ORIGINAL

Commissioner	Yes	No	Not Participating
Huston	√		
Bennett	√		
Freeman			√
Veleta	√		
Ziegner	√		

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

VERIFIED PETITION OF SOUTHERN INDIANA GAS AND ELECTRIC COMPANY d/b/a CENTERPOINT ENERGY INDIANA SOUTH. ("CEI SOUTH") FOR (1) ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY PURSUANT TO IND. CODE CH. 8-1-8.4 FOR COMPLIANCE PROJECTS TO MEET FEDERALLY MANDATED REQUIREMENTS ("CBR PROJECT"); (2) APPROVAL OF THE ESTIMATED FEDERALLY MANDATED COSTS ASSOCIATED WITH THE CBR PROJECT; (3) AUTHORITY TO TIMELY RECOVER 80% OF THE FEDERALLY MANDATED COSTS ASSOCIATED WITH THE CBR PROJECT THROUGH CEI SOUTH'S ENVIRONMENTAL COST ADJUSTMENT ("ECA") MECHANISM; (4) AUTHORITY TO DEFER 20% OF THE FEDERALLY MANDATED COSTS ASSOCIATED WITH THE CBR PROJECT UNTIL SUCH COSTS ARE REFLECTED IN RETAIL ELECTRIC RATES; (5) APPROVAL OF THE SPECIFIC RATEMAKING AND ACCOUNTING TREATMENT DESCRIBED HEREIN; AND (6) IN THE ALTERNATIVE, APPROVAL TO INCLUDE THE CBR PROJECT IN RATE BASE PURSUANT TO IND. CODE § 8-1-2-23.	**CAUSE NO. 45903** **APPROVED: FEB 07 2024**

ORDER OF THE COMMISSION

Presiding Officers:
David E. Veleta, Commissioner
Jennifer L. Schuster, Senior Administrative Law Judge

On June 8, 2023, Southern Indiana Gas and Electric Company d/b/a CenterPoint Energy Indiana South ("Petitioner" or "CEI South") filed its verified petition in this Cause, seeking: (1) issuance of a certificate of public convenience and necessity ("CPCN") for a federally mandated compliance project necessary to comply with the United States Environmental Protection Agency's ("EPA") Coal Combustion Residuals ("CCR") rule for the F.B. Culley Generating Station ("Culley"), including the closure by removal ("CBR") of the Culley East ash pond (the "CBR Project"); (2) approval of the estimated federally mandated costs associated with the CBR Project; (3) approval of the timely recovery of 80% of the approved federally mandated costs of the CBR Project through Petitioner's environmental cost adjustment ("ECA") mechanism; (4) authorization for Petitioner to defer for recovery in Petitioner's then ensuing general rate case 20% of such approved federally mandated costs; (5) approval of the specific ratemaking and accounting treatment described herein and in CEI South's case-in-chief; and, (6) in the alternative, approval to include the CBR Project in rate base pursuant to Ind. Code § 8-1-2-23.

Also on June 8, 2023, Petitioner filed the direct testimony, attachments, and workpapers of the following CEI South witnesses:

- Angila M. Retherford, Vice President, Environmental and Corporate Responsibility (Pet. Ex. 1)
- F. Shane Bradford, Vice President Power Generation Operations (Pet. Ex. 2)
- Chrissy M. Behme, Manager, Regulatory Reporting (Pet. Ex. 3)
- Matthew A. Rice, Director of Indiana Electric Regulatory and Rates (Pet. Ex. 4)

On June 13, 2023, a petition to intervene was filed by the Citizens Action Coalition of Indiana, Inc. ("CAC"), which was granted by docket entry on June 21, 2023.

On September 12, 2023, the Indiana Office of Utility Consumer Counselor ("OUCC") and the CAC filed the testimony and attachments of their respective witnesses as follows:

OUCC

- Cynthia M. Armstrong, Chief Technical Advisor, Electric Division (Pub. Ex. 1)
- Gregory L. Krieger, Utility Analyst, Electric Division (Pub. Ex. 2)
- Wes R. Blakley, Senior Utility Analyst, Electric Division (Pub. Ex. 3)

CAC

- Benjamin Inskeep, Program Director of CAC (CAC Ex. 1)

On September 26, 2023, CEI South filed rebuttal testimony of Ms. Retherford (Pet. Ex. 1-R), Mr. Bradford (Pet. Ex. 2-R), Ms. Behme (Pet. Ex. 3-R), and Mr. Rice (Pet. Ex. 4-R).

On October 13, 2023, the Presiding Officers issued a Docket Entry requesting additional information from CEI South, to which CEI South responded on October 16, 2023. (Pet. Exs. 5 and 5-C).

The Commission and counsel for Petitioner, the OUCC and the CAC convened at 9:30 a.m. on October 19, 2023. While all parties offered their evidence into the record at that time, to allow for publication of notice, the hearing was continued to November 6, 2023 at 1 p.m., in Room 222 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana. At the November 6, 2023 evidentiary hearing, the record of the proceedings conducted on October 19, 2023 (including the evidence offered into the record by the parties) was incorporated into the record without objection.

Based on the applicable law and the evidence of record, the Commission now finds:

1. Notice and Jurisdiction. Due, legal, and timely notice of the evidentiary hearing in this Cause was given and published as required by law. Petitioner is a "public utility" as defined in Ind. Code § 8-1-2-1(a) and Ind. Code § 8-1-8.5-1, an "energy utility" as defined in Ind. Code § 8-1-8.4-3, and an "eligible business" as defined in Ind. Code § 8-1-8.8-6. Petitioner is subject to the jurisdiction of this Commission in the manner and to the extent provided by Indiana law.

Pursuant to Ind. Code chs. 8-1-8.5 and 8-1-8.4, Petitioner may seek Commission approval of a CPCN. Therefore, the Commission has jurisdiction over Petitioner and the subject matter of this proceeding in the manner and to the extent provided by Indiana law.

2. Petitioner's Characteristics and System. Petitioner CEI South is an operating public utility incorporated under Indiana law and has its principal office at 211 NW Riverside Drive, Evansville, Indiana. CEI South has charter power and authority to engage in, and is engaged in the business of, rendering retail electric service in Indiana. CEI South owns, operates, manages, and controls, among other things, plant, property, equipment, and facilities which are used and useful for the production, storage, transmission, distribution, and furnishing of electric service to approximately 150,000 electric consumers in southwestern Indiana. Its service territory is spread throughout seven counties: Pike, Gibson, Dubois, Posey, Vanderburgh, Warrick, and Spencer counties.

CEI South's operations are subject to federal, state, and local rules promulgated by, among others, the federal EPA and the Indiana Department of Environmental Management ("IDEM"). Such rules establish environmental compliance standards that govern emissions and discharges from CEI South's electric generating units.

3. Evidence Presented.

A. CEI South's Case-in-Chief. Ms. Retherford explained how the EPA's effluent limitations guidelines ("ELG") and CCR Rules impact Culley and how these regulations affect the continued use of Petitioner's coal-fired generating units. She stated that the CCR Rule requires CEI South to commence closure activities at the Culley East ash pond upon the cessation of ash disposal, no later than October of 2023. She testified that the cessation of CCR waste streams into the Culley East ash pond on April 30, 2023 was driven by the completion of the wastewater treatment upgrades to meet ELG compliance and the completion of the new lined pond and GeoTube Containment Area. Once the pond was no longer being used for the disposal of CCR waste streams, CEI South began closure of the pond pursuant to federal guidelines.

Ms. Retherford explained CEI South's plans to dewater the ten-acre Culley East ash pond, excavate the CCR material in the pond, and transport and dispose of the excavated material in an off-site landfill operated by Waste Management. She opined that the removal of ash from the pond will mitigate future potential impacts to groundwater and potential surface water impacts which could result from an ahistorical flooding event or dam breach. She stated that removal of the ash functions as the primary Corrective Action Measure for addressing detected groundwater impacts. She testified that the closure plan was submitted to IDEM for approval on February 14, 2022. She discussed the timeline for recovery under applicable federal and state regulations.

Mr. Bradford testified that the Compliance Project will involve federally mandated costs of approximately $52,044,328 in estimated capital costs and an estimated $133,000 for groundwater monitoring, system and road maintenance, well replacement, and post-closure inspections and reporting. Mr. Bradford described the various alternatives to the CBR Project considered by Petitioner and their costs. He also discussed why beneficial reuse of the Culley East ash was not a viable option. He described the Engineering, Procurement, and Construction

Management ("EPCM") agreement for the project entered into with AECOM and summarized the scope of work. He explained that, rather than negotiate a fixed price contract with a large contingency due to uncertainty, the contract has a target price, with cost-sharing opportunities that provide an incentive to complete under the target price. He testified that the notice to proceed with closure activities was issued on May 25, 2023. Given the delayed start, costs have increased from the previous estimate due to upfront standby costs and costs associated with additional winter activities. He testified that there were no known concerns with supplies, labor, or inflation and that CEI South did not expect any change orders unless the IDEM closure requirement changes resulting in additional unplanned cost.

Ms. Behme supported the requested ratemaking and accounting treatment for the Compliance Project. She stated Petitioner is proposing to include 80% of the revenue requirement associated with the approved federally mandated costs within Petitioner's ECA rate adjustment mechanism, with the remaining 20% of the revenue requirement deferred and recovered by CEI South as part of its next ensuing general base rate case. She testified that the costs of the CBR Project are costs of removal and described how utilities typically would account for and recover such costs. As costs are incurred and before completion, costs would be recorded to Removal Work in Progress ("RWIP"), an account within Accumulated Depreciation Account 108. This debit entry reduces Accumulated Depreciation. Upon completion, the amounts recorded to RWIP are closed to Account 108 associated with the underlying capital asset. Under this traditional approach and in future general rate cases, the utility would recover a return of the cost of removal through adjustment of future depreciation rates and a return on the cost of removal through the increase to net original cost rate base from the reduction to Accumulated Depreciation.

Ms. Behme explained that the Federal Mandate Statute provides a mechanism for timely recovery of such federally mandated costs, and CEI South seeks to recover through its ECA the return on the incurred CBR Project costs at CEI South's weighted average cost of capital ("WACC"). She explained there are only slight modifications CEI South proposes to the traditional accounting. Before completion, costs incurred would still be recorded to RWIP, including planning and engineering costs and other costs incurred prior to the date of an Order in this Cause. Post-in-service carrying charges ("PISCC") at the WACC would also be recorded to RWIP from the date such costs are incurred until the date of a Commission Order authorizing recovery of a return on such costs. Upon completion, the RWIP, including PISCC, would be closed to Account 108. After completion, PISCC on the recorded cost of the CBR Project would be recorded to a regulatory asset until the date of a Commission Order authorizing recovery of a return and including amortization expense in CEI South's recoverable operating expenses. The balance of the regulatory asset would be included in CEI South's rate base for ratemaking purposes. She also explained that CEI South seeks to establish a depreciation rate associated with the CBR Project, such that depreciation and recovery of such may begin effective with the implementation of rates. The CEI South proposes a depreciation rate of seven years or 14.29%, which is estimated to be the remaining life of the Culley Generating Station. The depreciation life could be adjusted in future general rate cases.

Ms. Behme addressed CEI South's proposed recovery through the ECA. Prioritization of recovery would be consistent with CEI South's other federally mandated costs recovered through the ECA. CEI South also requests to earn a return on the unamortized project cost balance through the ECA mechanism. CEI South would present a revenue requirement calculating the WACC as

applied to the undepreciated balance of the CBR Project plus the annual depreciation and also the WACC as applied to the regulatory asset, as appropriate. The ECA would then recover 80% of the revenue requirement with 20% deferred for recovery in CEI South's next ensuing general rate case. Pursuant to the Federal Mandate Statute, CEI South will adjust for the FAC earnings test purposes its statutory net operating income by including the operating income associated with the CBR project as part of its authorized net operating income. She then discussed the ECA revenue requirement and presented an illustrative revenue requirement of the ECA as Attachment CMB-1 to her testimony.

Ms. Behme also discussed how, in the alternative, CEI South seeks approval of the CBR Project pursuant to Ind. Code § 8-1-2-23. To the extent the requested CPCN is not granted with respect to any of the estimated costs of the CBR Project, such costs, including carrying charges, recorded to FERC Account 108 would be reflected in CEI South's next general rate case.

Mr. Rice explained how the CBR Project will be included in the ECA revenue requirement calculation. He stated that the recoverable amounts for the approved investments will be aggregated and utilized to derive annual ECA rates and charges based on annualized billing determinants. He explained that CEI South is not proposing ECA rates and charges in this proceeding, but provided Attachment MAR-1, which contains three schedules illustrating the calculation of the ECA rates inclusive of the CBR Project. He explained the basis for allocation of the ECA revenue requirements to each rate schedule and the allocation changes approved in Cause No. 43354 MCRA 21 S1.

Mr. Rice sponsored Attachment MAR-4, which demonstrates that the estimated residential bill impact for a residential customer that uses 1,000 kWh per month is approximately $2.63 per month, depending on the cost of the Project.

B. <u>OUCC's Evidence</u>. Ms. Armstrong testified that CEI South's plans to close the Culley East ash pond appear to be reasonable and that the CBR Project meets the definition of a compliance project under Ind. Code § 8-1-8.4-2(a) that is necessary to comply with the CCR Rule, which qualifies as a federally mandated requirement under Ind. Code § 8-1-8.4-5. She discussed affordability and other factors impacting CEI South's request. She said CEI South estimates the CBR Project will increase the average residential customer's monthly bill by $2.63. This would be in addition to CEI South's other tracking mechanisms and recent requests for new generation. For this reason, Ms. Armstrong recommended that the Commission deny CEI South's request for a CPCN and that the costs of the CBR Project instead be reviewed for recovery in CEI South's upcoming general rate case.

Mr. Krieger recommended the Commission approve CEI South's choice of the CBR Project, but recommended a reduction of the approved estimate to $44.4 million and suggested that CEI South pursue rate recovery through an upcoming rate case rather than through a tracker. He testified that OUCC is comfortable with the cost of the Project given the RFP and comparison process used by CEI South and performed by AECOM, but recommended denial due to the OUCC's assertion that CEI South has some of the highest electric rates in Indiana. Thus, the OUCC recommends the Commission deny the CPCN and order CEI South to include the cost of the project in the context of a general rate case.

Mr. Blakley also discussed how affordability ties into CEI South's ECA request and how it should be considered. Like the other OUCC witnesses, Mr. Blakley concluded that the Project is necessary, but recommended that the removal costs receive normal ratemaking treatment instead of Petitioner's requested treatment, because the removal costs are not capital investments or operating expenses. Mr. Blakley opined that proper recovery, instead, would be in the retirement process as a charge to Accumulated Depreciation Account 108. This provides recovery of removal costs at the time of the next rate case through the depreciation cost recovery process.

C. <u>CAC</u>. Mr. Inskeep said that he agreed that CEI South's selection of CBR is reasonable and recommended that the Commission approve the CBR method for the Culley East ash pond. However, he recommended CEI South not be allowed to earn a return "on" the project because he does not believe it should be considered a capital project for ratemaking purposes. He also opined that contingency is not known and measurable and is therefore not appropriate to include in estimated costs.

Mr. Inskeep also recommended allocating the costs using an "energy allocator." He testified that costs incurred by a utility for purchasing coal and other fuels are allocated on the basis of energy. He opined that it is logically inconsistent to allocate the coal coming into the coal plant on the basis of energy, while the byproducts of burning that same amount of coal coming out of the coal plant (such as coal ash) are allocated on the basis of demand. He provided his calculation of customer class impacts when using energy allocators as opposed to demand allocators.

Mr. Inskeep also argued that the Commission should disallow CEI South's recovery of costs incurred prior to a final Commission order in this proceeding, citing the Indiana Supreme Court's decision in *Indiana Office of Utility Consumer Counselor v. Duke Energy Indiana, LLC*, 183 N.E.3d 266 (Ind. 2022). He opined that the Commission should deny cost recovery for all costs incurred for the Culley East Ash Point closure prior to the Commission's final order in this proceeding to avoid contravening Indiana's statutory prohibition on retroactive ratemaking.

D. <u>CEI South Rebuttal</u>. Ms. Retherford disagreed with Mr. Inskeep's contention that CEI South failed to act prudently when it "co-mingl[ed] other waste streams with the coal ash . . . resulting in coal ash no longer being suited for encapsulated beneficial reuse," and "waited an imprudently long period of time" to start closure. Pet. Ex. 1-R at 2. She testified that scrubber wastewater is a CCR wastestream as defined in the CCR Rule, not an additional wastewater stream not associated with coal-fired power plants. She stated that scrubber wastewater, fly ash, and bottom ash — all CCR wastestreams as defined by the CCR Rule — were combined in the Culley East ash pond pursuant to CEI South's approved National Pollution Discharge Elimination System ("NPDES") water discharge permit issued by IDEM, with the pond serving as a final water containment and mercury treatment structure under the authorized permit. She stated that the ponded material must meet mercury specifications in the contract, which it cannot.

In response to Mr. Inskeep's assertion that CEI South waited an imprudently long time to start closure, Ms. Retherford explained that the closure of the Culley East ash pond was driven by the need to continue to treat wastewater at the plant while required wastewater treatment upgrades were under construction. She stated that the timing of the closure of the Culley East ash pond was driven by that coordination.

Ms. Retherford noted that the Culley East ash pond was constructed in 1971, ten years before the siting and design considerations discussed in the 1981 Electric Power Research Institute ("EPRI") Coal Ash Disposal Manual cited by Mr. Inskeep. She opined that CEI South acted prudently when it began pulling wastestreams (specifically fly ash and scrubber by-product) off the Culley East ash pond years before it was required by the CCR Rule.

Mr. Bradford disagreed with Mr. Krieger's recommendation that the Commission approve the CBR Project but at a reduced estimate of $44.4 million. In response to Mr. Krieger's objection that CEI South did not prepare Class 3 estimates for the alternatives that had not been selected, Mr. Bradford opined that spending additional money to develop more refined cost estimates of the alternatives that were not selected would have been a waste of resources that would have unnecessarily raised the cost of this proceeding (and therefore the CBR Project). Mr. Bradford disputed Mr. Krieger's testimony that the CBR Project should be approved without contingency and delay costs and that CEI South should be required to request approvals of cost overruns before they occur.

Ms. Behme disputed Mr. Blakley's assertion that the cost of removal is not a capital investment in plant, noting that the FERC USOA defines cost of removal as "the cost of demolishing, dismantling, tearing down, or otherwise removing electric plant, including the cost of transportation and handling incidental thereto." She stated that amounts for cost of removal are recorded to FERC Account 108, which is a Utility Plant FERC account per the USOA. at 2. Furthermore, FERC Account 108 is required to be maintained by functional classifications applicable for electric plant, similar to how FERC Account 101 – Electric Plant in Service is maintained and includes amounts for cost of removal.

Ms. Behme disagreed with Mr. Inskeep's concerns regarding CEI South earning a return on the CBR Project, arguing, among other things, that the CBR Project should be considered a capital project, rather than operation and maintenance ("O&M"), for ratemaking purposes. She noted that some of the activities Mr. Inskeep identifies as O&M rather than capital are explicitly identified within the USOA's definition of cost of removal, including "the cost of demolishing, dismantling, tearing down, or otherwise removing electric plant, including the cost of transportation and handling incidental thereto."

Ms. Behme responded to Mr. Blakley's argument that removal costs are not a capital investment for which a return "on" and a return "of" is calculated, nor are they an expense that would impact CEI South's income statement. She testified that the removal costs in this case are federally mandated costs that are being incurred in relation to a compliance project and opined that these costs, if approved by the Commission, are eligible for a timely recovery through a periodic rate adjustment mechanism.

Ms. Behme explained why she does not agree with Ms. Armstrong's suggestion that the CBR Project costs would be better considered in the context of a general rate case, noting that no costs of closing this pond are reflected in existing depreciation rates and that no funds have been collected in relation to the removal costs associated with the CBR Project.

In response to Mr. Blakley's concern regarding double recovery if CEI South recovers the CBR Project costs within the ECA mechanism because of the costs being charged to accumulated depreciation, Ms. Behme explained that double recovery will not be an issue due to CEI South's accounting processes. She stated that CEI South will adjust its rate base for this project, if approved as a federally mandated project, in the same manner that previously approved federally mandated projects are adjusted. CEI South has sought recovery of other federally mandated projects through its ECA mechanism. She stated that, once those projects are approved and recovery of those costs through the ECA mechanism begins, those costs are separate from those recovered through base rates. Costs that are recovered through an interim mechanism will remain separate until those costs are incorporated into base rates through a rate case proceeding.

Mr. Rice responded to Ms. Armstrong's testimony about effects on customer bills, stating that CEI South's customers will realize savings not listed in Ms. Armstrong's Table 2 because the general transition plan projects, which are included in the table, do not include O&M or fuel savings that result from these plant closures or savings associated with selling renewable energy credits ("RECs") from the renewable projects CEI South is pursuing, all of which will help to offset individual impacts included in the Generation Transition Plan.

In response to Mr. Krieger, Ms. Armstrong, and Mr. Blakley all of whom recommended the Commission deny the CPCN and review the costs of the project in the context of CEI South's next general rate case, Mr. Rice explained that the proposed CBR Project meets every requirement under the Federal Mandate Statute. Mr. Rice opined that, while the timing of the Project is close in proximity to CEI South's upcoming rate case and could potentially be recovered through the method proposed by the OUCC, CEI South's proposal for timely recovery via the ECA is appropriate and reasonable and complies with the statute.

Mr. Rice also disputed Mr. Inskeep's contention that CEI South inappropriately selected a demand allocator instead of an energy allocator for assigning costs of the CBR Project. In response, Mr. Rice said that CEI South has proposed to include the CBR Project within the ECA mechanism, allocating the revenue requirements in the ECA based on 4CP allocation percentages approved by the Commission on September 2, 2020, in Cause No. 43354 MCRA 21 S1 (the "43354 MCRA 21 S1 Order). Mr. Rice stated that, pursuant to the 43354 MCRA 21 S1 Order, CEI South has not proposed new allocations in this proceeding or outside of a rate case. Mr. Rice also discussed why CEI South did not want to create a separate tracking measure for the CBR Project outside the ECA mechanism approved in Cause No. 45052 to recover federally mandated costs associated with federally mandated compliance projects as defined by Ind. Code § 8-1-8.4-2 and Ind. Code § 8-1-8.4-4.

Mr. Rice addressed Mr. Inskeep's testimony on SEA 9, noting that even if costs incurred before the effective date of SEA 9 were ineligible, that would not necessarily mean that such costs are nonrecoverable. He noted that there are two eligible means of recovery of CCR remediation costs: as federally mandated costs under Ind. Code ch. 8-1-8.4 and through the cost of removal and the normal process of updating depreciation rates. To the extent any costs were ineligible as federally mandated costs, they would still be recoverable as costs of removal. Mr. Rice also disputed Mr. Inskeep's recommendation that costs associated with Cause No. 45795 be disallowed.

In response to Mr. Inskeep's recommendation that the costs associated with Cause No. 45795 be disallowed, Mr. Rice explained that CEI South should absolutely be entitled to include the costs associated with Cause No. 45795. He noted that CEI South refiled this case and largely relied upon the pleadings, evidentiary record, and counsel representation in Cause No. 45795 in its presentation here, and the parties agreed that discovery from Cause No. 45795 could be used in this case. Mr. Rice opined that because of the work done in Cause No. 45795, the costs in this case have been greatly mitigated, and, therefore, CEI South should be able to recover the costs associated with Cause No. 45795.

4. Commission Discussion and Findings.

A. CPCN. CEI South's Petition seeks a CPCN for the CBR Project under Ind. Code ch. 8-1-8.4 as a "federally mandated" project. Under Ind. Code § 8-1-8.4-6(b), "the commission shall issue a certificate of public convenience and necessity under [Ind. Code § 8-1-8.4-7(b)] if the commission finds that the compliance project allows the energy utility to comply with one (1) or more federally mandated requirements."

When considering a petition seeking a CPCN under Ind. Code ch. 8-1-8.4, the Commission may only issue the requested CPCN if we have:

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

Ind. Code § 8-1-8.4-7(b). The factors set forth in Ind. Code § 8-1-8.4-6(b) are addressed below.

i. Federally Mandated Requirements (Ind. Code § 8-1-8.4-6(b)(1)(A)). Ind. Code § 8-1-8.4-5 defines a federally mandated requirement to include, among other things,

> a requirement that the commission determines is imposed on an energy utility by the federal government in connection with . . . [t]he federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*); . . . the federal Resource Conservation and Recovery Act ["RCRA"] (42 U.S.C. 6901 *et seq.*); . . . [or] [a]ny other law, order, or regulation administered or issued by the United States Environmental Protection Agency, the United States Department of Transportation, the Federal Energy Regulatory Commission, or the United States Department of Energy.

As described in Petitioner's case-in-chief, the CBR Project is required to comply with the EPA's CCR Rule. Ms. Retherford testified that the closure of the Culley East ash pond is the result of a requirement imposed on CEI South by the federal government in connection with the federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.*) and the RCRA (42 U.S.C. § 6901 *et seq.*). She explained that the Culley East ash pond does not meet the requirements for continued

operation under the CCR Rule and CEI South must commence closure activities within thirty days of ceasing ash disposal, on or about May 30, 2023.

No party disputed CEI South's need to undertake the CBR Project. As we have recognized in previous instances (*see* Cause Nos. 45052 and 45564), a project necessary to comply with the CCR Rule, promulgated pursuant to Subtitle D of the RCRA (42 U.S.C. § 6901 *et seq.*), constitutes a federally mandated requirement. Therefore, based on the evidence of record, we find that the CBR Project is a federally mandated requirement of the CCR Rule.

ii. Incurred and Projected Federally Mandated Costs (Ind. Code § 8-1-8.4-6(b)(1)(B)). Energy utilities seeking recovery of federally mandated costs must establish that the costs incurred or estimated to be incurred are in connection with a compliance project, including capital, operating, maintenance, depreciation, tax or financing costs and describe the costs to be recovered. Ind. Code §§ 8-1-8.4-4 and 8-1-8.8-6(b)(1)(B). We have already found that the CBR Project is federally mandated. Consequently, the costs associated with the project constitute federally mandated costs. These costs will consist of capital, operating, maintenance, depreciation, tax, and financing costs. CEI South identified the estimated costs to be recovered as federally mandated costs. Estimated Project costs associated with the CBR Project were identified by Mr. Bradford, including the estimated annual post-closure spend for groundwater monitoring, system, and road maintenance, well replacement, and post-closure inspections and reporting. Based on the evidence of record, we find that CEI South has identified federally mandated costs and reasonably described those costs. The total capital costs are estimated at $52,044,328 and annual O&M costs are estimated at $133,000, and are approved.

No party disputed the derivation of these cost estimates for the CBR Project, but they did make various arguments against Petitioner's proposed recovery of costs. The only challenges raised were to the recovery of (1) costs of removal through the Federal Mandate Statute, (2) delay costs, (3) costs incurred before the effective date of SEA 9, including those associated with Cause No. 45795, and (4) contingency costs.

1. Cost Recovery through Federal Mandate Statute. The OUCC first objects to cost recovery through the Federal Mandate Statute, arguing that the applicable costs are costs of removal that are not capital or O&M costs. "Federally mandated costs" is defined as "costs that an energy utility has incurred or estimates that it will incur in connection with a compliance project, including capital, operating, maintenance, depreciation, tax or financing costs." Ind. Code § 8-1-8.4-4. We do not read the categories of costs following the word "including" as a limitation on the definition, and we find that the costs at issue are being incurred in connection with a compliance project. We agree with CEI South that costs of removal are appropriately considered capital costs in connection with the Federal Mandate Statute. While OUCC witness Blakley is correct that one avenue for recovery of CCR remediation costs is a general rate case, that does not render them ineligible for recovery under the Federal Mandate Statute.

The OUCC also argues that costs of removal are more appropriately recovered through normal retirements and removal accounting, debiting Account 108 for costs and including them in future depreciation accrual rates. Again, we find that, even though this is a valid form of recovery, it does not prevent CEI South from pursuing cost recovery for which it is eligible under the Federal Mandate Statute, as it has done here.

2. Delay Costs. Mr. Bradford's and Ms. Retherford's testimony reflects that the disputed delay costs were caused because the Culley East ash pond did not cease receiving ash as of March 1, 2023 as originally anticipated, but instead continued to receive ash until May 1, 2023 due to unforeseen circumstances impacting the construction schedule for alternative capacity. Mr. Bradford testified that these costs were not reasonably anticipated in Cause No. 45795 because, at that time, CEI South did not expect that the final cessation of receipt of ash would be extended to May 1, 2023. We find that CEI South has adequately explained its delay costs, and we find they are reasonably included in the federally mandated costs.

3. SEA 9 and Recovery of Costs. CAC witness Inskeep noted that, prior to SEA 9, there was not any language in the Federal Mandate Statute that authorized a utility to recover past costs incurred that were not previously approved by the Commission. He stated that SEA 9 modified the future tense phrasing in the Federal Mandate Statute to now allow a utility to recover certain costs incurred prior to a Commission order if the Commission finds the costs are just and reasonable. Mr. Inskeep argued that CEI South has unreasonably delayed taking action at the Culley East ash pond for years, including through its voluntary withdrawal of Cause No. 45795 after the case had been fully briefed. He opined that SEA 9 does not contain a provision on retroactivity or that it should apply prior to its effective date. As such, he recommended that CEI South should not be able to recover costs incurred prior to the March 22, 2023 passing of SEA 9, including expenses related to Cause No. 45795.

On rebuttal, Mr. Rice argued that SEA 9 authorizes the filing of a petition pursuant to Ind. Code ch. 8-1-8.4 to recover costs that had been incurred prior to the petition being filed, as long as the petition is filed within a reasonable time after the compliance deadline. Mr. Rice also argued that the Commission should allow recovery of costs associated with Cause No. 45795 because CEI South relied upon the pleadings, evidentiary record, and counsel representation from Cause No. 45795 in this case, mitigating the costs incurred by CEI South in this case.

Based on the evidence of record, we agree with CEI South that the costs it has already incurred and will continue to incur as part of the CBR Project are federally mandated and therefore just and reasonable, and are eligible for recovery under SEA 9; this includes costs incurred before the filing of this case. Ms. Retherford testified that the federally mandated obligation in this case is the commencement of closure activities pursuant to the CCR, which was May 30, 2023. The Petition in this Cause was filed nine days after that compliance date, which we find is a reasonable time after the federally mandated compliance date. We find the federally mandated costs (both incurred and projected) of $52,044,328 in capital costs, plus an estimated $133,000 in annual O&M expenses, as set forth in Petitioner's case-in-chief are just and reasonable and are approved for recovery.

However, we agree with the CAC that CEI South voluntarily withdrew Cause No. 45795 in an effort to receive a more favorable cost recovery ruling following the passage of SEA 9. Therefore, we find that CEI South is not entitled to recover the costs it incurred in Cause No. 45795.

4. Contingency Costs. The OUCC has acknowledged that CEI South's proposed level of contingency is appropriate for a project the size of the CBR Project. As for the provision of the Federal Mandate Statute requiring specific justification for actual costs that exceed the projected federally mandated costs by more than 25%,[1] we again reject the argument that this takes the place of contingency. As noted by CEI South witness Bradford, we have consistently found the inclusion of contingency to be appropriate and rejected arguments similar to those made by the OUCC here. *See, e.g.*, *CEI South*, Cause No. 45612, at 16 (April 20, 2022).

iii. Compliance with Federally Mandated Requirements (Ind. Code §§ 8-1-8.4-6(b)(1)(C)). No party disputed that the CBR Project will allow CEI South to comply with the CCR Rule, and we so find.

iv. Alternative Plans for Compliance (Ind. Code §§ 8-1-8.4-6(b)(1)(D)). CEI South witnesses Retherford and Bradford testified about the options CEI South explored for the CBR Project.

Ms. Retherford testified that a closure-in-place option was reviewed and rejected by CEI South as not sufficiently protective of the environment. She noted that, to her knowledge, IDEM has not approved any closure-in-place plans for CCR ponds that have CCR material in contact with groundwater. She noted the location of the dam of the pond on the bank of the Ohio River and testified that the pond failed the location restriction requirement of CCR and ash is located, with ash less than five feet from the nearest aquifer. She explained that the removal of the ash from the pond will mitigate future potential impacts to groundwater and potential surface water impacts which could result from an ahistorical flooding event or dam breach, and it also functions as the primary corrective action measure for addressing detected groundwater impacts. She argued that removal of the ash will prevent further horizontal infiltration of groundwater and will mitigate future impacts.

Mr. Bradford also described CEI South's examination of the option of transporting the CCR material to a mine as opposed to a lined landfill. He and Ms. Retherford described the risks associated with this option, including long-term risk of future liability related to changes in groundwater protection standards and/or future regulations from EPA related to prohibiting ash disposal in surface coal mines and/or requiring remediation of mines with historic ash disposal.

Finally, Mr. Bradford explained why beneficial reuse is not available for the CCR material in the Culley East ash pond. He stated that beneficial reusers have strict specifications for any materials used in their process, which the CCR material in the Culley East ash pond cannot meet, in part due to the high concentration of FGD byproduct (sulfites) and high mercury content.

[1] Ind. Code § 8-1-8.4-7(3).

The OUCC and CAC witnesses agreed that the CBR Project is reasonable. OUCC witness Armstrong agreed that the option to deposit ash in coal mines could be impacted by future environmental rule changes and could lead to groundwater contamination that CEI South would likely be partially responsible for remediating. CAC witness Inskeep agreed that closure in place would not be appropriate, and he agreed that, if the ash from the Culley East ash pond cannot be used for beneficial reuse, then closure by removal is the most reasonable and prudent method of permanently and safely disposing of the CCR material.

Based on the evidence of record, we find that CEI South considered alternative plans for compliance with the CCR Rule and selected the most reasonable option. The evidence shows that the CBR Project is reasonable and necessary.

v. Useful Life of the Facility (Ind. Code §§ 8-1-8.4-6(b)(1)(E)). Ms. Retherford testified that timely closure activities at the Culley East ash pond will keep the Culley Generation Station in compliance with federal RCRA requirements, thereby enabling the continued operation of the plant. CEI South witness Rice explained how continued operation of F.B. Culley Units 2 and 3 helps shield customers from various risks by providing reliability, capacity in the MISO market, energy sales in the MISO market, and resource diversity to CEI South system.

No party disputes that issuance of a CPCN for the CBR Project will extend the useful life of CEI South's Culley Generation Station. Based on the evidence of record, we find that CEI South has satisfied the requirements of Ind. Code § 8-1-8.4-6(b)(1)(E).

vi. Conclusion on CPCN. Based on the evidence of record, we find that the CBR Project will allow CEI South to comply with the CCR Rule (a federally mandated requirement), and thus the public convenience and necessity requires the CBR Project. Ind. Code § 8-1-8.4-6(b). We have approved the federally mandated costs associated with the CBR Project (except for the costs associated with Cause No. 45795, as discussed above), and we have made a finding on each of the factors described in Ind. Code § 8-1-8.4-6(b).Therefore, based on the law and evidence of record, we approve the CBR Project pursuant to the Federal Mandate Statute and grant CEI South's request for a CPCN for the CBR Project.

B. Accounting and Ratemaking Issues Associated with CCR Compliance Projects.

Ind. Code § 8-1-8.4-7(c) provides:

> If the commission approves under subsection (b) a compliance project and the federally mandated costs associated with the compliance project, the following apply:
>
> (1) Eighty percent (80%) of the approved federally mandated costs shall be recovered by the energy utility through a periodic retail rate adjustment mechanism that allows the timely recovery of the approved federally mandated costs. The Commission shall adjust the energy utility's authorized net operating income to

reflect any approved earnings for purposes of IC 8-1-2-42(d)(3) and IC 8-1-2-42(g)(3), with recovery commencing no earlier than:

(A) the date of a final agency action regarding the federally mandated requirement; or

(B) in the absence of a final agency action, the date on which the federally mandated requirement becomes effective.

(2) Twenty percent (20%) of the approved federally mandated costs, including depreciation, allowance for funds used during construction, and post in service carrying costs, based on the overall cost of capital most recently approved by the commission, shall be deferred and recovered by the energy utility as part of the next general rate case filed by the energy utility with the commission.

(3) Actual costs that exceed the projected federally mandated costs of the approved compliance project by more than twenty-five percent (25%) shall require specific justification by the energy utility and specific approval by the commission before being authorized in the next general rate case filed by the energy utility with the commission.

i. Accounting and Ratemaking Treatment for ECA. CEI South requests authority to include the costs of the CBR Project in its ECA mechanism pursuant to Ind. Code § 8-1-8.4-7 for the timely and periodic recovery of 80% of the federally mandated costs. Ind. Code § 8-1-8.4-8 provides that an energy utility may, in a timely manner, recover 80% of all federally mandated costs through a periodic rate adjustment mechanism. Ind. Code §§ 8-1-8.4-4 and 8-1-8.4-7 provide that such costs include capital, allowance for funds used during construction ("AFUDC"), O&M, depreciation, tax, and financing costs.

CEI South witness Behme described CEI South's proposed accounting and ratemaking treatment of the eligible costs associated with the CBR Project, which is summarized above. Ms. Behme also noted that the proposed depreciation rate, seven years or 14.29%, could be adjusted in future general rate cases. PISCC will be accrued on the federally mandated costs for the period between when costs are incurred for the CBR Project and when such costs are included for recovery in rates through the ECA mechanism. PISCC would be calculated and recorded based upon CEI South's WACC. Before the project is completed, PISCC will be recorded to RWIP. PISCC after completion of the project will be recorded to a regulatory asset which will be amortized over the same period as the depreciation rate for the CBR Project. CEI South has also requested to earn a return on the unamortized regulatory asset balance through the ECA mechanism.

Ms. Behme testified that CEI South will prepare in each annual ECA filing a revenue requirement calculation. She presented an illustrative calculation inclusive of the CBR Project which includes (1) the return on total new capital investments, which includes the CBR Project capital investment net of depreciation, net regulatory asset, and PISCC; (2) an annual level of depreciation and amortization of the CBR Project; and (3) ongoing O&M costs and property taxes associated with the project. The annual revenue requirement will represent the basis for the

recovery of 80% of the eligible revenue requirement requested in each annual ECA filing and deferral of 20% of the eligible revenue requirement for future recovery. The recoverable amounts for the approved investments will be aggregated and utilized to derive annual ECA rates and charges based on annualized billing determinants.

Ms. Behme stated CEI South is not proposing an ECA revenue requirement amount for recovery in this proceeding. In each annual ECA filing, CEI South will calculate a revenue requirement for the ECA mechanism which will accumulate all eligible costs incurred through December 31 of the prior calendar year. The CBR Project is expected to be included with the May 2024 ECA filing if the CPCN is granted. The revenue requirement for the CBR Project will be aggregated with the other federally mandated projects approved in Cause Nos. 45052, 45280, and 45564 to arrive at the total revenue requirement that represents the basis for determining the 80% recoverable portion requested in each annual ECA filing. For purposes of the earnings test in CEI South's FAC proceedings, CEI South will adjust its statutory net operating income by including the operating income associated with the CBR Project as part of its authorized net operating income. This is consistent with the treatment of earnings associated with CEI South's ECA mechanism from Cause Nos. 45052, 45280, and 45564.

We have already approved the federally mandated costs associated with the CBR Project and rejected the OUCC's and CAC's arguments to disallow certain costs they believe may already be embedded in rates and to disallow contingency. The remaining issue that has been raised with respect to CEI South's proposed recovery is the OUCC's and CAC's proposed denial of CEI South's ability to earn a return "on" the CBR project. The evidence of record reflects that the FERC USOA contemplates the costs like those associated with the CBR Project as cost of removal and therefore an investment in capital plant. Ms. Behme's rebuttal explains that the FERC USOA includes in the definition of cost of removal costs of "demolishing, dismantling, tearing down, or otherwise removing electric plant, including the cost of transportation and handling incidental thereto." We find that the CBR Project plainly fits within the Federal Mandate Statute. Denial of the timely cost recovery afforded by the statute is not supported by the evidence of record. While Mr. Inskeep has suggested that allowing CEI South to earn a return on the CBR Project would lead to higher costs and delays in addressing other removal costs, there is no evidence to support this. The CCR Rule is driving the need and the timing for the CBR Project. The Federal Mandate Statute provides a mechanism for timely recovery of the costs incurred to comply with environmental regulations.

Therefore, we find that CEI South is authorized to accrue PISCC on the federally mandated costs commencing from the date such costs are incurred until recovered through rates. CEI South is also authorized to defer expenses that are approved federally mandated costs (until captured within the ECA mechanism). CEI South is authorized to recover through the ECA 80% of the approved federally mandated costs incurred in connection with the CBR Project through the ECA mechanism pursuant to Ind. Code § 8-1-8.4-7, including capital, O&M, depreciation, taxes, financing, and carrying costs based on the current overall WACC. We also find that Petitioner's proposed prioritization of the 80% recovery through the rider in terms of accounting, as described by Ms. Behme and not opposed by the OUCC or CAC, should be approved. This prioritization is consistent with the recovery prioritization approved in Cause No. 44910. *See also Indiana-American Water Co.*, Cause No. 45609, at 8 (March 16, 2022).

CEI South is authorized to defer the remaining 20% of the approved federally mandated costs, including depreciation and PISCC. CEI South shall recover the deferred portion as part of its ensuing general rate case.

CEI South's proposed cost allocation factors are also approved. Any changes in cost allocation factors, such as those proposed by CAC, should be addressed in CEI South's ensuing general rate case.

Based on the evidence of record, we find that CEI South's request for approval to adjust its authorized net operating income to reflect any approved earnings associated with the CCR Compliance Project for purposes of Ind. Code §§ 8-1-2-42(d)(3) and 8-1-2-42(g)(3) is consistent with Ind. Code § 8-1-8.4-7(c)(1).

5. Confidentiality. CEI South filed motions for protection and nondisclosure of confidential and proprietary information on June 8, 2023 and September 21, 2023. In its motions, CEI South states certain information redacted in the evidence is confidential, proprietary, competitively sensitive, and/or trade secrets. Docket entries were issued on June 21, 2023 and October 4, 2023, finding such information to be preliminarily confidential and protected from disclosure under Ind. Code §§ 8-1-2-29 and 5-14-3-4. The confidential information was subsequently submitted under seal. At the hearing, the CAC, joined by the OUCC, objected to a portion of CEI South's redactions in its response to the Commission's October 13, 2023 docket entry. The Presiding Officers took the matter under advisement and granted leave for the parties to address the confidentiality objection in their post-hearing submissions. Having considered the parties' arguments, the Commission overrules the CAC and OUCC's objection. The Commission finds the information for which CEI South seeks confidential treatment is confidential pursuant to Ind. Code § 8-1-2-29 and Ind. Code ch. 5-14-3, is exempt from public access and disclosure by Indiana law and shall continue to be held by the Commission as confidential and protected from public access and disclosure.

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

1. CEI South is issued a certificate of public convenience and necessity for the CBR Project pursuant to Ind. Code ch. 8-1-8.4. This order constitutes the certificate.

2. The CCR Rule constitutes a federally mandated requirement as defined by Ind. Code § 8-1-8.4-5.

3. The CBR Project constitutes a compliance project as that term is defined in Ind. Code § 8-1-8.4-2, and the costs incurred in connection with the CBR Project are federally mandated costs as that term is defined in Ind. Code § 8-1-8.4-4. The federally mandated costs are eligible for ratemaking treatment described in Ind. Code § 8-1-8.4-7, except for the costs associated with Cause No. 45795, as discussed above.

4. CEI South's cost estimates for the CBR Project set forth above are approved.

5. CEI South is authorized to timely recover 80% of the approved federally mandated costs incurred in connection with the CBR Project through its existing ECA mechanism pursuant to Ind. Code § 8-1-8.4-7 including capital, O&M, depreciation, taxes, financing, and carrying costs based on its weighted average cost of capital, as described above.

6. CEI South is authorized to accrue post-in-service carrying charges based upon CEI South's WACC on the federally mandated costs for the period between when costs are incurred for the CBR Project and when such costs are included for recovery in rates through the ECA.

7. CEI South is authorized to adjust its authorized net operating income to reflect any approved earnings associated with the CBR Project for purposes of Ind. Code § 8-1-2-42(d)(3) as allowed under Ind. Code § 8-1-8.4-7(c)(1).

8. CEI South is authorized to defer 20% of the federally mandated costs incurred in connection with the CBR Project for recovery in its next general rate case, as described in Finding Paragraph 4.B.i.

9. CEI South is authorized to record post-in-service carrying charges authorized herein until completion of the CBR Project as RWIP within Account 108 and after completion as a regulatory asset in Account 182.3 Other Regulatory Assets.

10. The confidential information submitted under seal in this Cause pursuant to CEI South's requests for confidential treatment is determined to be confidential trade secret information as defined in Ind. Code § 24-2-3-2 and shall continue to be held as confidential and exempt from public access and disclosure under Ind. Code §§ 8-1-2-29 and 5-14-3-4.

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

HUSTON, BENNETT, VELETA, AND ZIEGNER CONCUR; FREEMAN ABSENT:

APPROVED: FEB 07 2024

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

Dana Kosco

Digitally signed by Dana Kosco
Date: 2024.02.07 10:10:33 -05'00'

Dana Kosco
Secretary of the Commission