

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF DUKE ENERGY INDIANA, LLC)
PURSUANT TO IND. CODE §§ 8-1-2-42.7 AND)
8-1-2-61, FOR (1) AUTHORITY TO MODIFY)
ITS RATES AND CHARGES FOR ELECTRIC)
UTILITY SERVICE THROUGH A STEP-IN OF)
NEW RATES AND CHARGES USING A)
FORECASTED TEST PERIOD; (2) APPROVAL)
OF NEW SCHEDULES OF RATES AND)
CHARGES, GENERAL RULES AND)
REGULATIONS, AND RIDERS; (3))
APPROVAL OF A FEDERAL MANDATE)
CERTIFICATE UNDER IND. CODE § 8-1-8.4-1;)
(4) APPROVAL OF REVISED ELECTRIC)
DEPRECIATION RATES APPLICABLE TO)
ITS ELECTRIC PLANT IN SERVICE; (5))
APPROVAL OF NECESSARY AND)
APPROPRIATE ACCOUNTING DEFERRAL)
RELIEF; AND (6) APPROVAL OF A)
REVENUE DECOUPLING MECHANISM FOR)
CERTAIN CUSTOMER CLASSES)

FILED
January 13, 2020
INDIANA UTILITY
REGULATORY COMMISSION

CAUSE NO. 45253

**DUKE ENERGY INDIANA, LLC'S RESPONSE TO JOINT MOVANTS'
MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL**

Petitioner Duke Energy Indiana, LLC (“Duke Energy Indiana” or the “Company”), by counsel, respectfully responds to the *Motion to Certify for Interlocutory Appeal* (“*Motion to Certify*”) filed on December 27, 2019, by Citizens Action Coalition of Indiana, Inc. (“CAC”), the Environmental Working Group (“EWG”), and Indiana Community Action Association (“INCAA”) (collectively, the “Joint Movants”). Duke Energy Indiana opposes this eleventh hour request to certify an interlocutory appeal as it would prolong a proceeding that is nearing conclusion. Furthermore, if granted, it would inject uncertainty and unnecessary complexity on the eve of the evidentiary hearing on an issue that could be adequately addressed on an appeal from the Commission’s final order. Duke Energy Indiana respectfully submits the *Motion to Certify* should be denied.

I. Introduction.

Joint Movants assert that the *Motion to Certify* is based on Indiana Appellate Rule 14(B), which governs discretionary interlocutory appeals. Appellate Rule 14(B) provides that “[a]n appeal may be taken from other interlocutory orders if the trial court certifies its order and the Court of Appeals accepts jurisdiction over the appeal.” Certification is within the trial court’s (or, in this case, the Commission’s) discretion: “The trial court, in its discretion, upon motion by a party, *may* certify an interlocutory order to allow an immediate appeal.” *See* Ind. App. Rule 14(B)(1)(emphasis added). Grounds for granting an interlocutory appeal include: (i) the appellant will suffer substantial expense, damage or injury if the order is erroneous and the determination of the error is withheld until after judgment; (ii) the order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case; and (iii) the remedy by appeal is otherwise inadequate. *See* Ind. App. Rule 14(B)(1)(c).

Joint Movants’ *Motion to Certify* should be denied because it is baseless on its merits. Additionally, notwithstanding the exaggerated claims¹ included in the *Motion to Certify*, none of the grounds enumerated in Appellate Rule 14(B)(1) are present.

¹ As an example: Joint Movants claim their clients consist of over 800,000 Duke Energy Indiana customers. *See Motion to Certify*, at pp. 3 and 4. However, as the Commission is well aware, the OUCC, not Joint Movants, represents utility ratepayers. Moreover, Joint Movants’ petitions to intervene state that each organization represents far fewer customers. CAC’s petition to intervene states that CAC has over 40,000 members, *some* of which are Duke Energy Indiana customers. INCAA’s petition to intervene states that it assists low-income individuals throughout the state, *some* of which are served by Duke Energy Indiana. EWG’s petition to intervene states that it is a national organization having approximately 5,800 supporters in Indiana, *some* of whom are Duke Energy Indiana customers. If each organization represented separate and unique customers, the grand total would be 45,800, or about 7% of Duke Energy Indiana’s total customer base.

Joint Movants also state that Duke Energy Indiana’s alleged “seriously defective” cost of service study affects all aspects of the rate case. *See Motion to Certify*, at p. 3. Contrary to their assertions, cost of service is one aspect of a rate case, separate from the determination of revenue requirements, rate design, cost of equity, cost of debt, capital structure, used and usefulness of rate base investments, etc. The primary cost of service issue raised in this case — 4 CP versus 12 CP — affects allocations to respective rate classes but does not impact the overall revenue requirements.

II. Joint Movants' Motion to Certify is Meritless; the Commission's Order Approving Denial of Their Request for Relief is Correct and Supported by the Facts and the Law.

In order to better understand why the Commission should deny the requested *Motion to Certify* an interlocutory appeal of the denial of a motion to revise a procedural schedule, reviews of the Docket Entry and full Commission determination are instructive.

Joint Movants seek the Commission's certification of a discretionary interlocutory appeal of the November 27, 2019 decision of the full Commission approving the presiding officers' October 28, 2019 denial of the *Joint Motion to Amend Procedural Schedule for Appropriate Relief and for Expedited Briefing*.² When the presiding officers denied the *Joint Motion to Amend Procedural Schedule for Appropriate Relief and for Expedited Briefing*, they focused on three major factors. First, Duke Energy Indiana made its cost of service study model available to all parties, at its Plainfield office – although no party availed itself of such opportunity. Second, the parties agreed to a procedural schedule at the outset of this proceeding that was two months longer than the standard rate case procedural schedule. Third, the parties failed to utilize the extra time afforded to the parties on the front end of the procedural schedule. As the presiding officers' decision, upheld by the full Commission, is correct on all counts, the Commission should not grant the Joint Movants' *Motion to Certify*.

A. In Accordance with the Commission's Rules, Duke Energy Indiana Made its Cost of Service Study Model Available for the Parties' Review.

As Duke Energy Indiana's *Response to Joint Movants' Motion to Amend Procedural Schedule* (including attachments/affidavits) demonstrated, when it filed its case-in-chief, MSFRs,

² In that Joint Motion, Joint Movants had requested the following: (1) an order directing Duke Energy Indiana to refile its Minimum Standard Filing Requirements documents ("MSFRs"), workpapers, exhibits and discovery responses in a format with formulas intact and linked to one another; (2) extension of the prefilings date of the OUCC and intervenors by three weeks from the date Duke Energy Indiana refiles its MSFRs, workpapers, exhibits, and discovery; and (3) expedited discovery turnaround for discovery requests related to Duke Energy Indiana's cost of service study. Note that the parties that moved to amend the procedural schedule consisted of additional parties beyond the three Joint Movants who chose to advance the *Motion to Certify*.

and workpapers in early July 2019, Duke Energy Indiana: (1) filed a case-in-chief that fully complied with applicable Commission statutes and rules; (2) filed MSFRs in full compliance with the Commission's rules and guidance; and (3) filed workpapers supporting its case-in-chief that also fully complied with the Commission's rules. Notably, with regard to cost of service studies, the Commission's rules recognize that a utility's cost of service studies may contain confidential information and that filing such studies with the utility's rate case filing may not be possible or practical. Accordingly, the Commission's rules explicitly provide that, with respect to a utility's cost of service study: (1) such information shall be confidential and protected from disclosure, and (2) if it is impossible or impractical for the utility to file and serve such information electronically, the utility shall make available to the Commission staff and any other party (subject to a nondisclosure agreement), during normal business hours, on the utility's premises, a computer and all software used to create and store such information. *See* 170 IAC 1-5-15(e), (f), (g).

In this rate case, Duke Energy Indiana used a third-party's proprietary cost of service model. Duke Energy Indiana's cost of service studies contained both confidential customer information and proprietary trade secret information of the third-party model vendor. As such, it was neither possible nor practical to file that proprietary third-party model with its rate case filing.³ For this reason, Duke Energy Indiana relied on the Commission's rules and made its cost of service study model available for review by the Commission Staff and parties at its Plainfield, Indiana offices. Thus, as the Commission correctly found, Duke Energy Indiana fully complied with the Commission's rules with respect to the cost of service studies used to prepare its rate

³ With its case-in-chief, however, the Company did include descriptions and the results of both a jurisdictional separation study and class cost of service study.

case. Further, as the Commission also noted, no party availed itself of the opportunity to review the cost of service model⁴ at Duke Energy Indiana's Plainfield, Indiana offices.⁵

B. The Agreed-Upon Procedural Schedule for this Rate Case Was Extended by Two Months, Yet Joint Movants Failed to Utilize this Extra Time to Analyze the Company's Rate Case Filing.

As the presiding officers correctly noted in their October 28, 2019 docket entry, the procedural schedule agreed to by Duke Energy Indiana, on behalf of itself, CAC, and other parties at the outset of this case afforded Joint Movants and other parties two months longer than is standard for rate case procedural schedules. Per the Commission's governing statutes, rules, and guidance, the standard timeframe for processing a rate case is 300 days.⁶ However, "[a]t the request of the parties for more time to conduct discovery and to prepare their testimony and in recognition of holiday breaks, Duke Energy Indiana consent[ed] to a schedule that goes beyond the 300-day schedule. . . ."⁷

As also correctly noted by the presiding officers, Joint Movants failed to take advantage of this extra time. Despite the extended procedural schedule at the front end, the ability and

⁴ It is noteworthy that although none of the parties took the opportunity to come to Plainfield to review the model, on November 21, 2019, the Commission's Advisory Staff members visited, reviewed and utilized the model. See Presiding Officers' Docket Entry dated November 14, 2019. Representatives from the OUCC and other parties, including Joint Movants, attended that meeting.

⁵ Beyond making its cost of service study model available to the Commission Staff and parties, Duke Energy Indiana also took a number of steps above and beyond the Commission rule's requirements to try and aid the parties in analyzing its cost of service studies. As is documented in Duke Energy Indiana's *Response to Joint Movants' Motion to Amend Procedural Schedule*, among other things, Duke Energy Indiana: (1) set up a Skype meeting with the parties to walk through the cost of service model with its cost of service witness, other rate department personnel, and Duke Energy's in-house PowerPlan modeling expert; (2) replicated the entire jurisdictional separation studies and class cost of service study in Excel spreadsheet format, for the convenience of the parties; (3) held several Skype meetings with the parties to walk them through the Excel spreadsheets replicating its cost of service studies; (4) at the request of the parties, after these Skype meetings, added additional functionality to the replica COSS Excel spreadsheets; (5) offered to run other parties' cost of service scenarios using the replicated Excel spreadsheets – although, to date, only one party has requested that three limited scenarios be run; and (6) has timely answered numerous discovery requests relating to its cost of service studies.

⁶ See Ind. Code § 8-1-2-42.7(e); 170 IAC 1-5-2.1(a); and GAO 2013-5.

⁷ See Motion for Approval of Agreed Procedural Schedule in Lieu of Prehearing Conference, ¶6, filed July 23, 2019.

opportunity to review the cost of service study model at Duke Energy Indiana's offices, and the many actions Duke Energy Indiana took above and beyond making the model available at its offices, a mere fifteen days before their testimony was due Joint Movants requested the extraordinary relief of asking the Commission to require the Company to refile its case-in-chief, MSFRs and workpapers in an entirely different format,⁸ along with an extension of time to file their testimony. Joint Movants' request for relief was exceptionally untimely. The Commission's rules provide that the Commission should address any issues raised concerning the completeness of the utility's filing at the prehearing conference. 170 IAC 1-5-2.1. Yet there were no complaints raised about the completeness of Duke Energy Indiana's filing during the prehearing conference process. In fact, many of the parties that had intervened at the time of the prehearing conference process joined in the July 23, 2019 *Motion for Approval of Agreed Procedural Schedule In Lieu of Prehearing Conference*.

Similarly, the Commission's rules provide that any party to the proceeding may file with the Commission a notice that the utility's MSFR information does not comply with the rule, identifying the alleged defect or defects and the requirements necessary to cure the alleged defect or defects, within twenty (20) days of the utility's filing. 170 IAC 5-1-4(a). The Company filed its petition and case-in-chief on July 2, 2019; the other parties did not begin communicating with the Company about its cost-of-service study until the end of the first week of September; and not until mid-October did Joint Movants file their Motion with the Commission claiming

⁸ Of course, Joint Movants' request that Duke Energy Indiana refile its MSFRs and workpapers in a specific format finds no support in the Commission's rules. MSFRs are not even required to be filed – they are filed at an electing utility's option, in order to achieve a relatively expedited procedural schedule for its rate case. 170 IAC 1-5-2(c). Although the Commission's guidance recommends that MSFRs be filed as a "best practice," it is not a requirement. See GAO 2013-5. The Company followed this best practice by filing MSFRs. Further, and significantly, 170 IAC 1-5-1(r) provides that "working papers" may be provided in paper or electronic format. Working papers submitted in paper format, of course, do not include linked formulas. Joint Movants have no legal basis to seek to dictate the format – Excel spreadsheets with linkages throughout -- in which Duke Energy Indiana files its workpapers.

“deficiencies” in the Company’s MSFRs – approximately two and a half months beyond the rule’s 20-day deadline.

Joint Movants’ failure to take advantage of the two extra months built into the procedural schedule to meet their needs, along with their failure to comply with Commission rules specifying prompt deadlines for objecting to the sufficiency of a utility’s case-in-chief filing, compelled the presiding officers’ decision – that Joint Movants had failed to take advantage of the already generous procedural schedule in this case.

III. The Motion to Certify Does Not Meet the Requirements of Appellate Rule 14(B).

A. Joint Movants Will Not Suffer Substantial Expense, Damage or Injury if Interlocutory Relief is Denied.

Despite Duke Energy Indiana’s compliance with Commission rules and despite Joint Movants’ lack of due diligence in analyzing Duke Energy Indiana’s rate case filing and raising these issues, in the unlikely event that a court later finds that Joint Movants’ arguments have some validity, Joint Movants will not suffer substantial expense, damage, or injury without interlocutory relief. If, on appeal of the Commission’s final order, Joint Movants were to prevail on their issues, the case would presumably be remanded to the Commission for further proceedings. And upon conclusion of those further proceedings, if the Commission were to find that Duke Energy Indiana’s cost of service study was unreasonable and resulted in unjust and unreasonable rates, Duke Energy Indiana’s customers (including Joint Movants) may be entitled to a refund if their rates were ultimately found to be too high.

Joint Movants argue that their due process rights will be infringed if they are not afforded the ability to delay this case, the evidentiary hearing of which is set to begin on January 22, 2020, and file supplemental testimony.⁹ Parties that have been given extra time to prepare their

⁹ Despite additional discovery and the passage of more time, Joint Movants have not set forth what their supplemental testimony would say.

case, and have failed to productively use that extra time, cannot legitimately make a due process argument.

Moreover, while utility customers have due process rights, so too do utilities. A utility is entitled to charge just and reasonable rates – rates that are neither too high nor too low. Unreasonably low rates can give rise to constitutional confiscation arguments on behalf of the utility. Similarly, a rate case procedural schedule which is unreasonably delayed, thus delaying needed rate relief, raises due process and confiscation questions with respect to the utility. Utilities are also entitled to rely on the Commission’s rules when presenting a cost of service study.

B. The Motion to Certify for Interlocutory Appeal a Procedural Docket Entry Does Not Involve a Substantial Question of Law.

In an effort to buttress their request for any interlocutory appeal of a docket entry, Joint Movants claim that circumstances presented here are “extraordinary” and that Duke Energy Indiana’s cost of service study presentation is “seriously deficient.” Neither claim is true. As set forth above, Duke Energy Indiana has followed Commission rules which allow a proprietary cost of service model to be made available at the utility’s offices rather than filed with its case-in-chief. And in addition to making such model available to Joint Movants – which opportunity Joint Movants did not even avail themselves of – Duke Energy Indiana has taken a number of steps to try to assist Joint Movants’ understanding of its cost of service study.

The evidentiary hearing is set to begin on January 22, 2020, a mere six business days after the filing of this Response. Duke Energy Indiana initiated this proceeding on July 2, 2019, but due to Joint Movants’ delay (delay in reviewing Duke Energy Indiana’s case-in-chief; delay in raising their issues; delay in seeking the relief underlying this *Motion to Certify*; and even delay in waiting the full thirty days to file the *Motion to Certify*), the Commission’s ruling on the

Motion to Certify is governed by Appellate Rule 14(B)(1)(e), which provides for thirty days to set the motion for hearing, or if no hearing is set and no ruling is made within thirty days after its filing, the Motion to Certify would be deemed denied. And in the unlikely event the Commission grants the Motion to Certify, Joint Movants would still need to file a request that the Court of Appeals accept jurisdiction, to which Duke Energy Indiana would have the right to respond. It is a near certainty that this process would surpass the scheduled end of the evidentiary hearing on February 7, 2020. Even still, the Court of Appeals would need to enter an order on the jurisdiction issue.

The Appellate Rules on interlocutory appeals are intended to facilitate an early determination of issues in order to support orderly disposition of a proceeding. The Joint Movants' request would do the exact opposite: undermine the process, force a decision on a motion to certify during or after the evidentiary hearing has occurred, and compel parallel proceedings of piecemeal litigation. The Commission should exercise its discretion and avoid all of these unpleasant outcomes.

C. Joint Movants' Remedy by Appeal Would Not Be Inadequate.

As described above, an appeal of the Commission's final order provides an adequate remedy.

What would be inadequate is to orchestrate an eleventh hour injection of chaos into the evidentiary hearing, and proceed through an interlocutory appeal, which would last an unknowable length of time. The Commission should exercise its discretion and avoid such a waste of resources and unnecessary delay to the parties on an issue that should have been raised much earlier by Joint Movants.

For all the reasons contained in this Response, Duke Energy Indiana respectfully requests that the Commission deny the *Motion to Certify*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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