ORIGINAL

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

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF DUKE ENERGY INDIANA, LLC, PURSUANT TO IND. CODE 8-1-8.4, REQUESTING (1) A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR FEDERALLY MANDATED COAL COMBUSTION RESIDUALS ("CCR") RULE COMPLIANCE PROJECTS AND COSTS; (2) APPROVAL OF ESTIMATED COSTS OF ITS FEDERALLY MANDATED COMPLIANCE PROJECTS; (3) AUTHORITY TO REFLECT COSTS AND CREDITS INCURRED FOR THE FEDERALLY MANDATED PROJECTS THROUGH ITS EXISTING STANDARD CONTRACT RIDER NO. 62; (4) RECOVERY OF 80% OF THE FEDERALLY MANDATED COSTS ON A TIMELY BASIS AND APPROVAL OF THE USE OF A REGULATORY ASSET TO ACCRUE SUCH COSTS, WITH FINANCING COSTS, UNTIL THE COSTS ARE REFLECTED IN PETITIONER'S RATES; AND (5) AUTHORITY TO ACCRUE A REGULATORY ASSET FOR THE DEFERRAL OF 20% OF THE FEDERALLY MANDATED COSTS ON AN INTERIM BASIS, WITH CARRYING COSTS, UNTIL THE APPLICABLE COSTS ARE REFLECTED IN PETITIONER'S BASE RETAIL ELECTRIC RATES	**CAUSE NO. 45940** **APPROVED: MAY 08 2024**

ORDER OF THE COMMISSION

Presiding Officers:
Sarah E. Freeman, Commissioner
Jennifer L. Schuster, Senior Administrative Law Judge

On August 30, 2023, Duke Energy Indiana, LLC ("Petitioner" or "Duke Energy Indiana") filed its Petition and case-in-chief testimony with the Indiana Utility Regulatory Commission ("Commission") requesting a certificate of public convenience and necessity under Ind. Code § 8-1-8.4 ("CPCN") for federally mandated Coal Combustion Residuals ("CCR") Rule compliance projects and costs. On September 5, 2023, Citizens Action Coalition of Indiana, Inc. ("CAC") filed a Petition to Intervene, which the Presiding Officers granted on September 18, 2023.

On November 30, 2023, the Indiana Office of Utility Consumer Counselor ("OUCC") and CAC filed testimony. Petitioner filed its rebuttal testimony on December 21, 2023.

An evidentiary hearing was held in this Cause on January 25, 2024 at 9:30 a.m. in Room 222 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana. Counsel for Petitioner, OUCC, and CAC participated in the hearing, and the evidence of all parties was admitted without objection.

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

1. Notice and Jurisdiction. Due, legal, and timely notice of the evidentiary hearing was given and published by the Commission. Petitioner is a public utility as defined in Ind. Code § 8-1-2-1 and requests relief pursuant to Ind. Code ch. 8-1-8.4 (the "Federal Mandate Statute") and Ind. Code §§ 8-1-2-10, -11, -23, -39, and -42(a). The Commission has jurisdiction over Petitioner and the subject matter of this proceeding.

2. Petitioner's Characteristics. Duke Energy Indiana is a public utility organized and existing under Indiana law and has its principal office at 1000 East Main Street, Plainfield, Indiana. It is engaged in rendering electric utility service in Indiana and owns, operates, manages, and controls, among other things, plant and equipment in Indiana used for the production, transmission, delivery, and furnishing of such electric service to the public.

3. Petitioner's Electric Generating Properties. As of the date of the Petition in this proceeding, Petitioner's electric generating properties consist of: (1) two syngas/natural gas-fired combustion turbines ("CT") and one steam turbine located at Edwardsport; (2) four solar-powered facilities; (3) steam capacity located at two stations comprised of seven coal-fired generating units; (4) combined cycle capacity located at one station comprised of three natural gas-fired CTs and two steam turbine-generators; (5) a run-of-river hydroelectric generation facility comprised of three units; (6) one combined heat and power facility located at Purdue; and (7) peaking capacity consisting of four oil-fired diesels and twenty-four natural gas-fired CTs, one of which has oil back-up.

4. Relief Requested. Petitioner requests the following: (1) a determination that the standards and requirements of the United States Environmental Protection Agency ("EPA") CCR Rule are federally mandated requirements under Ind. Code § 8-1-8.4-5; (2) a finding that Petitioner's Coal Ash Compliance Project meets the requirements of federally mandated compliance projects under Ind. Code § 8-1-8.4-2; (3) a CPCN under Ind. Code §§ 8-1-8.4-6 and -7 for the proposed Coal Ash Compliance Project; (4) authority to recover federally mandated costs incurred to comply with the CCR Rule, pursuant to Ind. Code § 8-1-8.4-7; (5) authority to recover 80% of the federally mandated costs until such costs are reflected in Petitioner's rates via Petitioner's existing Standard Contract Rider No. 62 – Environmental Compliance Adjustment ("Rider 62"); (6) deferral, with carrying costs, of the remaining 20% of federally mandated costs until Petitioner's next general base rate case; and (7) authority to adjust Petitioner's net operating income to reflect any approved earnings associated with the Coal Ash Compliance Project under Ind. Code § 8-1-8.4-7(c)(1) for purposes of Ind. Code § 8-1-2-42(d)(3). In the alternative, to the extent Petitioner's costs are found ineligible under Ind. Code § 8-1-8.4, Petitioner requests: (1) approval of its Coal Ash Compliance Project expenditures as an improvement to Petitioner's plant and equipment pursuant to Ind. Code § 8-1-2-23; and (2) deferral of those expenses, with carrying costs until such costs are included in Petitioner's base rates as costs of removal.

5. Petitioner's Case-in-Chief. Petitioner presented case-in-chief testimony of Owen R. Schwartz, Manager, Environmental Services for Duke Energy Business Services LLC ("DEBS"), Timothy S. Hill, Vice President of Coal Combustion Products ("CCP") Operations for DEBS, and Brian P. Davey, Vice President, Rates and Regulatory Strategy, for Petitioner.

Mr. Schwartz testified that many of Petitioner's surface impoundments have triggered closure in accordance with the CCR Rule and Indiana Department of Environmental Management ("IDEM") requirements. He described the CCR Rule, explaining that until an approved state or federal CCR permit program is established, the CCR Rule remains self-implementing, and CCR units must remain in compliance with the CCR Rule's minimum national criteria. In 2016, the CCR Rule requirements were incorporated into the Indiana Code, and IDEM later adopted an amendment to Indiana's Solid Waste Management Plan describing its plan to update Indiana's regulations for regulating CCR disposal facilities to standards equivalent to the EPA's CCR Rule. IDEM's rulemaking, initiated to propose additional changes to the Indiana CCR standards, offer compliance alternatives and flexibility, while meeting the federal CCR standards, and establishing a permit program for CCR units, remains underway.

Mr. Schwartz testified that existing landfills and surface impoundments that were receiving waste on the effective date of the rule (October 19, 2015) are covered under the regulation. Existing surface impoundments not receiving waste on the effective date of the rule, but still containing water, are considered "inactive," and have the same requirements as active impoundments, but with extended compliance timelines. Compliance requirements include location restrictions, impoundment design criteria, operating criteria, groundwater monitoring and corrective action, closure and post-closure and recordkeeping, notification and posting of information to the internet. He testified certain events may cause a CCR unit to trigger closure, such as location restrictions, structural integrity and safety factor assessments, which was the case for Petitioner's Gallagher Primary Pond, Gibson North Ash Pond, and Cayuga Primary Ash Settling Pond and Lined Ash Disposal Area. Exceeding the applicable groundwater standard based on CCR Rule-required sampling can also trigger closure, which was the case for Wabash River Ash Pond A and B, and Wabash River Secondary Settling Pond. When a generating facility retires, or a CCR unit is no longer used, requirements for closure will also take effect. Cayuga Secondary Ash Settling Pond, Gallagher Secondary Settling Pond, Gibson North Settling Basin, Gibson East Ash Pond Settling Basin, and Gibson South Settling Basin posted Notices of Intent to Close based on their receiving their last known quantities of CCR and station water.

Mr. Schwartz testified that, in October 2020, the EPA revised two key closure-related deadlines: (1) the deadline to cease receipt of coal ash in response to the detection of a leak from an unlined impoundment, and (2) the deadline to cease receipt of coal ash in a surface impoundment that fails to meet the uppermost aquifer location restriction. Petitioner does not anticipate any of the EPA's additional proposed revisions addressing various court orders to materially alter Duke Energy Indiana's CCR compliance plan schedule. Mr. Schwartz testified that, absent extenuating circumstances, the CCR Rule requires closure be complete within five years of its initiation. However, if a surface impoundment is less than or equal to 40 acres in area, a single two-year extension is available, for a maximum closure duration of seven years. For surface impoundments greater than forty acres, up to five two-year extensions are available, for a maximum potential closure duration of 15 years. Mr. Schwartz described the post-closure

monitoring requirements for surface impoundments and landfills. For closure in place, post-closure monitoring and care is entered after closure is complete, which includes maintaining the integrity and effectiveness of the final cover system, any leachate collection and removal system, and the groundwater monitoring system for a default period of 30 years. However, if applicable groundwater protection standards are not achieved at the end of this period, post-closure care must continue until such standards are achieved.

Mr. Schwartz testified that Petitioner's Closure and Post-Closure Plans have been approved by IDEM for all of Petitioner's surface impoundments except for the original Edwardsport Closure Plan, which remains under review by IDEM. Petitioner withdrew its Closure Plans for Gallagher North Ash Pond and Primary Pond Ash Fill in April 2022, and submitted slightly revised Closure Plans in November 2022 proposing installation of a slurry wall. He testified that Petitioner will update the Commission and parties on the revised Gallagher Closure Plans in its semi-annual ECR proceedings.

Mr. Schwartz described the EPA's recently proposed rule to expand the scope of units regulated under the CCR Rule to include legacy impoundments (inactive surface impoundments at inactive generating facilities) that contained CCR and liquids on or after the CCR Rule's effective date (October 19, 2015) ("Legacy CCR Rule"). For legacy impoundments, the proposed rule requires groundwater monitoring, combined detection and assessment monitoring, and initiation of closure within 12 months of the effective date of the rule, with completion within five years. The rule also proposes to revise closure in place performance standards for landfills. He testified that Petitioner does not have any impoundments that meet the definition of legacy CCR impoundment since they were all active on October 19, 2015. The rule also proposes to regulate CCR management units (areas of land on which any non-containerized accumulation of CCR is received, placed, or managed) that is not a CCR unit, including inactive CCR landfills and CCR units closed prior to October 17, 2015. He testified Petitioner does not have units that meet this definition. Petitioner will monitor the proposed rule and advise the Commission when the Legacy CCR Rule becomes effective. If the proposed Legacy CCR Rule becomes final without change, he opined that it could impact Petitioner's coal ash management areas at Cayuga, Gallagher, Gibson, and Wabash River generating sites.

Mr. Schwartz explained his understanding of the various rules and regulations impacting the coal ash closure activities in this proceeding, including the Resource Conservation and Recovery Act ("RCRA"), which he testified establishes a nationwide system of solid waste management and control. He testified that the final closure of the historic ash management areas at the former Dresser Station, Noblesville Station, and the repurposed Edwardsport Station, as well as its implemented and approved closure plan for Gibson Station's East Ash Pond, were conducted to comply with state regulations that are required by federal law and explicitly reviewed and approved by the EPA. Mr. Schwartz testified that compliance with the CCR, RCRA, and IDEM rules is mandatory. The CCR Rule was promulgated under RCRA and meets the definition of a "federally mandated requirement." Petitioner's CCR compliance projects proposed in this proceeding are being undertaken and relate to the direct or indirect compliance with one or more federally mandated requirements — in this case, the CCR Rule and other RCRA regulations. The proposed compliance projects mandated by IDEM also meet the definition of "compliance projects."

Mr. Hill testified concerning his understanding of the actions required for closure in place and closure by removal under the CCR Rule. Mr. Hill testified that no costs are included in this proceeding for any of the closure projects previously approved in Cause Nos. 45253 or 45253 S1. He provided an overview of the surface impoundments and ash management areas that Petitioner contends are governed by the CCR Rule and IDEM rules, including post-closure activities through 2030, which comprise Petitioner's Coal Ash Compliance Project for which Petitioner requests CPCN approval in this proceeding, as follows:

A. Gallagher Primary Pond. Petitioner received approval from IDEM on December 8, 2021 for the Gallagher Primary Pond to be closed in place. Mr. Hill testified that closure plans include utilizing a slurry wall to control, minimize, or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste, releases of CCR, leachate, contaminated run-off to the ground or surface waters, or to the atmosphere. Mr. Hill testified that the revised plans for the North Ash Pond and the Primary Pond Ash Fill Area also include a slurry wall. The three units are contiguous and once operated as a single CCR unit, therefore the slurry wall will encircle all three units and will key into the underlying low-permeability shale bedrock to create a barrier between the ash and groundwater. A dewatering system within the slurry wall will be used to remove free liquids and ensure an inward groundwater gradient exists across the slurry wall. He testified the ash management areas at Gallagher anticipated to be closed by 2026.

B. Wabash River Ash Pond B and North Ash Pond. Petitioner received partial IDEM closure approval for Ash Pond B on April 13, 2021, and the North Ash Pond on September 8, 2021. Mr. Hill testified Petitioner plans to have the ash management areas at Wabash River are planned to be mainly closed by 2027.

The North Ash Pond is planned to be closed in place with any required structural fill materials coming from an on-site soil borrow location. Surface water runoff will be controlled via final grading and contour of the cap, and a CCR Rule compliant final cover system will be installed. Ash Pond B will be closed by removal of all CCR materials into the lined South Pond, including an additional one foot of soil. A soil layer will be established including vegetation that returns the area to a natural floodplain habitat.

C. Gibson North Pond, North Settling Basin, and South Ash Fill Area. Petitioner received IDEM approval of the North Ash Basin System on December 7, 2021, and the South Ash Fill area on February 10, 2021. Mr. Hill testified Petitioner plans to have all CCR basins and ash management areas in this proceeding at Gibson mainly closed by 2027.

The North Ash Pond is planned to be closed in place, utilizing targeted in-situ-stabilization ("ISS"), which solidifies portions of the ash in contact with groundwater to create an impermeable barrier. A stability wall will also be installed using a deep material mixing ("DMM") process along the north section of the basin to ensure stability in the event of a seismic event. After ISS and dewatering are complete, a CCR Rule-compliant engineered cap will be installed. To date, Petitioner has incurred engineering and planning costs, as well as costs to develop the ISS and DMM wall requirements, in addition to covering the adjacent Restricted Waste Type II landfill with a CCR Rule-compliant cover. Mr. Hill testified that all work on the North Pond is anticipated to be completed by 2027.

The North Settling Basin is planned to be closed by removal, with a 6.2-acre portion of the pond that currently has structures such as rail and access roads, closed in place. Once the ash is removed, the pond will be re-purposed to a non-CCR stormwater pond. Work to date includes removal of the ash to the onsite landfill. Mr. Hill testified final closeout activities are scheduled to complete in conjunction with the North Pond closure work in 2026.

The South Ash Fill Area will be closed in place by grading the top area to promote stormwater drainage using fixated material from the station then installing an IDEM-approved final cover system.

D. <u>Edwardsport Ash Management Area</u>. Mr. Hill testified that Petitioner must undertake coal ash-related remediation at the legacy Edwardsport Generating Facility (the coal-fired plant that retired when the IGCC was placed in service). The Edwardsport closure plan was submitted in the fall of 2019 and remains pending before IDEM. Petitioner has included legacy Edwardsport in this proceeding, but the plan will not be implemented until approval by IDEM. Petitioner's closure plan entails excavating the ash from portions of the site and consolidating it into one pile, which would then be covered with two feet of compacted cohesive soil plus a one-foot vegetative layer with top grades promoting positive drainage off the pile. The areas where existing ash is removed will be graded to drain and covered with a six-inch vegetative layer. Mr. Hill provided the cost estimate for the Edwardsport closure plan as submitted to IDEM. Petitioner expects to begin field work at Edwardsport in 2025, pending IDEM closure approval, and complete closure in 2027.

Mr. Hill testified that alternate site-specific options for compliance were evaluated for comparison and are included in the closure plan documents for each station. As the plans were developed, each ash management area was reviewed for the best and most cost-effective way to comply with the federal CCR and IDEM CCR requirements as described in the closure plan summaries, noting that Petitioner only has one alternative to the chosen method, since it is his understanding that surface impoundments can be closed using either closure by removal or closure in place. Mr. Hill testified that Petitioner used a third party to help develop the plans. Criteria considered were cost, safety, schedule, constructability, regional factors, and environmental protection and impacts. The proposed plans best fulfilled these criteria and meet the requirements of the CCR Rule and IDEM rules. Mr. Hill testified that although the CCR compliance activities at Gibson and Cayuga Stations are necessary for continued operation, the basin closures do not extend the useful life of the generating facilities.

Mr. Hill testified Duke Energy Indiana voluntarily sought to dismiss, without prejudice, Cause No. 45749 and refiled under this proceeding to make clear that the current, as amended, version of the Federal Mandate Statute applies to Petitioner's Coal Ash Compliance Project.

Mr. Hill approximated the total plan development and closure expenses through 2030 for the proposed Coal Ash Compliance Projects, unescalated and after subtracting cost of removal, to be $280 million. In addition, coal ash management costs are approximately $29 million (unescalated). Mr. Hill testified Petitioner has proceeded reasonably in the activities undertaken to comply with the CCR Rule and IDEM, and its compliance costs are reasonable and should be approved. He testified the Petition in this proceeding was filed within a reasonable time with

respect to the closure plan compliance dates for Gallagher, Gibson, Edwardsport, and Wabash River Generating Stations.

Mr. Davey testified that, upon Commission approval of the Coal Ash Compliance Project as federally mandated projects, Petitioner is proposing to commence Construction Work in Progress ("CWIP") ratemaking treatment (*i.e.*, recovery of cash return on investment expenditures via a Rider rather than continued accrual of financing costs on the expenditures) via Rider 62 in the next practicable filing (anticipated in the fall of 2024) for the retail jurisdictional portion of the costs incurred as of the cut-off date for the rider for the Coal Ash Compliance Project costs incremental to amounts included in base rates and prior ECR riders, with accrued financing costs. Amounts included for return calculation purposes will reflect a reduction for accumulated amortization amounts as of each Rider 62 cut-off date. Petitioner plans to continue this ratemaking treatment until the Commission approves inclusion of these projects in a proceeding that involves the establishment of Petitioner's base retail electric rates and charges.

Mr. Davey opined that, as recognized in the Federal Mandate Statute and in prior Commission orders, financing costs are not only incurred and recoverable under the Federal Mandate Statute on capital construction projects which have specific in-service dates, but also on other federally mandated costs which are not yet included in a rider for timely recovery. Financing costs, including on any previously accrued financing cost amounts, will be accrued on the coal ash closure costs included in Petitioner's Coal Ash Compliance Project (deferred in the regulatory asset due to Petitioner's Asset Retirement Obligation ("ARO") accounting), as well as project-related post closure maintenance expenditures, until the costs are recovered via rates. He testified Petitioner proposes to accrue in a regulatory asset account the financing cost on any portion of the retail jurisdictional portion of the 80% of the Coal Ash Compliance Project expenditures included in this proceeding that are not yet earning a CWIP ratemaking return in Rider 62 and to continue the accrual, including on previously computed financing cost amounts, until such expenditures and accrued financing costs are recovered in Petitioner's retail rates (via Rider 62 or retail base rates). For GAAP accounting and reporting purposes, Petitioner will reflect in its income statement the deferral of incurred interest expense on the full amount of expenditures incurred during the cost deferral period and will then recognize in earnings the remaining costs of capital amounts on a pro rata basis as such amounts are included in billings to Duke Energy Indiana customers. Mr. Davey confirmed controls are in place to ensure financing costs are not accrued on the same federally mandated costs once they are included in Rider 62. He testified Petitioner proposes all Coal Ash Compliance Project costs be amortized such that they will be fully recovered in 2035, to ensure full amortization of costs by the retirement of Petitioner's last operating coal unit at Gibson. Because additional costs will be reflected in the rider as incurred as of each cut-off date, Mr. Davey proposed to use the appropriate period for each filing to ensure all costs are recovered by July 2035. This ensures no matter the timing of the incurrence of the costs, they will be recovered primarily from Duke Energy Indiana customers who are benefitting while coal units are still operating. He testified the revenue requirement amounts included in Rider 62 are allocated to rate groups using the same coincident peak ("CP") demand allocation method adopted for production plant-related costs in Petitioner's most recent retail base rate case. Rates to be billed to individual customers within a rate group are developed by dividing the revenue requirement amounts by kilowatt-hour sales, except for industrial customers served under Rate HLF, for which non-coincident peak KW demand is used. Petitioner proposes deferral of 20% of the retail jurisdictional

portion of federally mandated costs in a regulatory asset with accrued financing costs, including on any previously accrued financing cost amounts, until such costs are recovered in retail base rates. These carrying costs represent financing costs on the portion of federally mandated costs not recovered in a rider mechanism.

Mr. Davey testified the projected rate impact of the Coal Ash Compliance Project shows a first-year rate increase of 1.37% in 2025 over the 2022 billed revenues, which is the peak year total revenue increase.

Mr. Davey opined that Petitioner's proposed accounting treatment in this proceeding is in accordance with GAAP and is appropriate. To the extent Petitioner's costs are found ineligible under Ind. Code ch. 8-1-8.4, he testified the alternative relief requested by Petitioner is reasonable to provide assurance of future recovery through rates of these prudently incurred costs.

6. <u>OUCC's Evidence</u>. The OUCC presented the testimony of Kaleb G. Lantrip, Utility Analyst, and Brian A. Wright, Utility Analyst II.

Mr. Lantrip voiced concern over the affordability of Petitioner's cost recovery request for the Coal Ash Compliance Project. He testified that the Commission's adoption of multiple cost recovery riders has led to increasing electric utility rates and concerns for Indiana electric utility ratepayers. The Commission should only approve necessary and reasonable requests for Petitioner to provide service at reasonable prices and take steps to moderate the imposition of higher rates over time. Mr. Lantrip testified, among the Five Pillars of Electric Utility Service ("Five Pillars") established in Ind. Code § 8-1-2-0.6, the Environmental Sustainability pillar requires the Commission to consider the impact of environmental regulations on electric costs when considering ratemaking constructs. Mr. Lantrip recommended the Commission deny Petitioner's request for CWIP treatment as not statutorily supported since it allows for periodic recovery of incurred amounts. He also had concerns over Petitioner's request for deferral of the retail jurisdictional portion of costs exceeding the estimate by more than 25% and recommended that these costs should require specific justification and approval by the Commission before being authorized in Petitioner's next general rate case.

Mr. Lantrip testified that Petitioner should use the AFUDC rate in calculating post-in-service carrying costs and calculate its financing costs at the debt only AFUDC rate, or alternatively, the lower of Duke Energy Indiana's most recently approved WACC rate or AFUDC rate. As to Petitioner's request for an alternative relief mechanism in the event its request to use the ECR tracker for recovery of Coal Ash Compliance Project costs is denied, Mr. Lantrip recommended Petitioner seek to recover these costs in its next general rate case.

Mr. Wright testified that, since the Gallagher slurry wall also encircles the Gallagher North Ash Pond and Primary Pond Ash Fill Area (for which revised closure plans have not yet been approved by the EPA), the requested cost recovery for the Gallagher Primary Pond should be denied and considered alongside approval of the other two ponds. The OUCC is concerned Petitioner is attempting to recover cost overruns related to these closures by attributing the entire slurry wall's costs to the Primary Pond. He noted Ind. Code § 8-1-1.4-7(c)(3) requires Petitioner to justify and receive Commission approval of any cost increases for the North Pond and Primary

Pond Fill Area exceeding more than 25% of the projected approved costs. He is also concerned with the proper allocation of costs, as Petitioner cannot recover costs for projects approved in Cause No. 45253 S1 incurred prior to November 3, 2021. Mr. Wright testified that Petitioner has not included groundwater remediation costs for Gallagher in its comparison of closure in place and closure by removal.

Mr. Wright testified that, since there are outstanding issues to be addressed for the Wabash River North Pond before final IDEM approval of the closure plan, and as Petitioner's Class 3 cost estimate may not reflect the full costs, he recommended Petitioner's cost recovery request for the North Pond be denied until final approval is granted by IDEM. However, he had no issue with Petitioner's cost recovery request for Wabash River Ash Pond B.

Mr. Wright opined that Petitioner's cost estimates for the Legacy Edwardsport Generating Facility are unreasonable given the plan has not been granted IDEM approval and the Class 5 estimates likely significantly underestimate the final costs for the project.

Mr. Wright also testified that he has concerns with the closure in place alternative selected by Petitioner for the Gallagher Primary Pond, Gibson North Pond, and Gibson South Ash Fill Area, since groundwater monitoring at these sites indicate contaminants from the CCR are leaching into the groundwater. Petitioner has not included potential additional costs of corrective actions in response to this contamination in its comparison of closure in place and closure by removal. He opined that the closure in place option exposes ratepayers to the risk of paying these costs 30 or more years into the future, creating intergenerational equity issues as many of these ratepayers could bear these costs without receiving the benefits of the generating plants the costs are tied to.

Mr. Wright testified the Commission should ensure the proposed Coal Ash Compliance Project costs do not include costs previously disallowed for recovery through the resolution of Cause No. 45253 S1 or cost increases attributable to the projects approved in Cause No. 45253 S1. He recommended the Commission require: (1) the Coal Ash Compliance Project estimate not include project costs related to projects approved in Cause No. 45253 S1, unless such costs were incurred after November 3, 2021; (2) if it is later found that Petitioner included these costs in the estimate, even if unintentional, the approved cost estimate should be revised to remove these costs and the decrease to the approved estimate be used as the benchmark for determining if the Coal Ash Compliance Project's actual costs have exceeded 25% of the projected federally mandated costs; (3) Petitioner to report costs in a manner that clearly distinguished the cost associated with each individual pond or basin; (4) that Petitioner not be allowed to recover any cost increase over 25% of the cost estimates without first seeking Commission approval as required by Ind. Code § 8-1-8.4-7(c)(3).

7. <u>CAC's Evidence</u>. Ben Inskeep, the CAC's Program Director, testified Petitioner's CCR units subject to the federal CCR Rule must meet federally required closure performance standards which prohibit closure-in-place where groundwater is in actual or likely contact with the CCR unless effective engineering measures can be installed to control, minimize, or eliminate such conditions. He opined that Duke Energy Indiana's closure plans associated with the Coal Ash Compliance Project do not fully comply with the federal CCR Rule nor adequately protect human

health and environment, subjecting its customers and Hoosiers to tremendous risk. Mr. Inskeep opined that closure by removal of all or the vast majority of Petitioner's CCR units is the only closure option that can reliably and cost-effectively meet the federal CCR closure performance standards. He further testified that IDEM's approvals of the closure by removal of the Gibson North Settling Basin and Wabash River Pond B expressly find that Petitioner's "closure by removal" does not actually comply with all of the federal requirements — specifically, that Petitioner must decontaminate and remove CCR constituents from all areas affected by releases from the unit, as well as demonstrate that there are no further exceedances of groundwater protection standards. Mr. Inskeep testified that Petitioner is not allowed to request cost recovery under the Federal Mandate Statute for expenditures that do not comply with the federal mandate at hand.

Mr. Inskeep opined that Petitioner's IDEM-required projects subject to RCRA requirements do not require closure nor are they subject to the federal CCR Rule, and should not be subject to cost recovery under the Federal Mandate Statute. Since RCRA requires corrective action for any "releases of hazardous waste or constituents from any solid waste management unit," and Petitioner does not concede the IDEM-required projects have released hazardous waste or constituents to the environment requiring corrective action, they are not subject to the federal CCR Rule. He stated that IDEM approval of Petitioner's closure plans does not render those plans compliant with the federal CCR Rule. Either the EPA or citizens could challenge the legal validity of Duke Energy Indiana's closure method, notwithstanding IDEM's approval.

Mr. Inskeep testified that one of the key issues for compliance with the CCR Rule is that ash closed in place cannot be subject to ongoing infiltration by groundwater, per 40 CFR § 257.102(d), and utilities must monitor groundwater and take corrective action to clean up releases of contaminants for CCR units. Mr. Inskeep testified Petitioner did not take into consideration the cost of future groundwater corrective action since capping in place can result in the leaching of contaminants, especially at sites were groundwater levels rise and fall as the water levels in neighboring rivers fluctuates. Future corrective actions will be significantly more likely under closure in place relative to closure by removal, as corrective action for groundwater under the federal CCR Rule could last for decades, making closure in place the less prudent and less cost-effective approach. Closure by removal significantly reduces the likelihood that corrective actions will be needed. He testified the EPA could also modify the federal CCR Rule in the future to make closure by removal even more appealing. Mr. Inskeep testified the Commission and other jurisdictions have recognized the benefits of closure by removal, including Duke Energy Indiana's affiliate Duke Energy Progress in South Carolina. He also questioned whether the skyrocketing CCR closure cost estimates led Petitioner to withdraw Cause No. 45749, given the Federal Mandate Statute's justification requirement for cost overruns of 25% or more. He testified that only 6% of the total coal ash covered by Petitioner's Coal Ash Compliance Project is covered by a closure by removal plan.

Mr. Inskeep testified that, although Petitioner proposes closure in place, including installing a slurry wall encircling the Gallagher North Ash Pond, Primary Pond Ash Fill Area, and Primary Pond, IDEM has only approved the Gallagher Primary Pond closure plan, which is the only Gallagher pond that is part of Petitioner's Coal Ash Compliance Project. He stated that Petitioner has not factored in the potential additional costs of corrective actions required by the

CCR Rule in evaluating its Gallagher closure plans, creating a substantial risk for ratepayers that future costs will be much larger since toxic contaminants have already been observed leaching into groundwater. Thus, he stated that the Commission will have to evaluate the prudency of making ratepayers pay for an expensive slurry wall that would only be operated for a limited time, and before it is fully evaluated and approved by IDEM. He testified this closure in place plan only provides temporary protection of groundwater because, after the 30-year post-closure period, it is possible the slurry wall inspection, maintenance, and leachate pumping could end. The slurry wall's transfer of coal ash contamination from groundwater to the surface water also may erode any long-term benefit from the slurry wall. If approved by the Commission, Mr. Inskeep recommended cost recovery only for the portion of the slurry wall associated with the Primary Pond based on its share of the perimeter cover, with the remaining portion of the slurry wall subject to the outcome of a future proceeding in which the closure plans for the other two ponds will be addressed.

Mr. Inskeep noted his concerns with Petitioner's closure plans at Wabash River, including the detection of statistically significant increased concentrations of arsenic, lithium, and molybdenum via groundwater monitoring and also the lack of testing and remediation of any contamination at Ash Pond B after the CCR and one foot of soil are removed. He also noted the future risk of contamination from the closure in place of North Pond B, specifically, erosion of the cap from the shifting of the Wabash River over time.

Mr. Inskeep testified concentrations above groundwater protection standards for CCR units have also already been detected at the Gibson North Ash Pond, North Settling Basin, and South Ash Fill, which he opined is not surprising given that coal ash has been sitting in groundwater, in unlined lagoons, for decades. He testified the Gibson closure plan's provisions related to use of CCR as structural fill to form the subgrade of the final cover fails to comply with 40 C.F.R. § 257, specifically that this use of CCR constitutes "overfill" as defined by 40 C.F.R. § 257.53. The proposed use of CCR as overfill does not comply with the overfill location restrictions and design requirements for new CCR landfills pursuant to 40 C.F.R. §§ 257.60 and 257.70. Mr. Inskeep testified the Gibson Station closure represents approximately 71% of the total closure costs included in the Coal Ash Compliance Project, which has increased by 58% since Petitioner's case-in-chief in Cause No. 45749. He stated that Petitioner has not provided any testimony explaining the changing risks and potential significant cost impact to ratepayers. He recommended the North Ash Pond closure and management costs be removed since Petitioner has not provided testimony justifying the increase to its cost estimate or why the project remains prudent and reasonable in light of the growing cost and risk. As to the Edwardsport closure plan, Mr. Inskeep opined it is not reasonable to approve cost recovery for a plan not approved by IDEM which is still subject to significant future changes and material changes in cost. He also noted the Edwardsport closure plan only removes 21.4% of coal ash from its current disposal area, leaving the vast majority to be consolidated into a pile that has no liner to protect groundwater contamination. He testified a berm would not provide long-term protection against significant changes in the course of the White River, extreme weather events that could damage the berm, or the potential for flooding from the sides. In addition, he stated that the closure plan does not contemplate corrective actions at the site to clean up contaminated groundwater, nor does it meet federal closure performance standards.

Mr. Inskeep opined that it is more appropriate to use energy allocators than demand allocators when allocating the Coal Ash Compliance Project costs, as the costs are neither related to capacity nor meeting Duke Energy Indiana's capacity obligations. As coal ash costs are related to the amount of electricity generation they should be allocated in the same manner as other energy-related costs. He testified Petitioner's proposed 4CP methodology is inappropriate because coal ash is generated in all months of the year in proportion to the amount of electricity that is generated by the plant. However, the 4CP methodology only considers a customer class's contribution to the peak demand in four months when allocating costs, which disregards which customer class "caused" coal ash costs in eight months in the year. He said that this harms some customer classes and creates windfall rate subsidies for others. He testified that the use of demand allocators create a large, undesirable cross-subsidy in rates primarily benefiting HLF industrial customers and result in higher rates to other customer classes, including residential customers. Mr. Inskeep calculated the customer class impacts of using demand allocators by using Petitioner's estimated total revenue requirement of the Coal Ash Compliance Project costs and allocating the costs to each customer class based on the demand and energy allocators provided by Petitioner. Using the proposed demand allocators, he stated that HLF customers would receive a cross-subsidy of approximately $17.3 million in reduced revenue requirements over 2025-2030, which would be shifted to other rate classes, resulting in a $18.6 million higher revenue requirement for residential customers.

He also stated that MISO utilities must now plan to have sufficient resources in all four seasons, which calls into question the relevance of the 4CP methodology. Mr. Inskeep testified the residential bill impact of Petitioner's proposed Coal Ash Compliance Project is unclear since only a comparison between the revenue requirement allocated to each customer class and each customer class's 2022 bill revenues was provided by Petitioner, using that information to estimate an increase for total revenue requirement. He testified that a forecast of estimated revenue requirements for years after 2030 was also not provided, making it impossible to estimate the total cost of the Coal Ash Compliance Project for ratepayers. He testified that if costs are being amortized through 2035, all coal ash compliance costs through 2035 should be included so as not to create an intergenerational equity issue. Mr. Inskeep recommended the Commission disallow Petitioner's ability to earn a return on Coal Ash Compliance Project costs. He also testified that Petitioner's presumed request for recovery of $16,651.31 in Utility Solid Waste Activities Group ("USWAG") membership dues should be denied as these dues, and any other membership dues to similar organizations, do not serve the public convenience and necessity.

Mr. Inskeep recommended the Commission deny Petitioner's request to defer large cost overruns that exceed 25% of its estimated costs as premature and deny Petitioner's alternative requested relief to approve the Coal Ash Compliance Project expenditures as an improvement to Duke Energy Indiana's plant and equipment pursuant to Ind. Code § 8-1-2-23. He opined that it is unclear why permission should be given to proceed with the project if the Commission determines they are not federally mandated costs. He also posted that this could allow an inappropriate return "of" and "on" such expenses, and is more appropriately addressed in a rate case.

Mr. Inskeep opined that the future-tense phrasing of the Federal Mandate Statute (prior to the enactment of Senate Enrolled Act ("SEA") 9 in 2023) indicated that these projects are to provide future benefits and did not authorize recovery of past incurred costs not previously approved by the Commission. He argued that Petitioner did not file this case "within a reasonable

time with respect to . . . any federally mandated compliance date" as required by SEA 9, since the federal CCR Rules were promulgated more than eight years ago in 2015 and Petitioner has incurred significant costs during 2019-2023. He opined that, by withdrawing Cause No. 45749, Petitioner created further regulatory delay. Mr. Inskeep recommended the Commission deny cost recovery for costs incurred prior to the effective date of SEA 9 of March 22, 2023 to avoid contravening statutory prohibition on retroactive ratemaking. He also argued that all costs incurred before the final order in this Cause and those related to Cause No. 45749 should be denied.

8. Petitioner's Rebuttal Evidence. Mr. Schwartz testified the Gallagher Primary Pond is contiguous to the North Ash Pond and Primary Pond Ash Fill Area, making it more cost-effective to modify the Primary Pond's slurry wall by extending its southern and northern boundaries to also encompass the North Ash Pond and Primary Pond Ash Fill Area. Should there be any changes or updates to either the Primary Pond, the North Ash Pond, or Primary Pond Ash Fill Area, Petitioner will explain those changes and their impact on the cost estimates approved in this proceeding or approved in Cause No. 45253 S1 in its future ECR proceedings. He testified the use of a cut-off wall to establish a hydraulic barrier is not uncommon and is recognized as a cost-effective method to control groundwater movement. The Gallagher Primary Pond closure plan encapsulates the closed ash units on top with a geo-composite liner, on the bottom with low hydraulic conductivity shale, and on the sides with a constructed containment wall. The installation and long-term maintenance of the water extraction system acts to prevent outward movement of water from the area surrounded by the slurry wall and is significantly less costly than removal of the CCR from the Gallagher Primary Pond to an offsite landfill. The current landfill at Gallagher is inadequate to hold this CCR. The closure requirement under the CCR Rule and IDEM regulations make it a compliance project related to the direct or indirect compliance with federally mandated requirements.

Mr. Schwartz testified that approval of a proposed closure plan is not a prerequisite for approval by the Commission under the federal mandate statute. Petitioner is working with IDEM to address any concerns raised with the Edwardsport closure plan as submitted, and believes any potential changes to the plan would be covered by the current project estimate. As to Mr. Inskeep's concerns with using CCR as structural fill at Gibson, Mr. Schwartz opined that the use of CCR to facilitate the installation of an engineered cover system as part of an approved closure is not construction of a landfill and, therefore, the overfill provisions of the CCR Rule are inapplicable to this situation. He stated that the CCR Rule "does not apply to practices that meet the definition of a beneficial use of CCR," including, without limitation, its location restrictions and design requirements for new CCR landfills. 40 C.F.R. § 257.50(g). Mr. Schwartz disputed the relevance of Mr. Inskeep's opinion on whether or not Petitioner's IDEM-approved closure plans for Wabash River Pond B and the Gibson North Settling Basin comply with the CCR Rule, given that the Commission's task in this proceeding is to assess the factors set forth in the Federal Mandate Statute.

Mr. Schwartz testified Petitioner should not add costs to its project estimates now to implement potential future costs from corrective actions that may be required to address groundwater concerns. He opined that neither the CCR Rule nor the Indiana Code require an estimate of corrective action costs when selecting a closure method. Any future actions are speculative, and their specific scope cannot be established until the effectiveness of closure, as

outlined in the approved closure plans, is evaluated. This is why closure/post-closure care and groundwater monitoring/corrective action are contained in separate and distinct sections under the CCR Rule and should not be conflated. He opined that adding such estimates to the compliance plan at this time would be imprudent and not in the interest of Duke Energy Indiana's customers. In addition, Petitioner's closure plans minimize the release of contaminants to groundwater. Mr. Inskeep's claim that Petitioner is in violation of federal law due to a failure to identify and begin implementing groundwater corrective actions at any of its CCR units is false and unsupported. Mr. Schwartz testified it is appropriate to include Petitioner's USWAG dues in the Coal Ash Compliance Project costs since the USWAG Petition for Review filed in 2022 specifically relates to the January 2022 EPA letter regarding Gallagher, and it is important for Duke Energy Indiana to participate as a member.

Mr. Hill testified on rebuttal regarding how Petitioner tracks costs between coal ash basins and ash management areas in this proceeding and those approved in Cause No. 45253 S1 to ensure costs are allocated and forecasted to the respective coal ash basin or ash management area. First, each coal ash basin or ash management area is assigned a unique Project ID number used by Petitioner's accounts payable department to allocate costs when invoices are processed. For work that covers more than one coal ash basin or ash management area, the system allows a percentage allocation to occur automatically. Second, if an invoice is received and no automatic allocation is set up, the approver can insert the correct allocation and the appropriate percentage split using the Project IDs. He testified this process ensures that any costs incurred to date, which would be included in the compliance project estimate, are allocated properly. Since 2021, Petitioner has included a report in its ECR filings to provide an accurate summary of incurred and forecasted costs. Going forward, this report will have information on each individual coal ash basin or ash management area from both Causes, as well as a summary sheet that shows each basin or management are in detail by Cause. This should establish that the actual costs incurred and forecasted to develop this compliance project estimate do not include actual or forecasted costs associated with Cause No. 45253 S1. However, if costs from Cause No. 45253 S1 were found inadvertently allocated to this proceeding and used to develop the compliance project estimate, Petitioner would not object to revising the compliance estimate as recommended by the OUCC.

Mr. Hill testified that Mr. Inskeep incorrectly cites testimony filed in South Carolina to support his position that closure by removal is always the preferred method. He opined that the federal CCR program recognizes the benefits of a federal/state partnership, which is inherent in the federal CCR Rule framework. Each basin or ash management area must be reviewed individually, and IDEM is a critical partner in the implementation of the CCR Rule as it must approve the closure method for each unit based on the site-specific conditions present. Mr. Hill stated that there are numerous differences in the on-the-ground circumstances for Duke Energy Indiana and elsewhere. In South Carolina, many ash basins are valley-fills, created by damming a creek or stream and using a combination of natural drainage and the CCR waste stream to create the basin. Ring-dike basins, which are the type of basins in this proceeding, are created by pushing up material to form a dike around the basin and are more adaptable to engineering controls. Technical evaluations are conducted to compare closure methods and support the closure plans approved by the state regulators on a basin-by-basin basis. Mr. Hill testified that location restrictions, such as seismic stability or flood plains, also influence the preferred closure method. Petitioner has accounted for any site-specific characteristics in its proposed closure plans, as has

IDEM in approving the plans. He stated that the IDEM-approved closure plans in Petitioner's Coal Ash Compliance Project meet the performance standard for closure-in-place or closure-by-removal, as appropriate. He opined that it is not required nor prudent for Petitioner to revise or delay its closure plans in anticipation of future unknown changes to the CCR Rule which are pure speculation and would only serve to delay the benefits of closure.

Mr. Hill disagreed with Mr. Wright's concern that using a Class 5 estimate for the Edwardsport site closure may underestimate actual costs. He stated that Petitioner has confidence in its estimate as it has dedicated staff of experienced cost estimators and project control professionals who have provided support of the safe closure of over 57 million tons of CCR across various Duke Energy jurisdictions, including Indiana. Should the estimate be significantly too low for any reason, that would require Petitioner to obtain additional Commission approval. Mr. Hill testified that it is not appropriate to increase the cost of the Coal Ash Compliance Project by including additional speculative costs associated with groundwater corrective actions. He testified the Coal Ash Compliance Project costs are reasonable and provide as accurate an estimate as possible at this time to support the closure timelines for the basins in this proceeding. Mr. Hill testified the increase in the estimates developed for the proposed Coal Ash Compliance Plan compared to the estimate submitted in Cause No. 45749 is driven by the closure work at the Gibson North Ash Pond. In Cause No. 45749, Petitioner used information from its September 30, 2021 forecast. At that time, the closure scope for the North Ash Pond was uncertain and Petitioner had not yet engaged the specialty contractors required to perform the work. He testified the estimate provided for this proposed compliance plan was based on Petitioner's June 30, 2023 forecast. Since then, he stated that Petitioner confirmed the scope and engaged the specialty contractors required to perform the work, and updated the estimate. The bid evaluation and award process not only resulted in the identification of additional risks not apparent when using a conceptual design as the basis for evaluation, it also allowed Petitioner to reduce or eliminate risks. He testified that the Expected Monetary Value ("EMV") used in the project estimate increased from $13 million to $29 million, but as a percentage of total project cost, remained essentially the same, decreasing from 18% to 17%. A 17% EMV for a project this size and with the specific scope and means & methods is appropriate.

Mr. Hill opined that the cost estimate for the Gallagher Primary Pond will not increase, as argued by the OUCC and CAC, since the costs for the slurry wall will be allocated by perimeter distance, which would likely reduce the cost of the Primary Pond since less perimeter would be enclosed. Should there be impacts to the cost estimate previously approved in Cause No. 45253 S1 (for the Primary Pond Ash Fill Area and the North Ash Pond), Petitioner would address those impacts in a future regulatory proceeding. He testified there is no reason to deny the proposed compliance project at the Gallagher Primary Pond because of potential changes to two different ash management areas. He opined that speculation on future litigation challenges to any closure plan is not a valid reason to deny any portion of the proposed Coal Ash Compliance Project.

In rebuttal, Mr. Davey testified the Federal Mandate Statute specifically allows for recovery of financing costs as federally mandated costs. The proposed Coal Ash Compliance Project will accrue WACC, within which a return on is earned. According to Mr. Davey, the return of the federally mandated costs is recovered through the tracked amortization of the Coal Ash Compliance Project in Petitioner's ECR, and, as those costs are recovered, the net book value of

the Coal Ash Compliance Project will decline, benefiting customers more timely than base rate case recovery. Mr. Davey disagreed with Mr. Lantrip's recommendation to deny CWIP treatment as the Federal Mandate statute specifically allows for recovery of "financing" costs as "federally mandated costs." In addition, he stated that the statute's provision for the periodic recovery of incurred amounts does not apply to Petitioner's proposal to amortize and recover the costs until 2035 as opposed to recover the costs as incurred. He testified that denial of a "return on" coal ash removal could have adverse impacts to Petitioner's credit ratings.

Mr. Davey disagreed with Mr. Lantrip's assertion that the AFUDC rate or the debt portion of the AFUDC rate should be used to calculate carrying costs. He opined that Petitioner has the authority to defer compliance costs that exceed Petitioner's estimate by more than 25% on its books until it can return to the Commission with "specific justification" for the increase and request "specific authority" to include these actual costs in its base rates in the "next general rate case." He testified that deferral does not mean "pre-approved" for recovery, as Petitioner must still request and be granted approval to move the deferred costs into rates.

Mr. Davey testified that Petitioner has proposed to include the Coal Ash Compliance Project in its ECR Rider, which specifically allocates on demand. The demand allocation for the projects included in this proceeding is consistent with the allocations approved in the prior CPCN proceeding for coal ash, Cause No. 45253 S1. He opined that Mr. Inskeep's recommendation to allocate the Coal Ash Compliance Project costs on an energy basis is inconsistent with how fixed costs have been allocated in the past and ignores the fact that the ash ponds are associated with Duke Energy Indiana's production facilities, which are designed to meet the demands of Duke Energy Indiana customers. Mr. Davey stated that it is appropriate to allocate these costs to customer classes in the same manner as all other production plant, which is on the basis of demand, not energy. According to Mr. Davey, residual, end-of-life costs typically follow the cost of the plant which is allocated based on demand. He opined that, if ARO accounting had not been implemented, these costs would have been included in the depreciation rates, and depreciation expenses are allocated based on demand. He testified that the environmental liability Petitioner is tasked with managing is an environmental compliance cost that he stated did not exist when the coal was burned, but arose years after, which is another reason that applying a demand factor is consistent with treatment of end-of-life costs associated with production plants. Mr. Davey testified that, in Cause No. 45253, the Commission approved use of the 4CP method of cost allocation for Duke Energy Indiana production plant. He opined that it would be inconsistent to have the CCR costs in this proceeding allocated on energy.

Mr. Davey also opined that the eligibility of pre-petition costs is not limited to costs incurred after the effective date of SEA 9, as asserted by Mr. Inskeep. He posited that the only limitation is that the petition be filed within a reasonable time after the compliance deadline, and he opined that this petition was. Even if any costs were ineligible as federally mandated costs, he opined that they would still be recoverable as costs of removal.

9. Commission Discussion and Findings.

A. CPCN for Coal Ash Compliance Project. Before granting Duke Energy Indiana a CPCN under Ind. Code ch. 8-1-8.4, we must: (1) find that public convenience and

necessity will be served by the proposed Coal Ash Compliance Project; (2) approve the projected federally mandated costs associated with the Coal Ash Compliance Project; and (3) make a finding on each of the factors in Ind. Code § 8-1-8.4-6(b). Those factors include:

(A) A description of the federally mandated requirements … that the energy utility seeks to comply with through the proposed compliance project.
(B) A description of the projected federally mandated costs associated with the proposed compliance project ...
(C) A description of how the proposed compliance project allows the energy utility to comply with the federally mandated requirements described by the energy utility under clause (A).
(D) Alternative plans that demonstrate that the proposed compliance project is reasonable and necessary.
(E) Information as to whether the proposed compliance project will extend the useful life of an existing energy utility facility and, if so, the value of that extension.

Ind. Code § 8-1-8.4-6(b)(1).

i. Federally Mandated Requirements. Ind. Code § 8-1-8.4-5 defines a federally mandated requirement to include "a requirement that the commission determines is imposed on an energy utility by the federal government in connection with . . . [a]ny other law, order, or regulation administered or issued by the [EPA.]" Mr. Schwartz testified that the CCR compliance projects at issue in this proceeding are being undertaken to comply with federally mandated requirements under Ind. Code § 8-1-8.4-5. The OUCC agreed that the CCR compliance projects are federally mandated; however, CAC witness Inskeep disagreed that the closure costs related to the ash management areas overseen by IDEM are federally mandated.

Mr. Schwartz testified that Indiana's solid waste management laws are part of a federally mandated and federally approved "solid waste management plan" that was required pursuant to the federal RCRA. Petitioner's final closure of ash management areas not regulated by the CCR Rule are being conducted in compliance with state law and accompanying regulations, which are required by federal law and approved by the EPA.

IDEM has asserted jurisdiction over all coal ash closure, post-closure, and compliance obligations in Indiana. Therefore, just as we did in Cause No. 45253 S1, we believe it appropriate to treat Petitioner's coal ash closure and compliance obligations presented in this proceeding as undertaken for purposes of direct or indirect compliance with the federally mandated requirements of the federal RCRA. In accordance with the policy of encouraging environmental rule compliance, and in light of the definition of "compliance project" in Ind. Code § 8-1-8.4-2(a), which specifically includes projects "related to direct or indirect compliance" with federally mandated requirements, we find that all of Petitioner's closure projects in this proceeding are for compliance with federally mandated requirements under Ind. Code § 8-1-8.4-5.

ii. Incurred and Projected Federally Mandated Costs. Ind. Code § 8-1-8.4-4(a) defines federally mandated costs 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, or costs that are directly related to the preparation and conduct of a regulatory proceeding." Mr. Hill testified that Petitioner's cost estimate, unescalated and after subtracting cost of removal, is approximately $309 million ($280 million in plan development and closure costs and $29 million in coal ash management costs) for costs it incurs through 2030, with more details shown in Petitioner's Confidential Attachment 2-K (TSH).

Mr. Inskeep of the CAC argued that the Commission should deny recovery of Duke Energy Indiana's CCR closure costs incurred prior to the effective date of SEA 9 on March 22, 2023 because SEA 9 contains no provision stating that the law is retroactive or should apply prior to its effective date. He also argued that the Commission should deny recovery of Duke Energy Indiana's CCR closure costs for the ash disposal sites which have not been granted full approval by IDEM (Edwardsport Ash Management Area, Gallagher North Ash Pond, and Primary Ash Pond Fill Area) since the cost estimates for these sites could significantly change to reflect the full costs for closure and post closure care.

Approval by IDEM of a proposed closure plan is not a prerequisite for approval by the Commission under the federal mandate statute. Ind. Code § 8-1-8.4-2 defines a "compliance project" as a project related to the "direct or indirect compliance" with one or more "federally mandated requirements." Having found Petitioner's closure projects in this proceeding to be federally mandated, thus making them compliance projects under the statutory definition, we will not deny recovery of Duke Energy Indiana's CCR closure costs on this basis, as proposed by the CAC.

Mr. Hill explained on rebuttal the increase in the cost estimate for the proposed compliance plan compared to the estimate submitted in Cause No. 45749. The Commission agrees that Petitioner's cost estimate represents a reasonable cost estimate for the closure and post-closure management costs in this proceeding. Based on the evidence of record, we approve the projected federally mandated costs and expenses associated with the closure, post-closure, and other coal-ash-related compliance projects as required by Ind. Code § 8-1-8.4-6(b)(1)(B). Mr. Hill testified that the federally mandated compliance obligations in this proceeding are the closures of the specific coal ash basins and areas at Gallagher, Gibson, Edwardsport, and Wabash Valley generating stations. According to Mr. Hill, under the closure plans submitted to IDEM, the closures must be complete at Gallagher by November 2025, at Gibson between September 2024 and May 2027, at Edwardsport by May 2027, and at Wabash River by November 2027. We agree with Petitioner that the CCR closure costs it has already incurred and will continue to incur associated with these closures are federally mandated and therefore just and reasonable, and are eligible for recovery under SEA 9, including costs incurred before the effective date of SEA 9 and before the filing of this case. The filing of the Petition in this case occurred before all of these federally mandated compliance dates and therefore complies with Ind. Code § 8-1-8.4-7(a). However, we agree with the CAC that Petitioner voluntarily withdrew Cause No. 45749 in an effort to receive a more favorable cost recovery ruling following the passage of SEA 9. Therefore, we find that Petitioner is not entitled to recover the regulatory and legal costs incurred specifically in connection with its previously filed Commission case related to the same compliance plan, Cause No. 45749.

Finally, Mr. Inskeep also opined that Petitioner failed to file this case "within a reasonable time with respect to . . . any federally mandated compliance date" as required under SEA 9. The CCR Rule contains multiple federally mandated compliance dates associated with the Coal Ash Compliance Project. In addition, IDEM approved the closure plans for the basins at Gallagher, Gibson, and Wabash River included in the Coal Ash Compliance Project in this proceeding on different dates in 2021. These closure plan approvals also gave rise to multiple compliance dates, including but not limited to, closure obligations, groundwater monitoring and 30 years of post-closure monitoring. This proceeding was filed on August 30, 2023. We find this was within a reasonable time with respect to the federally mandated compliance dates contemplated within this proceeding.

iii. Compliance Projects. Mr. Hill testified that, with the exception of Edwardsport, Petitioner's closure plans have been reviewed and approved, sometimes with modifications, by IDEM. Petitioner is working with IDEM to address any concerns raised with the Edwardsport closure plan and believes any potential changes to the plan would be covered by the current project estimate in this proceeding. As discussed above, IDEM has adopted the federal CCR Rule as part of its own Solid Waste Management Rules, and those rules were promulgated in order for Indiana to comply with RCRA. Based on the evidence of record, we find that Petitioner's compliance projects will allow it to comply directly or indirectly with RCRA. Therefore, we find that Petitioner has satisfied the requirements of Ind. Code § 8-1-8.4-6(b)(1)(C).

iv. Alternative Plans. Mr. Hill testified that IDEM Surface Impoundment Guidelines provide two types of closure methods, clean closure and closure in place. He stated that each site-specific closure option is included in the closure plan documents and the chosen option is listed for each basin in the Closure Plan narrative. As the plans were developed, each ash management area was reviewed for the best and most cost-effective way to comply with the federal CCR requirements. However, even though Petitioner has explained which method of closure it has proposed to IDEM, the only alternative that Duke Energy Indiana may use to close its surface impoundments is the alternative that IDEM approves. Therefore, based on the evidence of record, we find that Petitioner considered alternative plans for compliance and that the proposed compliance projects are reasonable and necessary. Therefore, we find Petitioner has satisfied the requirements of Ind. Code § 8-1-8.4-6(b)(1)(D).

v. Useful Life of Facilities. Mr. Hill explained that, for the generating sites Duke Energy Indiana plans to continue to operate, there are compliance activities necessary for continued operation, such as loading, hauling, and placement of ash and fixated material in the operating landfills, as well as landfill management. The closure of a basin at a particular site does not, however, extend the useful life of the generating facility. We understand the nature of these federally mandated requirements do not necessarily extend the useful life of a facility, but still must be performed in order to remain in compliance. Therefore, we find Petitioner has provided us with information as to whether the proposed compliance project will extend the useful life of an existing energy utility facility in accordance with Ind. Code § 8-1-8.4-6(b)(1)(E).

vi. Conclusion. The evidence of record demonstrates that the proposed compliance projects will allow Petitioner to comply with federally mandated requirements. As discussed above, we have made a finding on each of the factors described in Ind. Code § 8-1-8.4-

6(b) and approve the projected federally mandated costs associated with Petitioner's closure and coal ash related compliance projects. Therefore, we approve the proposed compliance projects and issue Duke Energy Indiana a certificate of public convenience and necessity for its proposed compliance projects under Ind. Code § 8-1-8.4-7(b).

B. Cost Recovery. Ind. Code § 8-1-8.4-7(c) states:

> If the commission approves under subsection (b) a proposed compliance project and the projected federally mandated costs associated with the proposed 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).
>
> (2) Twenty (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.

Because Petitioner's closure, post-closure, and coal ash related compliance projects are for direct or indirect compliance with federal mandates, as discussed above, and the federally mandated costs are associated with the proposed compliance projects, the Commission finds that Duke Energy Indiana is authorized to recover 80% of its approved costs through Standard Contract Rider No. 62. In addition, Duke Energy Indiana is authorized to defer 20% of the approved costs until its next general rate case. Duke Energy Indiana is also authorized to recover financing costs on 80% of its cost associated with the compliance projects through Standard Contract Rider No. 62 with 20% deferred with carrying costs until Petitioner's next general rate case. Recovery through Standard Contract Rider No. 62 shall be consistent with Petitioner's proposal in this proceeding as outlined in the testimony of Mr. Davey. Duke Energy Indiana is further permitted to recover its federally mandated costs incurred or estimated to be incurred, as proposed in this proceeding, to the extent such costs are reasonable and consistent with the scope of the Coal Ash Compliance Project pursuant to Ind. Code § 8-1-8.4-4.

The OUCC argued that the calculation of financing costs should reflect Petitioner's cost of debt only. However, Ind. Code § 8-1-8.4-7(c)(2) allows for 20% of approved federally mandated costs to be deferred, and carrying costs are based on the overall cost of capital most recently approved by the Commission, which compensates a utility for its cost of capital while waiting to collect the federally mandated costs it incurred. We agree with Petitioner that the OUCC's recommendation is inconsistent with the Federal Mandate Statute and would unfairly burden Duke Energy Indiana while it performed the Coal Ash Compliance Project, which it is required to do by RCRA and the CCR Rule.

Duke Energy Indiana requested authority to defer any actual costs that exceed the projected federally mandated costs by more than 25% percent. This request is consistent with the Federal Mandate Statute and would provide Petitioner authority to defer the costs on its books until it can return to the Commission with "specific justification" for the increase and request "specific authority" to include these actual costs in its base rates in the "next general rate case." As such, we approve Petitioner's request to defer any actual costs that exceed the projected federally mandated costs by more than 25% for the Coal Ash Compliance Project until it can return to the Commission to provide specific justification for the increased costs and seek authority to include those costs in rates.

10. Confidential Information. On August 30, 2023, Petitioner filed a motion requesting protection of confidential and proprietary information along with supporting affidavits. On September 18, 2023, the Presiding Officers made a preliminary determination that trade secret information should be subject to confidential procedures, as supported by Petitioner's affidavits, consisting of: (1) actual and estimated ash pond closure and ash management costs; and (2) proposed project schedules related to Duke Energy Indiana's ash pond closures. The Commission finds such information is confidential pursuant to Ind. Code §§ 5-14-3-4 and 24-2-3-2, is exempt from public access and disclosure by Indiana law and should 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. Duke Energy Indiana's proposed closure, post-closure, and coal ash related compliance projects detailed in the testimony in this proceeding constitute "federally mandated compliance projects" as defined by Ind. Code § 8-1-8.4-2.

2. Duke Energy Indiana is issued a certificate of public convenience and necessity for the compliance projects pursuant to Ind. Code §§ 8-1-8.4-6 and -7. This order constitutes the certificate.

3. Duke Energy Indiana is authorized to recover 80% of its federally mandated costs, including carrying costs at the most recently approved overall cost of capital, through Petitioner's Standard Contract Rider No. 62. Petitioner is authorized to defer the remaining 20% of its federally mandated costs until Petitioner's next general rate case including carrying costs.

4. Duke Energy Indiana is authorized to defer any actual costs that exceed the projected federally mandated costs by more than 25% for the Coal Ash Compliance Project until it returns to the Commission to provide specific justification for the increased costs and seek authority to include those costs in rates, in accordance with Ind. Code § 8-1-8.4-7.

5. Duke Energy Indiana is authorized to adjust its net operating income to reflect any approved earnings associated with the Coal Ash Compliance Project under Ind. Code § 8-1-8.4-7(c)(1) for purposes of Ind. Code § 8-1-2-42(d)(3).

6. The Confidential Information shall continue to be exempt from disclosure under Ind. Code § 8-1-2-29, Ind. Code § 24-2-3-2, and Ind. Code § 5-14-3-4.

7. This order shall be effective on and after the date of its approval.

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

APPROVED: MAY 08 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: 2024.05.08 10:12:25 -04'00'

Dana Kosco
Secretary to the Commission