STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

VERIFIED PETITION OF DUKE ENERGY INDIANA, INC. FOR APPROVAL OF PETITIONER'S 7-YEAR PLAN FOR ELIGIBLE TRANSMISSION, DISTRIBUTION AND STORAGE SYSTEM IMPROVEMENTS, PURSUANT TO IND. CODE § 8-1-39-10 AND APPROVAL OF A TRANSMISSION AND DISTRIBUTION INFRASTRUCTURE IMPROVEMENT COST RATE ADJUSTMENT AND DEFERRALS, PURSUANT TO IND. CODE § 8-1-39-9, AND APPROVAL OF CERTAIN REGULATORY ASSETS	)	**CAUSE NO. 44526**

DUKE ENERGY INDIANA, INC.'S RESPONSE IN OPPOSITION TO CAC'S MOTION TO STRIKE PREFILED TESTIMONY OF BRIAN DAVEY, OR IN THE ALTERNATIVE, TO RECONSIDER MOTION TO COMPEL DISCOVERY

I. Introduction and Summary of Argument.

On December 16, 2014 the Commission denied the Citizen Action Coalition of Indiana, Inc.'s ("CAC") Motion to Compel the production of certain financial risk scenarios ("Risk Scenarios") created solely in anticipation of the current proceeding. The Commission correctly found that the Risk Scenarios are protected by the work product doctrine under Indiana Trial Rule 26(B)(3). Unable to accept the Commission's protection of this indisputably privileged information, the CAC now takes a different tact and tries to strike the important and helpful testimony of Duke Energy Indiana, Inc.'s ("Duke Energy Indiana" or "Company") ratemaking witness Brian Davey, claiming that he will be providing impermissible opinion testimony. In the alternative, CAC asserts that, if Mr. Davey is permitted to testify, the Commission should reconsider its ruling and compel the production of the privileged documents.

As an initial matter, the CAC's alternative Motion to Reconsider must be denied because the motion is not only unfounded but untimely. Under the Commission rules, the CAC had six business days, up to and including December 24, 2014, to appeal this ruling to the Commission. CAC did not file its motion until December 30, 2014—six days late.

Moreover CAC's Motion to Strike the Testimony of Brian Davey "*in toto*" is overly broad and therefore improper. CAC purportedly seeks to strike the "opinion" testimony of Mr. Davey yet fails to identify any specific lines in Mr. Davey's testimony that it believes should be stricken. Instead CAC seeks the punitive measure of striking Mr. Davey's testimony in full. This is neither appropriate under the current circumstances, where the majority of Mr. Davey's testimony explains the facts and implications of Duke Energy Indiana's proposed T&D Plan, nor under Indiana law where overly broad motions to strike should be denied.

CAC's Motion is also based on a fundamental misunderstanding of Duke Energy Indiana's arguments, the Indiana rules of procedure for experts, and standard Commission practice. CAC is attempting to apply the federal rules of procedure for "retained" experts to Mr. Davey and other employee witnesses, which rules are not applicable here.[1] The Indiana rules differ significantly from the federal rules on the subject of expert disclosure. The Indiana Trial Rules do not require automatic disclosure of the data relied upon by an expert such that even if Mr. Davey was deemed an "expert" under Indiana Rule of Evidence 702 and had relied upon the Risk Scenarios, he would still not have to produce them. Rather Trial Rule 26(B)(4) allows interrogatories to be used to discover the "facts and opinions" known by experts. "Upon motion, the court may order further discover by other means . . ." Trial Rule 26(B)(4)(a)(ii). Thus, expert

[1] *See* 170 Ind. Admin. Code 1-1.*1-16(a) ("Parties shall be entitled to all the discovery provisions of Rules* 26 through 37 of the Indiana Rules of Trial Procedure…"); *see also* 170 Ind. Admin. Code 1-1.1-26(a) ("The commission may be guided by relevant provisions of the Indiana Trial Rules of Procedure and the Indiana Rules of Evidence to the extent they are consistent with this rule.")

document discovery would only proceed under a case management plan or similar court order, and only after the interrogatories. *See State Highway Comm'n v. Jones,* 363 N.E.2d 1018, 1022 (Ind. Ct. App. 1977) (failure to serve expert interrogatories precludes a party from seeking further expert discovery). This practice is significantly different from expert practice under Federal Rule of Civil Procedure 26(a)(2) where "retained" experts are required to provide expert reports that contain the "facts and data considered by the witness."

As discussed in Duke Energy Indiana's Response to CAC's Motion to Compel and below, Mr. Davey is a skilled lay witness under Indiana Rule of Evidence 701. Mr. Davey certainly has specialized knowledge of ratemaking and provides testimony and opinions that are helpful to a clear understanding of the issues in this matter. Indeed, Mr. Davey is precisely the type of employee witness that provides testimony before the Commission so that the Commission has a proper explanation and understanding of the issues before it. If such witnesses were automatically considered retained experts falling under federal standards (as CAC is attempting to establish here), Commission practice would become unwieldy and require production of documents and reports unprecedented in practice before the Commission. The Commission should reject the CAC's attempt to misapply federal law and to mislabel such knowledgeable employee witnesses and turn Commission proceedings into federal litigation.

II. CAC's Motion to Reconsider Is Untimely.

CAC's Motion to Reconsider the order denying its Motion to Compel is an untimely attempt to appeal that order. The order denying CAC's Motion to Compel was entered on December 16, 2014. CAC had six business days, until December 24, 2014, to appeal that order to the Commission. 170 Ind. Admin. Code 1-1.1-25(b). Failure to follow the appeal procedure outlined in 170 Indiana Administrative code 1-1.1-25(b) results in a waiver of the opportunity to

challenge the order. *In re N. Ind. Pub. Serv. Co.*, Cause No. 43696, 2011 WL 6837714 (IURC Dec. 21, 2011). CAC did not timely appeal the order on the Motion to Compel. Instead, it waited until December 30, 2014, and filed a "motion to reconsider" the order. The Commission should deny this untimely attempt to circumvent the appeal process laid out in 170 Indiana Administrative Code 1-1.1-25(b). If CAC wanted to challenge the order it had to file an appeal by December 24, 2014. It did not do so and has thus waived its challenge to that order.

III. CAC's Motion to Strike the Totality of Mr. Davey's Testimony is Improper.

CAC's attempt to strike the testimony of Mr. Davey "***in toto***" is nothing more than a retaliatory action in response to the denial of its Motion to Compel. CAC has failed to set forth a single basis for the denial of Brian Davey's entire pre-filed testimony. A motion to strike "must be specific and limited strictly to the testimony to which it is properly applicable. It would be error for a court to sustain too broad a motion, thus striking out relevant and competent testimony. . . . Such motions to be sustained must be very concise and specific as to the exact testimony to go out." *Southern Ind. Gas & Elec. Co. v. Gerhardt*, 172 N.E.2d 204, 398-99 (Ind. 1961) (denying motion to strike witness testimony where "motion was far too broad and was not limited to any specific testimony of [the] witness"); *see also Mueller v. Mueller*, 78 N.E.2d 667, 668 (Ind. 1948) ("The motion to strike should state the ground of objection and designate the portion of the testimony objected to, for it is not error to overrule a motion to strike out all of an answer when part is competent."). In this case there is simply no basis to ask the Commission to strike the entire testimony of Brian Davey, and CAC's real intent here – to create a nuisance for Duke Energy Indiana – should not be overlooked.

IV. Brian Davey's Testimony is Admissible under Indiana Rules of Evidence.

Under Indiana Rule of Evidence 701, skilled witnesses may offer opinions that are "helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue." Indiana Rule of Evidence 701(b). Brian Davey is a ratemaking professional for Duke Energy Indiana where he is the head of the Indiana Rate Department. There is no question that Mr. Davey has highly specialized knowledge in this field and is qualified to testify about the facts at issue in this matter. More importantly, if Mr. Davey's testimony was stricken, the Commission would also be at a disadvantage by not having access to a detailed explanation of the ratemaking aspects of Duke Energy Indiana's proposed T&D Plan from Duke Energy Indiana's chief ratemaking professional.

As the head of Duke Energy Indiana's Rate Department, Mr. Davey is personally involved in and therefore knowledgeable about the subject matter of his testimony. His opinions are based on his personal involvement in Duke Energy Indiana's proposed ratemaking. He is the most qualified employee witness to: 1) opine on Duke's compliance with the TDSIC statute; 2) explain the proposed recovery of the estimated costs of the Company's T&D Plan; 3) discuss the Company's request for continued, non-accelerated recovery of its investment in the existing meters which will be replaced under the T&D Plan; and 4) provide an estimate of the jurisdictional costs of the T&D Plan and the estimated rate impacts associated with those costs, because these topics are all components of his professional responsibilities for Duke Energy Indiana.

Furthermore, without providing any supporting case law or citations, the CAC argues that a lay witness cannot be a sponsoring witness for "any technical study or exhibit." (CAC Br. at 4.) This argument is without merit. Like CAC, Duke Energy Indiana has been unable to locate

any authority barring a lay witness from sponsoring "any technical study or exhibit." Mr. Davey is familiar with the exhibits he is sponsoring as he was personally involved in creating the exhibits. His testimony is more than sufficient to authenticate these exhibits and lay the foundation for their admissibility. Mr. Davey is also the appropriate witness to be cross-examined on the contents of those exhibits. Quite simply there is no reason, legal or otherwise that Mr. Davey should not be a suitable sponsor for these exhibits.

V. Employee Witnesses are not Held to the Same Standard as Retained Experts.

Mr. Davey, like all other employee witnesses, is not a retained expert for Duke Energy Indiana, but is an employee witness who clearly has expertise in this field. To hold all employee witnesses to the same standard as "retained experts" under the federal rules (as CAC is attempting to do here) would create an impossible scenario in which attorney client and work-product privileged information could be subject to disclosure.

Other regulatory commissions have recognized this issue, and found that "employee experts" should not be held to the same standard as retained experts. In *In re Kan. City Power and Light*, No. ER-2012-0174, YE-2012-0405, 2012 WL 5383721 (Mo. Pub. Serv. Comm'n Oct. 16, 2012), *adopted by Commission*, 2012WL 2817949 (Mo. Pub. Serv. Comm'n Oct. 31, 2012), a Kansas City Power & Light Co. ("KCPL") employee testifying as an expert witness was served with a subpoena deuces tecum. KCPL objected to the subpoena on the grounds that the documents sought were protected by the attorney-client privilege and the work product doctrine. The Commission Staff argued that all documents sent to an expert witness lose their privileged status. The ALJ held that under this theory, "no party using its employees as witnesses would have an attorney-client privilege." *Id.* The ALJ drew a distinction between a third-party retained expert who "has no direct knowledge or involvement with the events in

controversy who was given materials to review that serve the only basis for his or her opinion" and an employee-expert testifying from her own direct knowledge of the facts. *Id.* Information supplied to third-party retained witnesses must be produced, but the privileges that attach to communications with an employee are not waived when that employee is called as an expert. *Id.*

As in the KCPL case, the CAC is trying to turn skilled employee witnesses into retained experts using the federal rules of evidence. However, other commissions have recognized a distinction for the treatment of employee witnesses, and as indicated the federal rules of evidence do not apply.

Consistent with these opinions and the Commission's customary standards, it has been the practice of utilities to treat their employee experts as skilled lay witnesses under Indiana Rule of Evidence 701. Mr. Davey has direct knowledge regarding the T&D Plan and the recovery of estimated costs under the Plan, and can testify on these issues because of his position within Duke Energy Indiana.

VI. Even if Mr. Davey is an "Expert" the Risk Scenarios are not Discoverable.

The Commission could also label Mr. Davey as an expert under Indiana Rule of Evidence 702 if it desires, but Mr. Davey still would not have to produce the Risk Scenarios because Mr. Davey did not rely on the Risk Scenarios in developing his testimony. Under neither the Indiana Rules nor the Federal Rules would Mr. Davey be required to provide information that is otherwise privileged that he did not rely upon to develop his testimony.

When Duke Energy Indiana responded to CAC's Motion to Compel, the focal point was whether Duke Energy had to produce certain privileged documents, not the specific type of expert Mr. Davey would be or whether he would be permitted to testify. Among its arguments, Duke Energy indeed asserted that Mr. Davey was not the type of expert that was required to

produce all documents he considered in forming his testimony, let alone documents he did not consider in his analysis (such as the Risk Scenarios and the myriad of other documents that come across his desk as the Head of Ratemaking for Duke Energy Indiana). The Commission may label Mr. Davey in any number of ways —a skilled lay witness under Rule 701, an employee expert under Rule 701 or 702, or a skilled or expert witness under the Commission's customary practice. No matter the specific label assigned to Mr. Davey, he must be permitted to testify and does not have to produce the Risk Scenarios—both because they are not the type of documents he would be required to produce and he did not rely upon them for his testimony.

VII. Conclusion.

Mr. Davey is providing testimony as a skilled witness in these proceedings based on his direct personal experience in Duke Energy Indiana's ratemaking and cost recovery issues. Although he is offering some opinion testimony, he is permitted to do so under Rule of Evidence 701 to help provide a clear understanding to a determination of a fact in issue. His testimony will help determine whether the T&D Plan meets statutory requirements, the method used for rate recovery, and the costs and estimated rate impacts of the T&D Plan. These are all areas in which he is personally involved in his role within Duke Energy Indiana. Knowledgeable employees such as Mr. Davey should be permitted to testify and offer opinions that are helpful to a clear understanding of the issues before the Commission.

CAC has failed to provide any basis upon which any portion of Mr. Davey's testimony should be stricken, let alone the entirety of his testimony, such that their Motion to Strike must be denied.

WHEREFORE, Duke Energy respectfully requests that the CAC's Motion to Strike Prefiled Testimony of Brian Davey, or in the alternative, to Reconsider Motion to Compel Discovery be denied.

Respectfully submitted,

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