l. 4; 107, lines 5-8; Confidential Tr., vol. 1, at 23-24, cell I-117.)

Likewise, Duke claimed that the energy efficiency bundles were allowed to be optimized or economically selected by their IRP modeling tool that balances the resources based on cost. Although Duke's IRP Witness was not able to verify with the modeling files any specific constraints put in by the modeler due to his inability to read IRP modeling files, a run from the IRP model was admitted into the record which showed that minimum and maximum constraints were used in the modeling run in the IRP for the Energy Efficiency Base Bundle (Evid. Hr. Tr., vol. 2, p. 89, l. 5-p.91, l.10). The Energy Efficiency bundle that was selected by the IRP, called the Base Bundle, was "created using the assumption that [Duke] will be implementing the currently approved and proposed portfolio of EE programs during the IRP analysis period. For periods beyond 2018, the assumption was made that the composition and size of the future annual portfolio impacts were the same as in the 2018 portfolio." (Order at 15; Tr., vol. 8 at 89) In other words, Duke's energy efficiency resource that it plugged into the IRP was just based off the energy efficiency goals from the 2016-2018 Plan that the Commission rejected as not compliant with Section 10 requirements in DSM-3; it was not based off the economic optimization of the IRP model. (Order at 15; Tr., vol. 10, at 153, 155-56).

CAC's expert witness also presented significant evidence as to how Duke's "load forecasters would have needed to know exactly what bundles of energy efficiency were selected in the preferred plan in the IRP ahead of running the actual model…" (Order at 17). In other words, CAC argued that Duke hardwired the energy efficiency amount into the only IRP bundle that was selected by the IRP modeling tool.

Duke's IRP witness also confirmed that it modeled for more load than it needs. Specifically, Duke's IRP witness confirmed that Duke modeled a reserve margin, meaning the extra margin of capacity typically required by the grid operator, at or above 13.6%, (Evid. Hr. Tr., vol. 2, p. 82, l.9-19; Tr., vol. 8, at 32), despite the grid operator, MISO, requiring only 7-7.5% reserve margin over and above the capacity that is needed to serve Duke's customers. (Tr., vol. 9, at 92). Duke admitted that this can greatly impact which resources are selected and increase the amount of generation that would be required to serve the same load. (Evid. Hr. Tr. at 82, l.23-83, l.4). For example, "if the model was looking at year 2018, for instance, and had not yet met the 13.6 percent requirement, the model would have to add something so that it would meet that requirement." (Id. at 83, l.5-11).

Duke argued that its energy efficiency plan is consistent with its 2015 IRP. As the case progressed, it was discovered, however, that Duke used a six-step process to create the Energy Efficiency bundle plugged into the IRP (the Base Bundle) and then translated that to a proposed set of goals for this DSM plan. (Order at 15). CAC disaggregated and explained the convoluted six-step process by which Duke created the "Base" energy efficiency bundle for the IRP and then translated it to a proposed set of goals for this DSM plan. (Order at 15; Tr., vol. 10, pp. 153-163). CAC's expert expressed concern about "(1) the complexity of this process since review of the 'consistency' between the IRP and the DSM plan will be just as opaque in future proceedings and (2) the extent to which this reconciliation means that the IRP is undercounting savings." (Order at 16-17).

CAC presented evidence on how the following issues with the reconciliation means that the IRP is undercounting savings and resulting in a smaller energy efficiency goal in the filing: (1) the freerider adjustment is different with free rider savings being taken out at 19% and added back in at 25%, (2) the translation of cumulative to incremental savings in Step 5a is completely undescribed, and (3) the half-year convention in Step 3 distorts the annual savings total, are the least of the Commission's concerns with this reconciliation by Duke. (Tr., vol. 10, pp. 163-65).

D. Commission's Order on Duke's 2017-2019 Plan

1. Lost Revenue Rate

Commission approved Duke's full lost revenue proposal despite it being the exact same proposal that the Commission previously capped. The Order summarized and overgeneralized CAC and the other consumer parties' arguments, noting that non-Duke parties "present a number of interrelated arguments" which included: "lost revenues should be authorized only if Petitioner has experienced a reduction in kWh sales compared to kWh sales used to set rates in its last base rate case"; "the baseline against which energy consumption is measured to estimate lost revenues will change over time, and lost revenue calculations don't adequately account for this complication"; and "if recovery of lost revenue is allowed, it should be limited to three years or the life of the measure, whichever is shorter, to avoid the pancake effect. The pancake effect occurs when lost revenues caused by EE investments in different years aggregate." (Order at pp. 42-43).

The Commission noted Duke's rebuttal "that lost revenues are only recovered based on measure-level EM&V results, which insure that lost revenues recovered are directly attributable to EE." (Order at 43).

The Commission's rationale for approving the lifetime lost revenue rate without modification included a description of the evaluation, measurement, and verification process that has always been used to reconcile forecasted lost revenue rates to actuals. The Commission said, "EM&V is the most established approach to reasonably estimating energy savings and lost revenues associated with EE programs." (*Id.*) The Commission reasoned that the "approach appears reasonably designed to ensure it recovers only the lost revenues that EM&V can establish, with a high degree of confidence, will result from savings driven by EE measures" and degradation of EM&V is accounted for in the EM&V process. (*Id*.) The Commission then dismissed the consumer parties' arguments and evidence, stating that they "offered no basis on which we could make factual findings that a three-year cap, or any other limitation, would allow Petitioner to recover reasonable lost revenues." Finally, the Commission stated that "cost-effective EE programs should have lower programs costs with larger energy savings, which does result in higher lost revenues relate to program costs." In conclusion, the Commission found that "because Petitioner has EM&V in place to verify EE impacts, this Commission finds that lost revenue recovery for the life of the measure for Petitioner's EE programs is appropriate" and "consistent with the Commission's DSM rules at 170 IAC 4-8 and Section 10's requirement that EM&V are included in any EE plan" and that "Section 10(o) similarly recognizes the importance of subjecting lost revenues to EM&V." (*Id*. at 43).

2. Energy Efficiency Goal

The Commission also approved Duke's "energy efficiency goal" despite the same flaws being present in Duke's prior Section 10 energy efficiency goal the Commission previously rejected.

IV. SUMMARY OF ARGUMENT

Utility-sponsored energy efficiency programs have the goal of helping ratepayers and the utility use energy and captive ratepayer monies more efficiently. The Order flies in the face of this goal and fails to consider the reasonableness of this lost revenue rate recovery for ratepayers, the discrediting evidence before it, and the IRP process which the Commission itself established.

The total lost revenue rate recovery proposal approved amounts to $$63,448,839 for an energy efficiency plan that costs $110,233,151 to administer, provide customer incentives, and evaluate, i.e., $63.4 million in lost revenues for just $110.2 million in actual costs to deliver and evaluate the energy efficiency programs. (Tr., vol. 6, at 180; Tr., vol. 7, at 64; *see also* App., vol. 2, pp. 70-71). The approved lost revenue rate recovery perversely award a utility to not file general rate cases. (Tr., vol. 8, pp. 126-27, 129). Although the Commission's Order summarizes CAC's expert witness testimony as it relates to pancaking lost revenue rates, the Order does nothing else with this material, contentious issue, leaving available precedent unaddressed and unresolved. This leads to a series of collateral errors in interpretation, the most basic of which is that it created a rate in a vacuum and ignored the rest of the mandated considerations for ratemaking. At a minimum, the departure from available precedent should have been addressed in this about-face in the Commission's Order.

The Commission also ignored critical pieces of evidence discrediting the evidence upon which the Commission relied in concluding that Duke's energy efficiency goal met the statutory definition in Section 10. This is contrary to law and ignores a material issue put in dispute before it. It also calls into question many of its specific findings of fact in approving Duke's energy efficiency goal for 2017-2019 program delivery.

V. ARGUMENT

A. Standard of Review

Pursuant to Ind. Code § 8-1-3-1, this Court reviews Commission decisions using a multi-tiered standard of review. First, "the order must contain specific findings on all the factual determinations material to its ultimate conclusions." *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1016 (Ind. 2009). "Basic findings of fact are important because they enlighten the reviewing court as to the agency's 'reasoning process and subtle policy judgments' and allow for 'a rational and informed basis for review.'" *PSI Energy, Inc., v. Ind. Office of Util. Consumer Counsel*, 764 N.E.2d 769, 774 (Ind. Ct. App. 2002).

Second, this Court determines "whether there is substantial evidence in light of the whole record to support the Commission's findings of basic fact." *N. Ind. Pub. Serv. Co.*, 907 N.E.2d at 1016. At this stage, the reviewing court considers "all evidence, including evidence that supports the determination as well as evidence in opposition to the determination." *PSI Energy, Inc.*, 764 N.E.2d at 773-74. A court will set aside an agency's findings of fact if it "lacks a reasonably sound basis of evidentiary support." *Id.* at 774 (quoting *City of Evansville v. S. Ind. Gas & Elec. Co.*, 339 N.E.2d 562, 572 (Ind. Ct. App. 1975)).

Third, this Court determines whether the agency decision is contrary to law, meaning that the agency "fails to stay within its jurisdiction and to abide by the statutory and legal principles that guide it." *Ind. Office of Util. Consumer Counselor v. Lincoln Utils., Inc.*, 834 N.E.2d 137, 142 (Ind. Ct. App. 2005) (quoting *N. Ind. Pub. Serv. Co. v. LaPorte*, 791 N.E.2d 271, 278 (Ind. Ct. App. 2003)).

Based on this multi-stage review, the reviewing court may vacate a Commission decision if the order lacks a factual basis or is contrary to law. *Ind. Bell Tel. Co. v. Ind. Util. Reg. Comm'n*, 855 N.E.2d 357, 362 (Ind. Ct. App. 2006). This Court has remanded orders to the Commission where the Commission failed to make findings on contested issues that were material to the Commission's ultimate conclusions or where the Commission failed to reach any conclusion regarding a significant issue disputed by the parties. *See, e.g., Citizens Action Coalition of Ind., Inc. v. Duke Energy Ind., Inc.*, 16 N.E.3d 449, 460, 462 (Ind. Ct. App. 2014) (remanding an order because the Commission failed to make factual findings on issues disputed by the parties that were material to the Commission's ultimate conclusions); *City of Evansville*, 339 N.E.2d at 577 ("…[W]e are compelled to require the Commission to articulate the policy and evidentiary factors underlying its resolution of all issues which are put in dispute by the parties." (citing *Indianapolis & S. Motor Express, Inc. v. Public Serv. Comm'n*, 112 N.E.2d 864 (1953))). If a court finds agency action to be unlawful, a court may remand the matter to the agency, or, "where it would be pointless to remand, the trial court may compel agency action." *Ind. State Bd. of Health Facility Adm'rs v. Werner*, 841 N.E.2d 1196, 1209 (Ind. Ct. App.), aff'd on reh'g sub nom. *Indiana State Bd. of Health Facility Adm'rs v. Werner*, 846 N.E.2d 669 (Ind. Ct. App. 2006).

B. Whether the Order's Approval of Lost Revenues Totaling $63,448,839 for $110,233,151 Worth of Programs Is Contrary to Law

1. Whether the Order Is Just and Reasonable

Indiana law requires the Commission to set rates that are "just and reasonable." Ind. Code § 8-1-2-4 (1913) ("...The charge made by any public utility for any service rendered or to be rendered either directly or in connection therewith shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful.") A utility rate is defined as "every individual or joint rate, fare, toll, charge, rental, or other compensation of any utility or any two (2) or more such individual or joint rates, fares, tolls, charges, rentals, or other compensation of any utility or any schedule or tariff thereof." Ind. Code § 8-1-2-1(d) (1913).

As used in I.C. § 8-1-8.5-10 ("Section 10"), lost revenues (and other costs approved under this statute) are clearly rates. *See* Section 10(k) ("If, after notice and hearing, the commission determines that an electricity supplier's plan is reasonable in its entirety, the commission shall:…(2) allow the electricity to recover all associated program costs on a timely basis through a periodic rate adjustment mechanism..."); *see also* Section 10(o) ("If the commission finds a plan submitted by an electricity supplier under subsection (h) to be reasonable, the commission shall allow the electricity supplier to recover or receive the following:…(2) Reasonable lost revenues. A retail adjustment mechanism proposed by an electricity supplier under this section implement the timely recovery of program costs (including reasonable lost revenues) may be based on a reasonable forecast…"). Duke itself noted that it "considers the provisions of the Public Service Commission Act, as amended, including IC §§ 8-1-2-4, 12, 42(a), 46, 61, § 8-1-8.5-3, § 8-1-8.5-10, and 170 IAC 4-8-1 *et seq*., to be applicable to this proceeding, and believes that such traditional statutes and rules provide the Commission authority to approve the relief requested." (App., vol. 2, at 65).

Just and reasonable rates are those which fairly balance the competing interests of the captive ratepayer and the monopoly utility investor. I.C. § 8-1-2-4. In this balance, the utility has a right to earn a reasonable level of compensation for its property, i.e. its capital investment, used to provide utility service. *Evansville v. Southern Indiana Gas & Electric Co*., 167 Ind. App. 472, 339 N.E.2d 562, 1975 Ind. App. LEXIS 1460 (Ind. Ct. App. 1975). The customer, on the other hand, has a right to be protected against rates that are excessive, i.e., rates that provide the utility with too large a return on its capital investment. *Citizens Action Coalition, Inc. v. Northern Indiana Public Service Co*., 485 N.E.2d 610, 614-615 (Ind. 1985).

Thus the approval of any lost revenues rate is subject to the statutory "just and reasonable" rates standard and the Constitution's Takings Clause, which call on the Commission to satisfy the *legitimate* interests of both buyers and sellers. Justice Brandeis provided guidance for how this Takings analysis applies to the world of public utility ratemaking: "The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the federal Constitution guarantees to the utility the opportunity to earn a fair return." *Missouri ex rel. v. Southwestern Bell Tel. Co.*, 262 U.S. at 290 (1923) (Brandeis, J., concurring). Property is the shareholder's investment, the "taking" occurs when the utility invests capital to carry out its public service obligation, and the "just compensation" occurs when the regulator sets rates sufficient to "guarantee[] to the utility the opportunity to earn a fair return." *Id*.

In *Hope Natural Gas v. Fed. Power Comm'n*, 320 U.S. 591 (1944), the Federal Power Commission set Hope's rates using Justice Brandeis's approach which found that the focus must be on the rate order's "end result" and "total effect": "Rates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so called 'fair value' rate base." *Id.* at 605. Other key language in Hope included:

> [T]he Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate making function, moreover, involves the making of 'pragmatic adjustments.'…And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. …Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. … It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.

Id. at 602.

Both the "just and reasonable" standard and Hope's focus on the "end result" lead to the same place: the IURC has discretion over the method it selects, but this discretion is not unlimited. It requires the Commission to exercise its judgment within a "zone of reasonableness." *See In re Permian Basin Area Rate Cases,* 390 U.S. 747, 767 (1968); *Fed. Power Comm'n v. Natural Gas Pipeline Co.,* 315 U.S. 575, 585 (1942), *Citizens Action Coal. of*

Ind., Inc. v. Pub. Serv. Co. of Ind., 571 N.E.2d 1270, 1277 (Ind. Ct. App. 1991). In applying these tests to the case at hand, it becomes clear that Duke's proposal is unreasonable.

The Commission has exceeded its discretion in the Order. In this particular instance, the total lost revenue rate recovery proposal approved amounts to $63,448,839 as compared to the $110,233,151 approved to run the programs, i.e., $63.4 million in lost revenues for just $110.2 million in actual costs to deliver and evaluate the energy efficiency programs, which perversely awards a utility for not filing general rate cases to reset rates. (Tr., vol. 6, at 180; Tr., vol. 7, at 64; see also App., vol. 2, pp.70-71). Duke, the monopoly electric utility, wants compensated for reducing demand in electricity. This property is supposedly "taken" in that the monopoly electric utility has been mandated by the state legislature to institute utility-sponsored energy efficiency programs to reduce demand in electricity within its monopoly-granted service territory. *See generally* Section 10. The requirement to provide "just compensation" or a "fair return" needs to satisfy *legitimate* expectations of shareholders, but lost revenue rates that are artificially high in comparison to the cost to actually run the programs is far in excess of what is necessary to satisfy a monopoly utility's shareholders' *legitimate* expectations. This lost revenue guaranteed rate is outside the zone of reasonableness in light of the legal framework, ratemaking policy, regulatory history, objective of the required cost-effectiveness in the statute, and the appropriate degree of reliability in forecasting estimated savings out beyond a few immediate years. Similarly, Section 10(h) and (o) allow for the recovery of "reasonable" lost revenues, not for unreasonable lost revenues.

Ratemaking decisions are not to be viewed in a vacuum. Determining a fair rate of return involves looking at the "total effect" of program costs on the utility, while also balancing the interests of ratepayers. Under the *Hope* test, assessing the "end result" of Duke's energy efficiency program on its overall financial integrity is what will lead to the creation of "just and reasonable" rates, not what the Order ultimately approved. Additionally, energy efficiency programs create less risk than other utility load building options, therefore that fact should be considered when "compensating investors for the risks assumed." It is particularly wasteful and results in artificially high prices to award a utility $63.4 million for programs that cost $110.2 million to run *with no shown correlation that this extra revenue will equate to more energy efficiency services or savings*. (Tr., vol. 10, at 89-90 (addressing the compounding nature of lost revenue rates without frequent rate cases, the white paper concludes that, "While the lost revenue adjustment can help make a utility whole by compensating it for reduced energy sales, it will do little to encourage investment in energy efficiency unless combined with other policy levers. Our analyses indicate that having an LRAM policy itself is not currently associated with higher levels of energy efficiency effort (program spending) or achievement (energy savings) than are found in states without an LRAM policy."))

It is the Commission's very purpose to prevent this kind of consumer exploitation. The Indiana Supreme Court has stated:

> Utilities are regulated in order to protect the consumers from the abuses of monopoly i.e. *artificially high prices*. The statutes which govern the regulation of utilities and which grant the PSCI its authority and power provide a surrogate for competition. *See Public Service Commission v. Indiana Bell Telephone Co.*, (1955), 235 Ind. 1, 130 N.E.2d 467. IC § 8-1-2-1 and IC § 8-1-2-4 insure that the responsibilities of utility investors and consumers are commensurate with the responsibilities of investors and consumers in a competitive market.

Citizens Action Coalition, Inc., 485 N.E.2d at 614-615 (emphasis added). Additionally, as discussed further below, in determining what is a reasonable and just rate that a utility is permitted to charge, the Commission has always reviewed the utility's overall financial condition, including total revenue and expenses. *Prior v. GTE North Inc.*, 681 N.E.2d 768 (Ind.

Ct. App. 1997). The lost revenue rate approved in the Order, however, was set merely on a forecasted estimation of the amount of lost sales attributable to the energy efficiency programs from an evaluation vendor with no cogent reference to the utility's overall financial condition. (Order at 8-9). The approved lost revenue rate in the Order just guarantees rate recovery based on projected savings without any consideration for other ratemaking principles. It also disregards the distinction between a utility who comes in for regular rate cases, regularly zeroing out lost revenue totals when resetting rates, versus a utility who does not reset rates but for once every 10, 15, 20 years, resulting in exorbitant lost revenue rate recovery and millions of dollars in difference in terms of what the ratepayers is required to pay. (Tr., vol. 10, pp. 101-103, 110-11; Tr., vol. 12, at 177, 179-81).

These legal conclusions by the Commission are not supported by any reasonable reading of Section 10 with Indiana's Public Service Commission Act ("PSCA"). As a preliminary matter, Section 10 and Indiana's PSCA concern closely related subject matters, i.e., the economic regulation of the State's monopoly investor-owned electric utilities. Therefore, these statutes must be read *in pari materia*, that is, in a way that harmonizes and gives effect to <u>all</u> provisions of each statute. *Sanders v. State*, 466 N.E.2d 424, 428 (Ind. 1984) ("... statutes relating to the same general subject matter are *in pari materia* and should be construed together so as to produce a harmonious statutory scheme.") Moreover, there is nothing in the specific language of Section 10 that evidences any intent to repeal or create an exception to the cost-based ratemaking required by Indiana's PSCA.

When interpreting Section 10 and Indiana's PSCA, the Commission does not have the authority to ignore decades of regulatory precedent. The Commission is bound by its enabling statute and its duty to the ratepayers of Indiana, which clearly forbids this revenue scheme. The

Commission cannot contravene its own authority under Indiana's PSCA and allow Duke customers to fall prey to artificially high prices and monopoly exploitation. Because the Commission has ignored the requirement that each utility's rates must be set on the utility's overall financial condition including total revenue and expense, the approval of Duke's lost revenue rate recovery in the Order is not just and reasonable, and should be declared unlawful by this Court.

2. Whether Order Ignores a Critically Material Issue that Unjustifiably Deviates from Past Precedent

Although the Commission's Order summarizes CAC's and the other consumer parties' expert witness testimony as it relates to certain ratemaking principles, the Order does nothing else to reconcile the approval of a lost revenue rate with ratemaking requirements. The Order ignores available precedent related to the relationship between lost revenues and general rate cases that articulated principles by which to ascertain the reasonableness of lost revenue recovery proposals. Relatedly, the relationship between rate cases and lost revenues, as articulated in the Commission's available precedent, was a material issue raised and put in dispute by the parties before the Commission in this remand proceeding, but it went unaddressed.

Where possible, the rule of decision should be governed by available precedent. *Dillard v. State*, 257 Ind. 282, 274 N.E.2d 387 (1971); *Butler University v. State Bd. of Tax Com'rs*, 408 N.E.2d 1286 (Ind. Ct. App. 1980); *Apple v. Apple*, 149 Ind. App. 529, 274 N.E.2d 402 (1971). The doctrine of *stare decisis* states that, when a court has once laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same. *Emerson v. State*, 812 N.E.2d 1090 (Ind. Ct. App. 2004). *Stare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop in a principled and intelligible fashion; for that reason, any departure from the doctrine demands special justification. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014). Beyond workability, the relevant factors in deciding whether to adhere to the principle of stare decisis include (1) the antiquity of the precedent, (2) the reliance interests at stake, and (3) whether the decision was well reasoned. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

In addition to the longstanding requirements embodied in the Public Service Commission Act, the reasonableness of a lost revenue proposal in relation to periods between rate cases is established regulatory policy in Indiana. *See In re Northern Indiana Public Service Co.*, 2011 WL 3346770 (IURC 2011) (denying lost revenue recovery where utility had not filed a rate case in over twenty years); *In re Indianapolis Power & Light Co.*, 2010 WL 4499412 (IURC 2010) (denying lost revenue recovery in light of significant length of time since utility's last rate case); and *In re Northern Ind. Public Service Co.*, 2015 WL 9605053 (Ind. Util. Reg. Comm'n, Dec. 12, 2015) (limiting lost revenue recovery to four years in light concern about pancaking of lost revenue). The Commission followed these same articulated principles in the Order limiting Duke's lost revenue recovery for delivery of its 2016-2018 Plan:

> Although we have previously approved lost revenues over a measure's life or until a utility's next base rate case, whichever is shorter, Ms. Mims' and the other parties' concerns with pancaking and the increased length of time between base rate cases for utilities in Indiana raise a valid concern. Clearly, pancaking of lost revenue is much less of an issue in an environment where a utility comes in regularly, i.e., every three to five years, for a base rate case. When the Commission's DSM Rules were adopted in the early 1990's, the previous twenty years was characterized by routine and sometimes almost back-to-back rate case filings where utilities' rates were reset on a regular basis. Consequently, recovery of lost revenues at that time was viewed as a tool of limited duration until the utility filed its next base rate case in the not too distant future. However, in the years after adoption of the DSM Rules, utilities have been staying out for ten or more years before filing for a rate case. *E.g., Indianapolis Power & Light*, 19 years between Cause No. 38664 (IURC 8/23/95) and pending Cause No. 44576;

> *Southern Indiana Gas & Electric Co.*, 12 years between Cause No. 39871 (IURC 6/21/95) and Cause No. 43111 (IURC 8/15/07); *Duke Energy Indiana, Inc*., last rate case was filed 13 years ago in Cause No. 42359 (IURC 5/18/04, rh'g denied 7/28/04).

In re Duke Energy Indiana, Inc., IURC Cause No. 43955 DSM 3, 2016 WL 1118794(Ind. Util. Reg. Comm'n, Mar. 9, 2016) (Tr., vol. 12, at 181). Despite this Court reversing and remanding a Commission order on a similar subject matter, the Memorandum Opinion did not appear to do so in a way that directed the Commission to ignore its available precedent and approve whatever the utility put forward. *S. Ind. Gas & Elec. Co. v. Ind. Util. Regulatory Comm'n*, 2017 WL 899947 (Ind. App. 2017). Rather this Court merely required the Commission to put forth specific findings of fact and to correct the mechanics of its overall statutory interpretation (i.e., to reject the entire plan if the Commission finds the lost revenue proposal to be unreasonable, rather than altering the lost revenue proposal to make it reasonable for approval). Yet, the Commission's Order here makes no mention of this established regulatory policy and does not apply the previously articulated principles for examining the reasonableness of lost revenue proposals.

The reliance interests at stake are serious. *See Citizens United*, 558 U.S. at 913. Customers rely on the long-established ratemaking principles to protect them from harm with a utility decides to not file for a general rate case. Customers who are qualified to opt out of eligible energy efficiency rates pursuant to I.C. § 8-1-8.5-9 may have stayed in the programs, paying the rates, because they relied on the Commission's articulated ratemaking principles and the limitation of excessive lost revenues. (Tr., vol. 6, at 158 (reporting that approximately 83% of the eligible load of commercial and industrial ("C&I") customers have opted out, which is approximately (50%) of total C&I load)). Customer groups, including CAC, followed the articulated principles put forth by the Commission to inform its case, pointing out how Duke's 2017-2019 Plan proposal contained the exact same problems the Commission rejected in Duke's

2016-2018 Plan and in other proposals for in prior cases. (Order at 14, 18-21). However, the Commission never performed that analysis in the Order and never applied the articulated principles from precedential cases. The Order also never otherwise addressed why ratemaking is no longer material when establishing a lost revenue rate. Furthermore, the Commission never brought its expertise to bear on this important question.

The decision in the Order also falls short of the standard of being well reasoned. *See Citizens United,* 558 U.S. at 938-39. Outside of the fact that the Order ignores this major articulated set of principles and does nothing to address its departure from precedent, the Order puts forth rationale that is neither reliable nor relevant. The Order concludes that the lost revenue proposal was reasonable because “EM&V is the most established approach to reasonably estimating energy savings and lost revenues associated with EE programs.” (Order at 43). Yet, the Order fails to explain how the application and use of EM&V is any different than what has been done in the past. (*See, e.g.,* Tr., vol. 7, at 42, 47, 49-50, 60-62). EM&V has always been part of the lost revenue rate reconciliation process in terms of providing one component of the rate by assuring that savings were achieved a year after program delivery. This information is used to true up any savings that were forecasted to the actual amounts before plugging that figure into the lost revenue rate. But for the Commission to state that EM&V is somehow the new standard for judging the reasonableness of lost revenue rate proposals serves only to confuse and manufacture uncertainty in an already complicated subject area. It mischaracterizes the role of EM&V and ignores the purpose, creation, and mechanics of a lost revenue rate in the context of utility ratemaking.

These previously articulated principles from the Commission were not applied to Duke’s lost revenue rate recovery proposal, and thus the precedent went unaddressed in its Order.

Relatedly, the Commission must address material issues put into dispute by the parties. The Commission's available precedent and relationship between rate cases and lost revenues were material issues raised before the Commission in this proceeding but went unaddressed by the Commission when it concluded the lost revenue rate recovery of $63.4 million was reasonable for a program that cost $110.2 million to administer. (Tr., vol. 6, at 180; Tr., vol. 7, at 64; *see also* App., vol. 2, pp. 70-71). *See Citizens Action Coalition of Ind.*, 485 N.E.2d at 612. *See also L.S. Ayres & Co. v. Indianapolis Power & Light Co.*, 169 Ind. App. 652, 661, 351 N.E.2d 814, 822 (1976) (citing *General Tel. Co. of Ind. v. PSC*, 238 Ind. 646 (1958)); *Hidden Valley Lake Property Owners Association v. HVL Utilities*, 408 NE 2d. 622 (1980).

3. Whether the Order Approving the Lost Revenue Rate Is Supported by Substantial Evidence

The Order lacks a reasonably sound basis of evidentiary support. The lost revenue rate was not set with reference to the investor owned electric utility's financial data or any consideration for the relationship of the lost revenue rate with the resetting of rates in general rate cases. In addition, the Commission did not consider the complete record.

The substantial evidence standard for reviewing decisions of the Commission authorizes the Court of Appeals to set aside the Commission's findings of fact only when a review of the whole record clearly indicates that the Commission's decision lacks a reasonably sound base of evidentiary support. *Northern Indiana Public Service Co. v. Indiana Office of Utility Consumer Counselor*, 826 N.E.2d 112 (Ind. Ct. App. 2005); *Indiana Gas Co., Inc. v. Office Utility Consumer Counselor*, 675 N.E.2d 739 (Ind. Ct. App. 1997). The most fundamental problem with the evidentiary support for the approved lost revenue rate is the fact that there is no credible evidence that the investor owned electric utility experienced its claimed level of lost revenues or that the rate was established based on other financial aspects of the utility. The reliance upon EM&V as a basis for approving lost revenue rates is nonsensical and not cost- or rates-based.

The Commission also dismissed evidence, completely ignoring critical portions of the record. In the Order, the Commission writes:

> The OUCC, CAC, and Industrial Group offered no basis on which we could make factual findings that a three-year cap, or any other limitation, would allow Petitioner to recover reasonable lost revenues.

(Order at 43).

First, the Order fatally missed the point that lost revenues are a rate, so no matter how lost revenue projection of savings is determined, the duration by which a utility may collect lost revenues should depend on how often a utility resets its rates, especially when it is largely up to the utility to voluntarily make that decision. *See* Ind. Code § 8-1-2-42(a).[1] Second, the Order summarizes the arguments put forth by the consumer parties but fails to mention or otherwise consider the evidence these parties' witnesses put into the record to support these arguments. (Order at 14, 18-20, 42-43).

This Court should find that, in light of the whole record, it is apparent that the Order did not weigh certain, significant portions of the record. *PSI Energy, Inc*., 764 N.E.2d at 773-74. The Court should find that the Commission's findings in the Order "lack[] a reasonably sound basis of evidentiary support." *Id*. at 774 (quoting *City of Evansville,* 339 N.E.2d at 572).

4. Whether the Approved Lost Revenue Rate Is Consistent with Indiana Code Section 8-1-8.5-10

The Commission's Order misinterprets and misconstrues I.C. § 8-1-8.5-10 ("Section 10"). As noted above, the Commission makes a fundamental error in establishing rates under

[1] I. C. § 8-1-39-9(d) also requires a utility to petition for review and approval of the utility's basic rates and charges before the expiration of the approved seven (7) year plan in that statute.

Section 10 without any reference or consideration of ratemaking practices and the requirements of Indiana's Public Service Commission Act ("PSCA"). This has caused a number of collateral interpretation errors. As discussed at length above, the most basic error is the Commission's failure to reconcile its approval of a lost revenue rate without any reference or application of ratemaking practices. It also fails to consider ratepayers in making a determination as to the reasonableness of this rate.

In setting rates, the Commission must examine every aspect of the utility's operations and the economic environment in which the utility functions to ensure that the data it has received are representative of operating conditions that will, or should, prevail in future years. Ind. Code § 8–1–2–68 (1913). The Commission did not conduct this examination in setting lost revenue rates solely referencing an evaluator's projected, forecasted savings levels.

This Court should consider the persuasive authority from the New Mexico Supreme Court. *In AG of N.M. v. N.M. Pub. Regulation Comm'n*, 150 N.M. 174, 2011-NMSC-034, 258 P.3d 453, 2011 N.M. LEXIS 386, the New Mexico Supreme Court found in an analogous situation that the energy efficiency "adder" rates, awarded to address lost sales due to implementation of energy efficiency programs, were arbitrary and unlawfully adopted because New Mexico's Public Regulation Commission did not inquire into the utilities' revenue requirements or any of the traditional elements of the ratemaking process as part of determining whether these proposed adder rates were just and reasonable. (*Cf.* NMSA Sections 62-17-1 to 62-17-11 to Indiana's Section 10 and PSCA.)

The lost revenue rates approved in this Order also hinders, rather than promotes, the overall goal of Section 10, which is to promote the implementation of energy efficiency by Indiana's investor-owned monopoly electric utilities. Other decisions from the Commission speak to the promotion of energy efficiency, and why it is within the public interest to promote saving customers money. *See, e.g., In re Investigation of DSM Programs*, Cause No. 42693 at 32, 2009 WL 4886392 (Ind. Util. Reg. Comm., Dec. 9, 2009). However, the Commission's recent departure from its previously articulated principles for judging lost revenue rate proposals, which reconciled lost revenue rates with the mechanics of resetting rates, provides utilities with windfall gains and a perverse motivation to not file for general rate cases. It also would not be appealing for an "industrial customer" as defined in I.C. §§ 8-1-8.5-9 and 10 to remain in and pay for administrative costs for utility-sponsored energy efficiency programs, knowing that the utility is receiving $63,448,839 in lost revenue profit for a program that cost $110,233,151 to run. (Tr., vol. 6, at 158 (reporting that approximately 83% of the eligible load of commercial and industrial ("C&I") customers have opted out, which is approximately (50%) of total C&I load)). In fact, the approval of this lost revenue rate does "little to encourage investment in energy efficiency unless combined with other policy levers. Our analyses indicate that having an LRAM policy itself is not currently associated with higher levels of energy efficiency effort (program spending) or achievement (energy savings) than are found in states without an LRAM policy." (Tr., vol. 10, at 89-90). The Court should grant little deference to the Commission's interpretation of its authorizing statute, Indiana's PSCA. In this case, that lack of deference is amply justified too by the Commission's repeated failure in its Order to reasonably interpret Section 10 in a way that harmonizes the establishment of a rate pursuant to Section 10 with Indiana's PSCA and ratemaking basics.

B. Whether the Order's Approval of Duke's Energy Efficiency Goal is Contrary to Law and Failed to Address Several Material Issues

Despite Duke's testimony to the contrary, Duke's newly proposed Section 10 Plan for 2017-2019 asked for approval of an energy efficiency goal that is lower than the energy efficiency goal rejected by the Commission in Duke's previous year's filing. (*Cf*. Tr., Vol. 8, at 9, to Evid. Hr. Tr., vol. 2, at 150).

CAC "presented evidence on how much energy Petitioner is proposing to save in its 2017-2019 plan and...how it is not reasonable that Petitioner is proposing to reduce its efficiency goal in this application from DSM-3 to DSM-4." (Order at 13). CAC presented evidence on how Duke's "[Market Potential Study] identified more than twice as much efficiency that [Duke] could achieve than what it is proposing here." (*Id*.) CAC "noted that [Duke] is proposing to save just ~0.7% of 2015 retail sales each year in 2017-2019, while there are currently 16 states that are achieving energy efficiency savings of 1 % or more, and the leader is achieving nearly 3%." (*Id*. at 14).

Through the Commission's IRP stakeholder process, CAC provided an extensive analysis of Duke's 2015 IRP, (Tr., vol. 11, pp. 4-101; Confidential Tr., vol. 1, pp. 66-167), as well as the manner by which Duke translated energy efficiency figures from its IRP to its 2017-2019 Plan. (Order at 15).

Duke stated that its new energy efficiency goal and plan is based on its 2015 Integrated Resource Plan, and Duke argued that its 2015 IRP contained no constraints on any of the energy resources that were optimized in the IRP. Specifically, Duke argued that no available resource was limited or constrained in the 2015 IRP model. (Tr., vol. 10, at 28; Evid. Hr. Tr., vol. 2, at 103, lines 8-11). In other words, no resource was forced in insofar as that would mean said resource would not have been the chosen as a resource based on the economics. (Evid. Hr. Tr., vol. 2, at 103, lines 22-25).

However, Duke admitted at the hearing that not only did their modeling group have the ability to force in a resource should they decide to do so, (*id*., lines 13-21), but that Duke did indeed force in a resource. Specifically, Duke's IRP witness in this case admitted that Duke forced in a 448 megawatt natural gas combine cycle at year 2020 in its preferred, chosen plan from the IRP model, i.e. Duke did not allow the IRP model to economically select the natural gas combine cycle. (*Id*. at 81, l.6-82, l. 4; 107, lines 5-8; Confidential Tr., vol. 1, at 23-24, cell I-117.)

Likewise, Duke claimed that the energy efficiency bundles were allowed to be optimized or economically selected by their IRP modeling tool that balances the resources based on cost. Although Duke's IRP Witness was not able to verify with the modeling files any specific constraints put in by the modeler due to his inability to read IRP modeling files, a run from the IRP model was admitted into the record which showed that minimum and maximum constraints were used in the modeling run in the IRP for the Energy Efficiency Base Bundle (Evid. Hr. Tr., vol. 2, p. 89, l. 5-p.91, l.10). The Energy Efficiency bundle that was selected by the IRP, called the Base Bundle, was "created using the assumption that [Duke] will be implementing the currently approved and proposed portfolio of EE programs during the IRP analysis period. For periods beyond 2018, the assumption was made that the composition and size of the future annual portfolio impacts were the same as in the 2018 portfolio." (Order at 15; Tr., vol. 8 at 89) In other words, Duke's energy efficiency resource that it plugged into the IRP was just based off the energy efficiency goals from the 2016-2018 Plan that the Commission rejected as not compliant with Section 10 requirements in DSM-3; it was not based off the economic optimization of the IRP model. (Order at 15; Tr., vol. 10, at 153, 155-56).

CAC's expert witness also presented significant evidence as to how Duke's "load forecasters would have needed to know exactly what bundles of energy efficiency were selected in the preferred plan in the IRP ahead of running the actual model…" (Order at 17). In other words, CAC argued that Duke hardwired the energy efficiency amount into the only IRP bundle that was selected by the IRP modeling tool.

Duke's IRP witness also confirmed that it modeled for more load than it needs. Specifically, Duke's IRP witness confirmed that Duke modeled a reserve margin, meaning the extra margin of capacity typically required by the grid operator, at or above 13.6%, (Evid. Hr. Tr., vol. 2, p. 82, l.9-19; Tr., vol. 8, at 32), despite the grid operator, MISO, requiring only 7-7.5% reserve margin over and above the capacity that is needed to serve Duke's customers. (Tr., vol. 9, at 92). Duke admitted that this can greatly impact which resources are selected and increase the amount of generation that would be required to serve the same load. (Evid. Hr. Tr. at 82, l.23-83, l.4). For example, "if the model was looking at year 2018, for instance, and had not yet met the 13.6 percent requirement, the model would have to add something so that it would meet that requirement." (Id. at 83, l.5-11).

Duke argued that its energy efficiency plan is consistent with its 2015 IRP. As the case progressed, it was discovered, however, that Duke used a six-step process to create the Energy Efficiency bundle plugged into the IRP (the Base Bundle) and then translated that to a proposed set of goals for this DSM plan. (Order at 15). CAC disaggregated and explained the convoluted six-step process by which Duke created the "Base" energy efficiency bundle for the IRP and then translated it to a proposed set of goals for this DSM plan. (Order at 15; Tr., vol. 10, pp. 153-163).

CAC's expert expressed concern about "(1) the complexity of this process since review of the 'consistency' between the IRP and the DSM plan will be just as opaque in future proceedings and (2) the extent to which this reconciliation means that the IRP is undercounting savings." (Order at 16-17).

CAC presented evidence on how the following issues with the reconciliation means that the IRP is undercounting savings and resulting in a smaller energy efficiency goal in the filing: (1) the freerider adjustment is different with free rider savings being taken out at 19% and added back in at 25%, (2) the translation of cumulative to incremental savings in Step 5a is completely undescribed, and (3) the half-year convention in Step 3 distorts the annual savings total, are the least of the Commission's concerns with this reconciliation by Duke. (Tr., vol. 10, pp. 163-65).

The Commission ultimately relied on evidence to make a finding without considering the evidence in the record discrediting it. The Commission concluded that the IRP was an optimal balance of energy resources and that the IRP was consistent with this 2017-2019 energy efficiency plan. (Order, pp. 36-38). CAC raised several material issues as it relates to the Commission's Director's Report on Duke's 2015 IRP, as well as other outstanding issues related to the IRP economic optimization model.

CAC fully participated in Duke's 2015 IRP stakeholder process, as described above. The Director's Draft Report highlighted the transparency issue CAC identified with Duke's modeling of energy efficiency: "Moreover, the Joint Commenters, [on page 7 of their comments] raised important questions about the amount of EE that was considered and the need for transparency." (CITE Director's draft report at 4.) In particular, CAC's comments that the Director referenced in his Draft Report listed how Duke developed six criteria that ultimately confined energy efficiency as a resource to plug into the model. Duke "did not provide data to substantiate how much energy efficiency was eliminated with this methodology" which CAC asserted "creates an artificial constraint and arbitrarily reduces the amount of efficiency that the model could select." Attachment AS-2 at 7. In the Director's Final Report, it did not address this issue, and Duke never clarified how much energy efficiency was eliminated based on these constraints in the IRP Stakeholder process either. Thus, CAC again raised this issue in the context of this proceeding, but the Commission failed to address it, despite the fact their Director flagged it as a material issue for the Commission in making its conclusion.

1. As a separate issue, the Director's Draft Report also found, "However, it was not clear how Duke constructed the bundles of EE and demand response resources. Moreover, because many of the resource portfolios were predetermined, meaning they were not the result of optimization, it is not clear how the EE and demand response bundles would have been optimized to treat EE and demand response as resources on as comparable a basis as possible to any other resource. Ideally, EE and demand response should be simultaneously optimized with the other resource alternatives, but it is not clear that occurred." Page 7 of Draft Report.
   1. In its reply to the Director's Draft Report, Duke told the Director that Duke did not hardwire the results in advance of resource optimization and that Duke's IRP model did not limit the amount of EE and demand response in any year of the analysis. Specifically, Duke says the following:

      The Duke Energy Indiana IRP model did not limit the amount of EE and demand response in any year of the analysis. To lessen any confusion, the group of lowest cost EE bundles will be collectively referred to as the Base DSM Portfolio and the higher cost EE bundles will be collectively referred to as the Incremental DSM Portfolio. ***The first bundle of the Base DSM Portfolio was used to seed the process, but it was not hardwired into the plan.***

   (CITE.) The Director quotes this language in his Final Report. (Final Report page 6). However, the Director bases this on Duke's word, citing a meeting with Duke employees earlier in the final report as clarifying many of IRP Staff's questions and concerns on this point. However, through the current proceeding that is being appealed, it became evident that the cited personnel (Attorney Melanie Price, Experts Scott Park, Dick Stevie, Phil Stillman, and Tom Wiles) who attended the meeting, including the expert charged with speaking to the modeling files, Scott Park, cannot read the actual modeling files. (CITE TRANSCRIPT[1] However, Mr. Park, the IRP expert in this proceeding, said on more than one occasion that he does not know how to read these IRP modeling files, which form the basis for the IRP and this filing. (Transcript B-26-B-28.).) It also became evident through the current proceeding that Duke credibly argue that its energy efficiency bundles were not limited in the IRP model, thus the initial concerns about energy efficiency modeling raised in the Draft Report do and should stand. (CITE.) Thus, the initial concerns about the DSM modeling in Duke's 2015 IRP have reemerged as DEI's misrepresentations have misled the Director in the making of his Final Report.

VI. CONCLUSION

Wherefore, for all the reasons stated herein, CAC respectfully requests this Court to determine that the Commission's December 28, 2017 Order fails the standard of just and reasonable, ignores critically material issues including available precedent, is not supported by substantial evidence, and is otherwise not in accordance with the law.

Respectfully submitted,

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WORD COUNT CERTIFICATE

The undersigned hereby verifies, in accordance with Ind. Appellate Rule 44, that the foregoing Appellant's Brief contains no more than 14,000 words as calculated by the word count function of the word processing software used to prepare the brief, excluding those parts of the brief exempted by Ind. Appellate Rule 44C.

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CERTIFICATE OF SERVICE

The undersigned certifies that, on May 11, 2018, the foregoing was filed electronically using the Court's IEFS pursuant to Rule 68(C) and that service was made on the following through E-Service using the Public Service Contact List in accordance with Rules 24(C) and 68(F)(1):

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