STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

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

JOINT BRIEF IN OPPOSITION TO
NIPSCO'S PROPOSED ORDER

NIPSCO Industrial Group, the Indiana Office of Utility Consumer Counselor, and Citizens Action Coalition of Indiana, Inc. (collectively the "Consumer Parties") submit this brief in order to address fundamental legal defects in the proposed order submitted by Northern

Indiana Public Service Company ("NIPSCO"). The relief sought by NIPSCO is contrary to Indiana law. NIPSCO's petition, therefore, should be denied.

I. INTRODUCTION

The basic question of law presented in this case is whether NIPSCO is entitled to rate recovery for costs incurred prior to the order date in this cause, and before any grant of the required certificate of public convenience and necessity (CPCN). The legal analysis is controlled by the decision in Office of Utility Consumer Counselor v. Duke Energy Indiana, 183 N.E.3d 266 (Ind. 2022), which reversed a grant of recovery for the same type of costs, incurred prior to the order date, as a violation of the prohibition against retroactive ratemaking. The same principles and reasoning apply here, barring the relief sought by NIPSCO.

In all material respects, the holding in Duke Energy governs the parallel circumstances presented in this case. Duke, like NIPSCO, sought rate recovery for compliance costs associated with environmental regulations applicable to coal ash residuals. As here, the costs at issue in Duke Energy were not reflected in base rates, as established in the utility's most recent rate case. The costs, furthermore, were incurred prior to the grant of regulatory approval. In that situation, the Supreme Court held the allowance of rate recovery was barred by the statutory restriction prohibiting retroactive ratemaking. The Court's decision was unambiguous in holding that, for retroactive ratemaking purposes, the date of the Commission's order controls, not the date of the utility's petition.

NIPSCO cannot avoid the dispositive effect of the Duke Energy decision by arguing that this case involves the Federal Mandate Statute, Ind. Code ch. 8-1-8.4, as distinct from the general rate case context. Duke, too, premised its request for relief on the Federal Mandate Statute, but the Commission found that proposal untimely. The Supreme Court explicitly addressed the

Federal Mandate Statute, analyzing the statutory language and concluding that it requires Commission approval before the utility incurs the cost. NIPSCO now argues the Court's determination was dicta, but fails to demonstrate it was a mistake. NIPSCO has the burden of establishing a statutory exception to the general rule barring retroactive ratemaking, but nothing in the Federal Mandate Statute expressly authorizes recovery of costs incurred prior to the issuance of the necessary CPCN.

NIPSCO attempts to distinguish Duke Energy on the premise that the utility there included an allowance for coal ash compliance in its prior rate case and the costs simply turned out to be more than expected, whereas NIPSCO chose not to include any coal ash increment at all in its last rate case and instead undertook to seek recovery under the Federal Mandate Statute. In both instances, however, the base rate recovery is binding until changed by order of the Commission. Just like Duke, NIPSCO is seeking to readjudicate the relief granted in its last rate proceeding, by adding recovery for subsequent costs that it incurred without any regulatory preapproval. In essence, NIPSCO proposes to replicate the rate recovery it might have sought had it made a different request in the prior proceeding. But NIPSCO elected the rate relief it secured in its last rate case, and cannot retroactively amend the scope of that recovery.

The unstated premise of NIPSCO's proposed order is an erroneous assumption that the Federal Mandate Statute simply must entitle the utility to full recovery of all costs relating to compliance with federal environmental regulations. To the contrary, the tracker statute provides special ratemaking treatment for specified costs within its scope, and no more. Absent tracker treatment, the utility is left to the ratemaking mechanisms otherwise provided by law, which governed recovery long before the Federal Mandate Statute was enacted. The question is not whether NIPSCO should comply with federal mandates – of course it should. The question is

whether NIPSCO has satisfied the statutory prerequisites necessary for the special ratemaking treatment with respect to costs incurred in the absence of a CPCN. It has not.

NIPSCO's alternative theory is that it can obtain the relief to which it is not entitled under the Federal Mandate Statute by relying on a different statute and labelling the recovery an Alternative Regulatory Plan (ARP). The ARP statute, however, like the Federal Mandate Statute, requires a grant of Commission approval before any ARP can be implemented. It does not authorize retroactive recovery of costs incurred prior to the necessary regulatory approval. Furthermore, the flexibility afforded by the AUR Act involves incentive ratemaking, time-of-use rates and the like, not the after-the-fact suspension of legal principles for the unilateral benefit of a utility that finds itself otherwise incapable of complying with statutory requirements. The statutory ARP factors concern market conditions, technological advances, regulatory redundancy and efficiency. NIPSCO has not shown how those factors are addressed by a proposal to excuse a retroactive ratemaking defect in its request for relief.

II. LEGAL ANALYSIS

The legal question here does not require a determination of fault on the part of NIPSCO. The Consumer Parties do not have a burden to demonstrate that NIPSCO's expectations were unreasonable, or that NIPSCO should have adopted a different approach in its last rate case. That is because it is not the case that NIPSCO is automatically entitled to the rate relief it seeks, absent some showing of misconduct or dereliction of duty. This proceeding is governed by statute and by the applicable principles of Indiana law. Unless the legal requirements have been satisfied, the Commission is not authorized to grant the requested relief. The Federal Mandate Statute has a defined scope and essential prerequisites. For anything outside that scope, or any recovery for which the statutory conditions have not been satisfied, NIPSCO is left to the

ratemaking mechanisms otherwise provided by law. The only question is whether NIPSCO has fulfilled the statutory requirements for the special ratemaking available under the Federal Mandate Statute. It has not.

A. The Duke Energy Decision Is Dispositive Here

The Supreme Court's decision Duke Energy is controlling in the parallel circumstances presented in this case. As the Court explained, the prohibition against retroactive ratemaking is grounded on longstanding construction of the Commission's statutory authority, which calls for determination of rates to be followed "in the future." See 183 N.E.3d at 268 (quoting Ind. Code §8-1-2-68). See also Public Service Commission v. City of Indianapolis, 235 Ind. 70, 89, 131 N.E.2d 308, 315 (1956). The Court pointed out the costs at issue were incurred at a time when the rates established by the Commission in Duke's prior rate case were in effect. See 183 N.E.3d at 270. Duke's later request to add those historical costs to its subsequently proposed rate increase, therefore, was an effort to "re-adjudicate costs for a time period covered by a prior order." Id. "Here the commission violated the bar against retroactive ratemaking by readjudicating in 2020 coal-ash costs governed by its 2004 rate order. Thus, the commission exceeded its statutory authority." Id.

Importantly, the Duke Energy decision confirms that the dividing line between unlawful retroactive and lawful prospective ratemaking is the point at which a rate order is issued by the Commission, *not* the date when a utility files its petition. See 183 N.E.3d at 268 (holding recovery of costs "incurred before the June 2020 order" constituted retroactive ratemaking); id. at 270 (holding prior rate order governed the period "until the current order in June 2020"); id. ("Our order pertains only to coal-ash costs that Duke incurred before the commission's June 2020 order."); id. (reversing "the portion of the commission's June 2020 order relating to coal-

ash costs incurred before its order"). The Court held repeatedly and unambiguously that recovery of costs incurred prior to the *order* date constitutes retroactive ratemaking.

Furthermore, while reversing an order that premised recovery of pre-order coal ash costs on traditional ratemaking principles, the Supreme Court also specifically addressed the Federal Mandate Statute as well. See 183 N.E.3d at 270. Noting that certain statutes provide for pre-authorization to track specified expenses in rates, the Court addressed the Federal Mandate Statute in particular, and concluded that statute requires prior Commission approval *before* the costs are incurred. "Although we have not yet interpreted the statute, we note it is framed in the future tense and speaks of 'projected' costs for 'proposed' projects, see *id.* §§ 8-1-8.4-6(a), 6(b), 6(b)(1), 7(b)(1), 7(b)(2), which would seem to require commission approval **before** a utility incurs the cost." See 183 N.E.3d at 270 (emphasis in original).

The Federal Mandate Statute was at issue in Duke Energy because that was initially Duke's statutory basis for seeking recovery of its coal ash costs. See Cause No. 45253 (June 29, 2020) at 48. In the rate case order, the Commission concluded relief under that statute was untimely. See id. ("*Absent the timing of the request* these costs would have been the type of costs that are recoverable under the federal mandate statute.") (emphasis added). The Supreme Court, then, examined the language of that statute and concluded that it authorized recovery only for costs incurred after a grant of pre-approval by the Commission. See 183 N.E.3d at 270. The Federal Mandate Statute thus did not cure the retroactive ratemaking defect.

Importantly, the Federal Mandate Statute requires the utility to secure a CPCN from the Commission as a prerequisite to tracking the identified costs in rates. See Ind. Code §8-1-8.4-6. As the Supreme Court pointed out, 183 N.E.3d at 270, the statute is phrased entirely in the future tense and provides only for prospective recovery of costs subsequent to approval. See Ind. Code

§§8-1-8.4-6(a) (public convenience and necessity "will be served"), 6(b) (project "will allow" compliance), 6(b)(1) ("proposed" compliance project), 7(b)(1) (public convenience and necessity "will be served"), 7(b)(2) (approval of "projected" costs). The Supreme Court correctly construed the statute as requiring the utility to fulfill the CPCN prerequisite and secure Commission approval before incurring the costs.

In all respects, accordingly, the decision in Duke Energy establishes the applicable law governing the disposition of this case. The relief sought by NIPSCO is foreclosed as a matter of law because it contravenes the prohibition against retroactive ratemaking.

B. NIPSCO Cannot Distinguish the Duke Energy Decision

NIPSCO attempts to distinguish the Duke Energy case but cannot avoid the conclusive impact of the Supreme Court's decision. First, NIPSCO contends Duke Energy only addressed traditional ratemaking, and the Court's analysis of the Federal Mandate Statute should be disregarded as dicta. NIPSCO further argues the context is different, because Duke's prior rate case order included a level of coal ash recovery but NIPSCO elected not to include coal ash costs in its last rate case. NIPSCO also relies on selected Commission orders that pre-date the Duke Energy decision. Finally, NIPSCO asserts there are practical realities that precluded a timely petition under the Federal Mandate Statute here. None of those considerations alters the legal deficiencies in the request for relief in this case.

1. Traditional ratemaking and the Federal Mandate Statute

NIPSCO contends this case differs from Duke Energy because that was a rate case and this is a proceeding under the Federal Mandate Statute. See NIPSCO Proposed Order at 19-20. According to NIPSCO, coal ash remediation costs are recoverable through depreciation in a rate case, but Duke did not seek such recovery in its rate case. Id. Of course, neither did NIPSCO.

Just like Duke, NIPSCO is seeking recovery of costs that were not reflected in the depreciation component of its base rates. Just like Duke, NIPSCO seeks recovery under the Federal Mandate Statute. Because Duke's request under that statute was untimely, its fallback position relied on traditional ratemaking (see Cause No. 45253 (June 29, 2020) at 48), but the Supreme Court concluded such retroactive recovery was also contrary to the terms of the Federal Mandate Statute. See 183 N.E.3d at 268-70. Here, by the same token, the theory that the costs might be recoverable through depreciation in a rate case is immaterial to the request for relief that was actually made by the utility.

NIPSCO suggests the Supreme Court's reading of the Federal Mandate Statute should be disregarded as dicta. See NIPSCO Proposed Order at 21-22. But in concluding the Federal Mandate Statute requires Commission approval "**before** a utility incurs the cost" (see 183 N.E.3d at 270) (emphasis in original), the Court based its analysis on the statutory terms. The Court cited five statutory provisions supporting the conclusion that the Federal Mandate Statute is "framed in the future tense and speaks of 'projected' costs for 'proposed' projects." Id. Clearly, the Court grounded its determination on the language of the statute. The conclusion cannot be dismissed as a careless or uninformed comment. It is not enough for NIPSCO to say the Court's statutory interpretation was dicta – NIPSCO has to demonstrate it was wrong.

NIPSCO cannot deny that the Federal Mandate Statute, as the Supreme Court observed, is phrased in the future tense and speaks in terms of "projected" costs and "proposed" projects. See NIPSCO Proposed Order at 22-23. NIPSCO strives to construe the statutory language as nevertheless compatible with potential recovery of costs incurred prior to Commission approval, arguing only that the language does not expressly forbid such recovery. Id. But what is lacking in NIPSCO's arguments is identification of any provision that explicitly authorizes recovery of

pre-order costs. As explained by the Supreme Court, the framework of analysis is that Indiana law prohibits retroactive ratemaking, subject to limited statutory exceptions involving "pre-authorization" mechanisms. See 183 N.E.3d at 270. Absent a clear indication to the contrary, therefore, the default is that the general rule prevails. NIPSCO's attempt to work around the future tense phrasing fails to establish any error in the Supreme Court's interpretation.

NIPSCO also points to two other statutes that require a CPCN prior to construction, urging an inference that the lack of such a provision in the Federal Mandate Statute must mean pre-CPCN costs are recoverable. See NIPSCO Proposed Order at 22. The difference is that a CPCN is not required to comply with federal mandates. Indeed, a Federal Mandate tracker is a voluntary mechanism, so a CPCN is not necessary at all. A utility is obligated to comply with federal law, regardless of the status of any rate proceeding. In the Federal Mandate context, then, a CPCN is a prerequisite only to rate recovery, not a required step that must be satisfied before commencing compliance activities. The existence of other statutes calling for a CPCN before construction does not show the Supreme Court misconstrued the Federal Mandate Statute as covering only costs incurred after Commission approval.

NIPSCO advocates reading statutes "holistically." See NIPSCO Proposed Order at 23. The holistic approach, however, is *in pari materia* with the general bar against retroactive ratemaking under Indiana law. As the Supreme Court reasoned, pre-authorization statutes are in the nature of exceptions, and hence limited to their terms. The Federal Mandate Statute requires a CPCN with prospective orientation. NIPSCO has not shown the Court misread that statute.

2. NIPSCO's election to exclude coal ash recovery in its last rate case

In Duke Energy, the Supreme Court noted that in Duke's previous rate case the Commission granted a level of recovery for coal ash costs through the depreciation allowance of decommissioning costs for plant assets, but the "actual costs turned out to be more than Duke expected." See 183 N.E.3d at 270. The later effort to recover the higher level of costs, then, amounted to an attempt to readjudicate the relief granted in the prior order. The Court held that "utilities may not re-adjudicate costs for a time period governed by a prior order." Id.

NIPSCO emphasizes that, in its last rate case, it chose not to seek inclusion of coal ash costs in base rates at all, and instead announced that it planned to address those costs in its next rate case or rely on a future Federal Mandate filing to seek recovery. See NIPSCO Proposed Order at 20-21. According to NIPSCO, that distinguishes this case from Duke Energy, where the utility secured a rate allowance that turned out to be less than actual costs. Id. To the contrary, the situation here is the same: NIPSCO elected to include no coal ash costs in its depreciation study in the last rate case, those base rates remain in effect to this day, but now NIPSCO is seeking recovery of subsequently incurred coal ash costs not provided for in its most recent rate case. Just as the Supreme Court held in Duke Energy, the ratemaking approved in the last rate proceeding governs the subsequent period, unless and until revised by order of the Commission.

NIPSCO's proposal, in effect, is to replicate the ratemaking treatment it might have received if it had pursued a different approach in the last rate case. See NIPSCO Proposed Order at 15. That can only be regarded as an attempt to readjudicate the relief granted in the prior rate proceeding, exactly what the Supreme Court found to be impermissible retroactive ratemaking in

Duke Energy. Like Duke, NIPSCO received what it sought in the last case, and cannot now retroactively revise that rate adjudication.

NIPSCO suggests the context here is different, because NIPSCO announced its intentions and put the parties on notice that it anticipated a potential Federal Mandate filing instead of seeking an inclusion in base rates. See NIPSCO Proposed Order at 21. However, the provision of notice is not the touchstone of the retroactive ratemaking analysis. Had Duke purported to reserve an option to add to the allowed coal ash recovery in its prior rate case, the result would be the same: the adjudicated rates would still be controlling until altered by the next rate order. Moreover, NIPSCO admits that at the time of the last rate case it knew coal ash compliance costs were "forthcoming" and it was able, at that time, to present cost estimates. Id. at 26. An announced plan to file a Federal Mandate petition in the future does not mean the ultimate filing, whenever made, would automatically be timely. Duke, too, sought relief under the Federal Mandate Statute, but that request was untimely. See Cause No. 45253 (June 29, 2020) at 48.

3. Reliance on prior Commission orders

NIPSCO cites four Commission orders in prior cases as support for the proposition that costs incurred prior to the Commission order may be recoverable in tracker proceedings. See NIPSCO Proposed Order at 23. All of those orders, however, pre-date the Supreme Court's decision in Duke Energy. As explained supra, the Court's decision there enforced the bar on retroactive ratemaking, held that the Commission order date controls, and construed the Federal Mandate Statute as requiring Commission approval before the costs are incurred. The Court's decision is the conclusive determination of Indiana law. The Commission is not at liberty to disregard that decision, regardless of earlier regulatory practice.

Notably, in three of the four orders cited by NIPSCO, retroactive ratemaking was not a disputed issue. See Cause No. 45052 (April 24, 2019); Cause No. 45007 (Sept. 19, 2018); Cause No. 44971 (Dec. 28, 2017). The only instance where an objection was raised was the Duke FMCA-4 case, where the Commission correctly construed the Federal Mandate Statute as permitting only prospective rate recovery, stating:

> The statute establishes that the right to cost recovery is prospective: the Commission must find that the compliance project will serve the public convenience and necessity *in the future*. . . . Allowing the recovery of costs incurred before the Commission has authorized the utility to do so undoes the purpose of Commission oversight. The point of a CPCN proceeding is to determine whether the project and its attendant costs are prudent *before* the utility passes such costs to consumers.

See Cause No. 44367-FMCA-4 (Sept. 18, 2019) at 29 (emphasis in original). As noted in the denial of reconsideration (see Cause No. 44367-FMCA-4 (Dec. 4, 2019) at 2-4), the Commission allowed recovery for post-petition costs, although the analysis of the statutory terms did not explain that deviation from the prospective effect of a CPCN. In any event, none of the four orders cited by NIPSCO were appealed, and there was no judicial determination on any question of retroactive ratemaking. Nothing in those orders can be regarded as superseding the Supreme Court's decision in Duke Energy.

4. Practical realities

Finally, NIPSCO argues there were "practical realities" that "would make it impossible" for a utility to comply with federal mandates without incurring costs that would have to be disallowed. See NIPSCO Proposed Order at 23-24. Essentially, NIPSCO's position is that it acted with reasonable diligence in commencing this proceeding once it knew for sure that its plan would be approved by IDEM and it had completed RFPs to ascertain the projected costs. But as NIPSCO admits, it was able to put forward cost estimates for ratemaking purposes in its

last rate case, as filed in 2018. Id. at 26. NIPSCO secured IDEM approval in March 2021, but did not file its petition until a full year later. Id. at 23. Of course, the Federal Mandate Statute does not require IDEM approval, and does not state the estimated costs must be based on an RFP. See Ind. Code §8-1-8.4-6(b). The margin of error allowed under the statute is substantial, permitting actual costs to exceed the estimate by as much as 25%, and even beyond that cushion, excess costs can be recovered in the utility's next rate case with specific justification. Id. §7(c)(3). NIPSCO has not demonstrated it was impossible to seek a CPCN prior to proceeding with construction and basically completing the entire project before an order could be issued.

NIPSCO's assumption, in any event, is that the Federal Mandate Statute must allow full recovery of every nickel spent on compliance with federal law. That is not the case. If that were so, Duke's request for recovery under the Federal Mandate Statute would have related back to the commencement of compliance activities years earlier. The statute requires a CPCN and authorizes recovery for subsequently incurred costs, and no more. Indeed, for about a hundred years, before the Federal Mandate Statute was enacted, public utilities in Indiana were obligated to comply with federal law without special ratemaking treatment. Applying the statutory tracker prospectively does not disable a utility from taking appropriate steps to avoid violations of federal law. It only means that for costs outside the limits of that statute the utility is subject to the ratemaking mechanisms otherwise provided by law.

C. The ARP Statute Does Not Authorize Retroactive Relief or Excuse Past Deviations from Statutory Requirements

As an alternative theory to the contention that the Federal Mandate Statute permits recovery of pre-CPCN costs, despite the Supreme Court's contrary conclusion, NIPSCO suggests the same relief can be afforded by characterizing the proposal as an ARP pursuant to

Ind. Code ch. 8-1-2.5. See NIPSCO Proposed Order at 25-26. That alternative rationale is equally contrary to Indiana law, in multiple respects.

Like the Federal Mandate Statute, the ARP statute, too, is framed in prospective terms, requiring presentation of a proposed plan subject to Commission approval. See Ind. Code §8-1-2.5-6(c) (petitioning utility must file an ARP "proposing how the commission *will* approve" the requested deviations from traditional regulation) (emphasis added); id. §6(d) (Commission may approve, reject or modify an ARP "[a]fter notice and hearing"); id. (modifications to the "proposed" plan require utility consent); id. §6(f) (utility may withdraw a "proposed" plan "before the commission's approval"). By the same reasoning applied by the Supreme Court to the Federal Mandate Statute (see 183 N.E.3d at 270), the ARP statute does not authorize self-help implementation prior to a Commission order, and does not provide for retroactive relief reaching back to the period before regulatory approval.

Furthermore, the purpose of the ARP statute is not to grant rate relief in instances where the utility otherwise cannot comply with the statutory requirements. The types of potential ARPs recited in the statute focus on the "price, quality, reliability, and efficiency" of the utility's services (§6(a)(1)), utilize incentive ratemaking based on "market or average prices, price caps, index based prices, and prices that . . . use performance based rewards or penalties" (§6(a)(2)), or involve "time-varying" or alternative pricing "such as time-of-use or off-peak pricing, critical peak pricing, variable peak pricing, and real-time pricing" (§6(a)(3)). The relief sought by NIPSCO is not remotely the kind flexible ratemaking contemplated by the ARP statute. What NIPSCO seeks is after-the-fact dispensation for a rate request in contravention of applicable law. A proposed retroactive departure from a legal requirement is contrary to the public interest.

NIPSCO recites the statutory considerations applicable to a proposed ARP. See NIPSCO Proposed Order at 25. Those factors address technological advances, market conditions, the existence of other regulatory oversight, the promotion of efficiency, competitive forces, and other benefits. See Ind. Code §8-1-2.5-5(b). While seeking relief under that statute, NIPSCO does not address how those factors have any bearing on its proposal. Instead, NIPSCO's premise is that it proceeded in reliance on regulatory practice but was then surprised by the Supreme Court's decision in Duke Energy. See NIPSCO Proposed Order at 26. That rationale falls outside the scope of the statutory considerations. Nothing in the ARP statute contemplates proposals for relief from miscalculations of law.

The claim of surprise, in any event, does not establish the basis for an ARP. After all, the Supreme Court's retroactive ratemaking holding was supported by precedent from 1956. See 183 N.E.3d at 268-70 (relying on Public Service Commission v. City of Indianapolis, 235 Ind. 70, 131 N.E.2d 308 (1956)). The interpretation of the Federal Mandate Statute was based on the statutory language. See 183 N.E.3d at 270. On the same basis, the Commission explained in 2019 that cost recovery under the Federal Mandate Statute is prospective only. See Cause No. 44367-FMCA-4 (Sept. 18, 2019) at 29. Even though NIPSCO knew coal ash costs were forthcoming, with sufficient particularity to present an alternative ratemaking proposal in 2018 (see NIPSCO Proposed Order at 26), NIPSCO still failed to commence this proceeding until it was too late to secure a CPCN until after the project was completed. The circumstances are not so extraordinary as to warrant a departure from law through the approval of an ARP.

III. CONCLUSION

NIPSCO's claim for relief is contrary to law. The petition should be denied.

Respectfully submitted[1],

LEWIS KAPPES, P.C.

/s/ Todd A. Richardson
Todd A. Richardson, Atty. No. 16620-49
Joseph P. Rompala, Atty. No. 25078-49

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

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

CERTIFICATE OF SERVICE

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

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

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

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

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

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

/s/ Joseph P. Rompala
Joseph P. Rompala

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