IN THE INDIANA COURT OF APPEALS
Case No. 18A-EX-00140

CITIZENS ACTION COALITION OF, INDIANA, INC., Appellant (Respondent-Intervenor Below), v. SOUTHERN INDIANA GAS AND ELECTRIC COMPANY, d/b/a VECTREN ENERGY DELIVERY OF INDIANA, INC., Appellee (Petitioner Below).	Appeal from the Indiana Utility Regulatory Commissioner IURC Cause No: 44927 The Hon. David E. Ziegner, Commissioner The Hon. Loraine L. Seyfried, Chief Administrative Law Judge.

Brief of Appellee Vectren Energy Delivery of Indiana

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1. Statement of Issues

Southern Indiana Gas and Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc. **("Vectren")** sought approval from the Indiana Utility Regulatory Commission **("Commission")** of a plan to encourage customers to implement energy efficiency and demand side management measures to satisfy (or more precisely avoid) future investment in electric infrastructure. The Commission approved the Plan pursuant to Ind. Code § 8-1-8.5-10 **("Section 10")**. The issues on appeal are:

1.1. Whether the Commission's order contains all findings required by Section 10(j), which—due to the issues raised on appeal—are limited to a finding on the reasonableness of Vectren's proposed recovery of lost revenues.

1.2. Whether the Commission's finding that Vectren's lost-revenue recovery proposal is reasonable is supported by substantial evidence in the record, in the form of testimony on the nature, size, and reliability of lost revenue recovery provided by several witnesses.

1.3. Whether the Commission's order, which resolves the reasonableness of proposed lost revenue recovery as required by Section 10, is otherwise contrary to law.

2. Statement of Case

This appeal relates to Vectren's energy efficiency and demand side management plan for calendar years 2018–2020. The Plan was presented to comply with Section 10. The General Assembly enacted Section 10 in 2015. The Statute requires electric utilities to periodically present plans to the Commission that include energy efficiency goals, programs to meet those goals, budgets and costs, and procedures for independent evaluation and measurement of program success. I.C. § 8-1-8.5-10(h). The Statute is structured to require the Commission to balance the costs of the plan against its benefits, *id.* § 10(j)(2) & (7), and to ensure the energy efficiency initiatives are necessary to satisfy future needs of the utility, *id.* § 10(j)(9). Critical to the Statute's cost-effectiveness analysis is the requirement that a plan include reasonable "procedures to evaluate, measure, and verify the results of energy efficiency programs included in the plan." *Id.* § 10(j)(4). These procedures are known throughout the record as "EM&V." The "results" of energy efficiency are reduced future energy consumption, and these results drive benefits by reducing short and long term costs that vary with the amount of electricity consumed by customers.[1]

[1] Section 10's emphasis on cost-effectiveness and need was driven by then recent history of energy efficiency programs in Indiana. The Commission, after an investigation, issued a December 9, 2009 order requiring electric utilities to propose energy efficiency plans designed to achieve an overall goal of 2% annual cost-

When the Commission approves an energy-efficiency plan, the statute requires it to approve an adjustment to the utility's electric rate, the amount charged to consumers, to compensate the utility for lost revenues it would have received without these programs designed to reduce its sales. I.C. § 8-1-8.5-10(o). The statute requires the Commission to approve recovery of reasonable lost revenues and financial incentives to "eliminate or offset regulatory or financial bias against energy efficiency programs [or] in favor of supply side resources." *Id.* Electric utilities have a financial bias against energy efficiency, because it reduces the amount of electricity used by a customer and in turn reduces the consumption-based revenues that were designed to recover fixed-costs left unchanged by lower consumption. In simple terms, energy efficiency leaves an energy utility to try and pay for the same fixed costs (found to be reasonable by the Commission) with less revenue.

Vectren submitted a plan under Section 10 on April 10, 2017. This is the second plan submitted by Vectren under Section 10; an order on the first plan, for calendar years 2016–2017 was issued under Commission Cause No.

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effective energy efficiency savings within ten years. *In re Comm'n's Investigation into the Effectiveness of Demand Side Management Programs*, Cause No. 42693, 2009 Ind. PUC LEXIS 482, 2009 WL 4886392, 281 P.U.R.4th 5 (I.U.R.C. Dec. 9, 2009). The Legislature rescinded that order in 2014. *See* Ind. Code § 8-1-8.5-9(j). Section 10 was enacted in 2015 and brought with it a focus on need and cost and benefit evaluation. The "need" is evaluated by evaluating energy efficiency measures as an alternative to supply side resources in an integrated resource plan.

44645 and is also currently being appealed by CAC under Appellate Cause No. 18A-EX-95. The Court of Appeals previously issued a Memorandum Decision with respect to the issue of lost revenues and Vectren's 2016–2017 plan. *S. Indiana Gas & Elec. Co. v. Indiana Util. Regulatory Comm'n*, 81 N.E.3d 701, 2017 WL 899947 (Ind. Ct. App. Mar. 7, 2017) **("Memorandum Decision")**. Due to the identity of the parties and issues, Vectren respectfully asks the Court of Appeals to consider its prior opinion and thereby make an exception to the general rule under Appellate Rule 65(D) that a party may not refer the Court to a memorandum decision. *See* Ind. Appellate Rule 1 (permitting the Court to deviate from the Appellate Rules upon the motion of a party).

On December 28, 2017, the Commission issued an Order **("Order")** approving the plan that is the subject of *this* appeal, for calendar years 2018–2020. The Order approved Vectren's plan in its entirety. (Order at 27.) (The Order appears in CAC's appendix at Volume 2, Page 10. This Brief refers to the Order's internal pagination.) *See* I.C. § 8-1-8.5-10(k) (providing the procedure for the Commission to follow when it determines a plan is reasonable). The Commission's Order also refers to the guidance provided by the Court of Appeals in the above-mentioned Memorandum Decision. (*See* Order at nn. 3 & 5.)

CAC now appeals this Order and challenges only the Commission's approval of the recovery of lost revenues under Section 10. (*See* CAC Br. at 5.) No other factors related to reasonableness of Vectren's energy efficiency plan are at issue in this appeal. *See* I.C. § 8-1-8.5-10(j)(1)–(7) and (j)(9)–(10) (listing factors for the Commission to consider under Section 10). CAC also asserts that the Commission failed to give sufficient weight to a piece of evidence, a draft report, that it believes questions the validation of Vectren's energy efficiency goal. (CAC Br. at 5 & 38–41.)

In March of 2018, Vectren moved to consolidate this appeal with Appellate Cause No. 18A-EX-95. CAC successfully opposed the motion on the ground that the appeals involved "separate cases and series of arguments" that would involve "separate, additional legal issues." (CAC Ver. Opp. to Mot. to Consolidate at 2 & 3.) However, the Briefs of Appellant that CAC tendered in the two appeals are very similar, and have nearly identical arguments and argument headings. (*Compare, e.g.*, CAC Br. -95 at 2 (table of contents) *with* CAC Br. -140 at 2 (table of contents).) Accordingly, Vectren's responses to these two briefs are extremely similar, and—it respectfully submits—may be better considered together than in isolation.

3. Statement of Facts.

3.1. Vectren's characteristics.

Vectren is an Evansville-based public utility that provides electric utility service to about 140,000 customers in six counties. (Order at 2.) Vectren also provides natural gas services, which are not at issue in this appeal. Vectren owns, operates, manages, and controls plant and equipment used to provide electric service to the public. (*Id.*)

3.2. Energy Efficiency.

Energy efficiency, for the purpose of this appeal, refers specifically to "a reduction in electricity use for a comparable level of electricity service."[2] I.C. § 8-1-8.5-10(b). Activities that reduce electricity consumption (*e.g.,* use of energy-efficient lightbulbs) are distinguished in the utility industry from activities that benefit the public by increasing the supply of electricity (*e.g.*, construction of new generation facilities).

Lost revenues are "an estimation of the amount of lost sales attributable to the energy efficiency programs." (R. Harris, Tr. Vol. 1 at pg. 118 (quoting the Commission).) Lost revenues are directly related to

[2] Energy efficiency measures are sometimes called demand side management, or DSM, programs. While the two are closely related, DSM measures are designed to reduce electricity consumption at a certain time—typically the time when customers are collectively maximizing demand on the electric system. Reducing this peak "demand" can help reduce future investments in generation (to produce the electricity) and transmission and distribution facilitates (to deliver electricity).

consumer savings. (Order at 24 ("It is inherent that energy savings validated by EM&V will create lost revenues.").) When ratepayers use less electricity, because of energy efficiency programs, they are saving money. The utility is similarly losing revenue due to decreased sales of electricity.

Section 10 requires a utility to be reimbursed for reasonable lost revenues because of the way electric utilities are regulated. Vectren, like most electricity suppliers, incurs significant fixed costs to provide electricity service to its customers. It must build generation facilities, transmission and distribution facilities and incur other costs that, in the short term, do not go away or decline if customers use less of its product. Many electricity suppliers, including Vectren, recover a significant portion of these fixed costs through a useable-based energy charge to its customers. (*See* S. Albertson, Tr. Vol. 1 at pg. 167; Tr. Vol. 2 at pg. 104.) Vectren's base rates—which are designed to cover these fixed costs—are set in periodic base general rate cases based on fixed costs the Commission has determined are reasonable. (*See id.* (discussing the impact of base rate cases and stating fixed costs "do not go away" when energy-efficiency measures are implemented).) "All else being equal, if an energy efficiency program reduces sales, it reduces revenues proportionately, but fixed costs do not change. Less revenue, therefore, means that the utility is at some risk for not recovering all of its fixed costs." (R. Harris, Tr. Vol. 1 at pg. 119; Tr. Vol. 7 at pg. 7.)

When Vectren sponsors an energy-efficiency program to reduce demand, it helps its customers to buy *less* of the product it sells. (R. Harris, Tr. Vol. 1 at pg. 119 (discussing the Commission's recognition of "the inherent disincentive associated with utilities encouraging customers to use less of its product"); S. Albertson, Tr. Vol. 1 at pg. 176 (similar testimony); Tr. Vol. 2 at pg. 105.) No rational business would voluntarily undertake such a program, because rational businesses want to sell more, not less, of their product. This is especially true for utilities that must recoup approved fixed costs through volumetric or usage-based charges set by the Commission. Such costs are significant for a utility that builds and maintains power plants and a transmission and distribution system to provide service to customers.

When the Commission, General Assembly, and other parties speak of a financial "bias" by the utility against demand-side programs or demand-reduction, they are referring to this dynamic. *See* I.C. § 8-1-8.5-10(o)(1) (providing financial incentives to "encourage implementation of cost effective energy-efficiency programs to eliminate or offset regulatory or financial bias"); 170 I.A.C. § 4-8-3 ("The regulatory framework attempts to eliminate or offset regulatory or financial bias against DSM …")

The Commission's Order states: "The purpose of allowing lost revenue recovery is to assist in removing any disincentive a utility may have in promoting DSM, as opposed to pursuing a supply-side resource." (Order at 22

(citation omitted).) The Commission has also stated, on multiple occasions that: "As we have previously explained … ***the purpose of lost revenue recovery is to return the utility to the position it would have been in absent implementation of DSM*** … ." *See, e.g.*, *In re Vectren*, Cause No. 44645, 2016 WL 1179962, at *28 (Mar. 23, 2016) (citations omitted), *reversed in part and remanded,* 81 N.E.3d 701 (Table), 2017 WL 899947 (Ind. Ct. App. Mar. 7, 2017) (precedential value discussed above). (R. Harris, Tr. Vol. 1 at pg. 119.)

3.3. Impact of energy efficiency programs on the consumers.

The public receives a net benefit when cost-effective energy efficiency programs are made available, as Section 10 requires. In the short term, energy efficiency programs reduce the average electricity bill paid by ratepayers because electricity use decreases and customers avoid paying the variable costs for electricity never produced. In the long run, all customers benefit by minimizing investment in long-term generation supplies. As CAC acknowledges, "over time, reductions in sales will reduce participating customers' energy bills and defer the need for future generation." (CAC Br. at 8 (citation omitted).)

For example, customers that are using less electricity than they otherwise would (because of energy efficiency programs), will help delay the

construction of a new power generating plant or contribute to the utility's ability to build a smaller power generating plant the next time one must be built to replace aging facilities. Accordingly, the investment in these fixed costs will be smaller because of energy efficiency, and ratepayers will pay less for this investment in future rates.

Recognizing these benefits, Indiana's statutory scheme requires that when utilities periodically create integrated resource plans (plans to meet future electric generation demand), such plans must assess both "a variety of demand side management and supply side resources to meet future customer electricity service needs in a cost effective and reliable manner." I.C. § 8-1-8.5-3(e)(2). The goal of the statute is to achieve the "optimal balance of energy resources" that minimizes electricity costs by minimizing utility investment in new infrastructure. I.C. § 8-1-8.5-10(c).

Lost-revenue recovery aligns the utility's incentives with those of the State and utility customers toward an ultimate goal of energy efficiency and does so without depriving customers of the benefits from energy efficiency. The lost revenues paid by customers represent "fixed costs that [Vectren] would have reasonably expected to recover absent the implementation of [energy efficiency] measures." (S. Albertson, Tr. Vol. 1 at pg. 176; *see* Tr. Vol. 2 at pg. 104.) The lost revenues are not a new cost to customers. They are simply a different payment mechanism because recovery of those costs based

on the amount of energy consumed has been disrupted by the implementation of energy saving measures.

After considering the evaluation, measurement, and verification procedures in Vectren's program (EM&V, discussed below), the Commission concluded that Vectren's conservative estimates of lost revenues "safeguard the cost and benefit analysis relied upon to determine that the [Energy Efficiency] Plan provides short- and long-term benefits to customers." (Order at 23.) EM&V ensures that energy efficiency programs benefit customers by using a statistically-reliable calculation to ensure that the energy efficiency programs actually achieve the anticipated energy saving.

3.4. Evaluation, Measurement, and Verification.

Section 10 requires a utility's plan to include "evaluation, measurement, and verification procedures that must include independent evaluation, measurement, and verification." I.C. § 8-1-8.5-10(h)(4). Subpart (o) specifies that lost revenues and financial incentives, in particular, are subject to independent verification. *Id.* § 10(o).

As part of Vectren's energy-efficiency proposal, "[e]valuation for all programs in the Plan will be conducted by an independent evaluator every year for the prior year's programs." (Order at 21; R. Harris, Tr. Vol. 1 at pgs. 121–122; Tr. Vol. 7 at pgs. 8–9.) The purpose of EM&V is to provide "a

rigorous and reliable impact evaluation [that] produces a statistically valid estimate of actual savings." (R. Harris, Tr. Vol. 1 at pg. 122; Tr. Vol. 7 at pg. 9.) The EM&V that will occur to verify Vectren's lost revenues is based upon methods developed over the past 40 years, that have "been tested and subjected to considerable scrutiny." (S. Khawaja, Tr. Vol. 1 at pg. 152; Tr. Vol. 2 at pg. 134.) The process has been designed to ensure verified lost revenues are a conservative estimate of actual lost revenues (*Id.*, Tr. Vol. 1 at pgs. 156–57; Tr. Vol. 2 at pg. 138–139.) The statistical confidence level of these techniques is therefore very high, creating a 95% chance of being accurate or of undervaluing actual lost revenue to the detriment of Vectren. (*Id.*)

In its Order, the Commission recognized that, in addition to being written into Section 10, "EM&V is the most established approach to reasonably estimating energy savings and lost revenues associated with EE [energy efficiency] programs." (Order at 23.) Vectren's reliance on EM&V "appears reasonably designed to ensure it recovers only the lost revenues that EM&V can establish, with a high degree of confidence, will result from savings driven by EE measures." (*Id.*)

3.5. History of lost-revenue recovery in Indiana based on measure life.

Historically, the Commission has allowed a utility to recover its lost revenues for the predicted lifespan of the energy-efficiency measure. *In re Vectren*, Cause No. 44645, 2016 WL 1179962, at *28 ("we have previously approved lost revenues over a measure's life or until a utility's next base rate case, whichever is shorter"); *see also In re Duke Energy Indiana, Inc.*, Cause No. 43955 DSM 02 at 5 & 23–24, 2014 WL 7525811, at *4 & *23 (I.U.R.C. Dec. 30, 2014); *In re Indiana Michigan Power Co.*, Cause No. 44486 at 14–15, 2014 WL 7006337 at *15 (I.U.R.C. Dec. 3, 2014); *In re N. Indiana Pub. Serv. Co.*, Cause No. 44496 at 22, 2014 WL 6466719 at *22 (I.U.R.C. Nov. 12, 2014); measures."); *In re N. Indiana Pub. Serv. Co.*, Cause No. 44154 at 9, 2012 WL 3523626 (I.U.R.C. Aug. 8, 2012).

For example, suppose Vectren's energy-efficiency program supplies a consumer with a low-flow showerhead. A low-flow showerhead uses less hot water and therefore less electricity. Industry data shows that a low-flow showerhead has an estimated life of 5 years (it is predicted to be useful for 5 years) and its use is predicted to save the consumer 100 kilowatt hours of electricity per year. The measure-life approach historically used dictates that (1) the measure will save the consumer energy for five years; (2) the utility

will lose revenue for five years; and (3) the utility will recover its lost revenue for five years. As the Commission has previously recognized: "Lost revenues continue to accrue over the useful life of the measure … ." *In re Indianapolis Power & Light Co.*, Cause No. 44497 at 23, 2014 WL 7326585 at *24 (I.U.R.C. Dec. 17, 2014). The Commission has also long required EM&V, which (among other things) eliminates certain participating customers who would have installed the showerhead even if the utility had not sponsored the program.

3.6. Statutory Scheme under I.C. § 8-1-8.5-10.

Section 10, which the Commission applies in its Order, calls for the utility to submit a plan that includes (1) energy-efficiency goals; (2) programs to achieve these goals; (3) program budgets and "program costs"; and (4) evaluation, measurement, and verification procedures that include inspection of the program by an independent agent. I.C. § 8-1-8.5-10(h). (Order at 15.) The statutory phrase "program costs" actually includes "lost revenues," though most of the argument and testimony of this case refers to "program costs" as the costs of implementing energy efficiency measures and refers to "lost revenues" as the money lost by a utility due to reduced sales of electricity caused by these measures. *See id.* § 10(g)(3).

The Commission must evaluate an energy-efficiency plan for reasonableness based upon ten factors. *Id.* § 10(j). (Order at 14.) These

include the costs and benefits of the program, the method for verifying the program is effective, the effect on ratepayer bills, and others. *Id.* The Commission must also specifically consider "[t]he lost revenues and financial incentives associated with the plan and sought to be recovered or received by the electricity supplier." *Id.* § 10(j)(8). The statute calls for "a single reasonable inquiry that considers the ten factors in subjection (j). Recovery of lost revenues is included in this reasonableness inquiry." *See* Memorandum Decision at *6 (citation omitted).

If the Commission determines the utility's plan is reasonable, then it "shall" approve the plan in its entirety, *id.* § 10(k)(1); "shall" allow the utility to recover all program costs through a rate adjustment, *id.* § 10(k)(2); and "shall allow the electricity supplier to recover … Reasonable lost revenues," *id.* § 10(o)(2). The Commission also has the option to approve only certain energy-efficiency "programs" in the plan, *id.* § 10(l), or to set forth deficiencies in the plan and require submission of a modified plan, *id.* § 10(m).

3.7. Vectren's Demand Side Management Plan for 2018–2020.

Vectren's plan on appeal addresses calendar years 2018–2020 and proposed to reduce retail sales by 1%, in addition to previous energy-efficiency plans (Order at 15.) The plan projects total savings of about 111,000 megawatt hours (*Id.*) The estimated cost of the programs is $28.6

million. (*Id.* at 2.) The Commission's Order described large plan categories such as "Energy Efficient Schools" and "Small Business Direct Install." (Order at 3.) More fulsome descriptions of these programs appear in the record, but the Commission observes that "[n]o party took issue with any of the particular programs proposed for inclusion in the Plan." (Order at 17.)

The Commission evaluated this plan under the ten statutory reasonableness factors. (Order at 19–25.) Despite opposition from the OUCC and CAC, the Commission determined Vectren's plan was reasonable in its entirety. (*Id.* at 25 & 27.) It therefore ordered that Vectren recover all of its "associated program costs on a timely basis through a periodic rate adjustment mechanism." (*Id.* at 26.)

3.8. Vectren's proposal to reduce recovery of lost revenues.

Vectren submitted a proposal for lost revenue recovery. Before the Commission's ruling, Vectren presented a revised lost-revenue recovery proposal, with two significant changes, to ensure a statistically conservative estimate of net lifetime energy savings. (*See* Order at 4; S. Khawaja, Tr. Vol. 1 at pg. 151; Tr. Vol. 2 at 133.) Vectren's revised plan considers a weighted average lifespan of all energy-saving measures, in addition to simply seeking recovery based upon lost revenue calculated by the lifespan of each measure individually. Vectren proposed that lost revenues would not be recovered for

any program beyond the weighted average measure life of all programs in the plan. (Order at 4; R. Harris, Tr. Vol. 1 at pgs. 123–124 & 144 (explaining how weighted average measure life is calculated); Tr. Vol. 7 at pgs. 10–11.) Vectren thus performs both a measure-life and a weighted-average-measure-life analysis and seeks to recover "the amount of lost revenues associated with the WAML [weighted average measure life] of its EE programs or the measure life, ***whichever is less***." (Order at 4 (emphasis supplied).)

On top of this, Vectren will seek to recover only 90% of its projected annual savings. (*Id.*; R. Harris, Tr. Vol. 1 at pg. 127; Tr. Vol. 7 at pg. 10.) This change aligns with the statistical certainty that the lost revenues are real. (*See* Order at 4; R. Harris, Tr. Vol. 1 at pg. 124; Tr. Vol. 7 at pgs. 10–11.)

Vectren predicts that its lost revenue due to measures implemented in the 2018–2020 energy efficiency plan will be $73.6 million. (Order at 22; R. Harris, Tr. Vol. 7 at pg. 6.) This estimate is for the entire loss of electric sales caused by the energy saving measures over several years; the lost revenues for any given year are significantly smaller. (*See* R. Harris, Tr. Vol. 1 at pg. 121 (describing how "utility revenues continue to be reduced over time by energy efficiency measures or programs each year for the life of the measure"); Tr. Vol. 7 at pg. 7 (providing a table showing incremental lost revenues by year).)

In its revised proposal, Vectren is not seeking to recover its estimate of $73.6 million in lost revenues or sales; it is seeking to recover only about $54.8 million, or $18.8 less, assuming those amounts can be verified as actually lost on a year-by-year basis. (Order at 22; R. Harris, Tr. Vol. 7 at pg. 14.) Vectren does not concede that full recovery of its lost revenues is unreasonable, but it has offered this alternative calculation in "recognition that evaluation measurement and verification, over time, has limitations." (R. Harris, Tr. Vol. 1 at pg. 144.) Accordingly, Vectren created this modification "to offer even further customer safeguards." (*Id.*) In Section 5.4 of this Brief, Vectren explains why program savings exceed and should exceed the amount of money spent to create those savings (*i.e.* why lost revenues exceed program costs).

In its Order, the Commission approved Vectren's revised proposal to recover lost revenues. It wrote: "Vectren South's proposal recognizes that the EM&V process is not an exact science, and employs limitations on EM&V quantification of savings (and thus lost revenues) that assures customers are billed for lost revenues based on a conservative determination of achieved savings to ensure the highest level of confidence in the energy savings. … Therefore, we find Vectren South's modified proposal for lost revenue recovery is reasonable." (Order at 24.)

4. Summary of Argument

The Order should be affirmed under the well-established, multi-tiered standard of review for orders issued by the Indiana Utility Regulatory Commission. The Order contains a specific findings on all material facts relevant to its ultimate conclusion, as provided by Section 10(j). It also provides a specific finding on the only fact material to its ultimate conclusion that is disputed on appeal. This fact is the reasonableness of Vectren's proposal for lost-revenue recovery. (The ultimate conclusion is the Commission's approval of the entire energy efficiency plan.) The Order is supported by ample evidence in the record, and therefore passes muster under the substantial-evidence test. Finally, the Order is not contrary to law; the Commission followed the relevant provisions of Section 10 when it issued an order finding that Vectren's proposed lost-revenue recovery is reasonable. Accordingly, the Order should be affirmed.

At the agency level, CAC argued that lost revenues must be capped, and that the reason for the cap was that "term greater than four years creates unreasonable difficulties in tracking the accuracy of lost revenues … ." (Order at 23.) Vectren presented extensive testimony that the cap was arbitrary, not related to actual lost revenues, and therefore would not allow Vectren to recover reasonable lost revenues, as required by statute. (*E.g.* R. Harris, Tr. Vol. 1 at pg. 122; Tr. Vol .7 at pg. 11; S. Khawaja, Tr. Vol. 1 at pg.

154; Tr. Vol. 2 at pg. 136; S. Albertson, Tr. Vol. 1 at pgs. 171–184; Tr. Vol. 2 at pgs. 107–110.) The Commission agreed that CAC and the OUCC did not "provide us with sufficient facts from which we could determine that either of their alternative proposals for caps on lost revenue recovery would allow Vectren South to recover reasonable lost revenues. (Order at 24 (citing the Memorandum Decision).)

Having lost that battle before the agency factfinder, CAC now launches a broad attack against the Commission's Order and its decision not to credit the testimony elicited by CAC. CAC's arguments do not conform to the appropriate standard of review and provide no reason to overturn the Commission's Order. Its first argument, Section V(B)(1), states the order is not "just and reasonable." This argument applies an incorrect legal standard and attempts to fault the Commission for failing to do something—reviewing *all* of the utility's operations—that is not required by Section 10. CAC's second argument, Section V(B)(2), presents an incorrect picture of Commission precedent that is, again, not presented in line with this Court's standard of review. Its third argument, Section V(B)(3), ostensibly focuses on the "substantial evidence" part of the standard of review. However, CAC misapplies the standard by focusing exclusively on the evidence *that does not support the order* instead of evidence that *does* support the order, as required by law. In essence, CAC complains that the Commission credited the wrong

testimony. CAC's last argument on lost revenues, Section V(B)(4), repeats its incorrect statement that the Commission must consider a utility's entire financial situation. It also makes several assertions that, respectfully, are not supported by cogent reasoning or citation to legal authority. *See* Ind. Appellate Rule 46(A)(8).

CAC's remaining argument, mislabeled V(B) (at page 38 of the Brief) asserts that the Commission failed to give sufficient weight to a piece of evidence, a draft report. CAC does not identify how the evidence relates to a statutory factor the Commission considers when approving a Plan, *see* I.C. § 8-1-8.5-10(j), and the argument is not presented in line with this Court's standard of review. Moreover, CAC asserts this challenge is one of "credibility." CAC's argument does not consider the contrary evidence presented by Vectren, and the Court of Appeals does not assess the credibility of evidence already weighed by the Commission.

CAC's arguments provide no reason to reverse the Order, and the Order should be affirmed.

5. Argument

5.1. The multi-tiered standard of review is well-established and applies here.

The standard of review in an appeal from the Commission is well established under Indiana law. CAC identifies this standard but then—throughout its Appellant's Brief—fails to apply the standard or attempts to apply another standard. CAC is mistaken on the law and the Court should reject its arguments for a heightened or different standard.

The Court of Appeals recently articulated the correct standard on May 21, 2018. *Mullett v. Duke Energy Indiana, LLC*, --- N.E.3d ----, No. 93A02-1710-EX-2468, 2018 WL 2293647, at *2 (Ind. Ct. App. May 21, 2018). It wrote:

"The standard for our review of decisions of the Commission is governed by Indiana Code section 8–1–3–1, which the Indiana Supreme Court has interpreted as providing a tiered standard of review." *Id.*

> A multiple-tier standard of review is applicable to the IURC's orders. A court on review must inquire whether specific findings exist as to all factual determinations material to the ultimate conclusions; whether substantial evidence within the record as a whole supports the findings of fact; and whether the decision, ruling, or order is contrary to law.

Id. (citation omitted). "In applying this standard, we review the conclusions of ultimate facts, or mixed questions of fact and law, for their reasonableness, with greater deference to matters within the Commission's expertise and

jurisdiction." *Id.* (citation omitted). "Additionally, we neither reweigh the evidence nor asses the credibility of witnesses and consider only the evidence most favorable to the Commission's findings." *Id.* (citation omitted). "On matters within its jurisdiction, the Commission enjoys wide discretion and its findings and decision will not be lightly overridden simply because we might reach a different decision on the same evidence." *Id.* (citation omitted).

CAC identifies the correct standard of review on Page 21 of its Appellant's Brief. However, to the extent CAC argues that a Commission order is unlawful if it "fails to make findings on contested issues" or "where the Commission failed to reach any conclusion regarding a significant issue disputed by the parties," it is misstating the law. (*See* CAC Br. at 22.) Its citation to *Citizens Action Coal. of Indiana, Inc. v. Duke Energy Indiana, Inc.*, 16 N.E.3d 449, 457 (Ind. Ct. App. 2014), does not support this notion, because the Court of Appeals merely observed a dispute about the standard of review but did not resolve it. *Id.* That opinion stands only for the proposition that an "order must contain specific findings on all factual determinations material to its ultimate conclusions," which is the version more deferential to the Commission and the version that appears elsewhere in Indiana law. *Id.*; *see, e.g.*, *Mullett*, 2018 WL 2293647, at *2 (quoted above).

Similarly, CAC's reliance on *City of Evansville v. S. Indiana Gas & Elec. Co.*, 167 Ind. App. 472, 493 (1975), is misplaced, because the statement

in dicta it quotes is outdated. *City of Evansville* relied upon a 1953 opinion from the Indiana Supreme Court. The Indiana Supreme Court has articulated the correct standard more recently than 65 years ago. For example, the Memorandum Decision cited *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1015 (Ind. 2009), which provides the correct, multi-tiered standard of review.

5.2. The Commission's Order is lawful and should be affirmed on appeal.

5.2.1. The Commission's order includes specific findings as to all factual determinations material to its ultimate conclusion. In this instance, there is only one such relevant determination.

The Commission's ultimate conclusion is its approval of Vectren's energy efficiency plan in its entirety. *See* I.C. § 8-1-8.5-10(k). (Order at 27.) The Commission must provide specific findings as to all factual determinations material to this ultimate conclusion. *Mullett*, 2018 WL 2293647 at *2. Here, the material factual determinations are provided by the statute. They are listed in Section 10(j).

Although Section 10(j) lists ten factors the Commission must consider, the only disputed factor here is lost revenues. *See* I.C. § 8-1-8.5-10(j)(8). The Commission's findings on each Section 10(j) factor appears explicitly at pages 19 to 25. With respect to Section 10(j)(8), the Commission provided a two-

and-a-half page discussion of lost revenues (in addition to summarizing the testimony of witnesses on this subject, earlier in its Order). It wrote: "we find that Vectren South's modified lost revenue recovery proposal, which has a strong nexus to the EM&V process, will allow the recovery of reasonable lost revenues." (Order at 24.) Because the Commission entered an explicit finding that Vectren's modified proposal was reasonable, it cannot be disputed that the Commission made a finding of fact on the issue of lost revenue. Thus, the Order passes muster under this part of the multi-tiered test.

5.2.2. Substantial evidence supports the Commission's finding that Vectren's lost-revenue proposal is reasonable.

The second tier of the standard of review asks "whether substantial evidence within the record as a whole supports the findings of fact." *Mullett*, 2018 WL 2293647 at *2. At this point, the reviewing Court "consider[s] ***only the evidence most favorable to the Commission's findings***." *Id.* (emphasis supplied) The Court gives deference to matters within the Commission's expertise and jurisdiction. The calculation of a utility's lost revenues following its adoption of energy efficiency programs qualifies as an issue within the Commission's expertise and jurisdiction. *See id.* The Commission enjoys "wide discretion" in making factual findings, and the

reviewing court does not "reweigh the evidence or asses the credibility of witnesses" presented to the Commission. *Id.*

Under substantial evidence review, the Appellant carries an extremely heavy burden. "The Commission's order is conclusive and binding unless the evidence on which the Commission based its findings was devoid of probative value[,] the quantum of legitimate evidence was so proportionately meager as to lead to the conviction that the finding does not rest upon a rational basis," or other extraordinary circumstances—such as fraud or undue influence over the Commission—exist. *N. Indiana Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1016 (Ind. 2009) (punctuation adjusted).

Here, in discharging its duty to look only at the evidence most favorable to the Commission's finding, the Court may easily conclude that substantial, probative evidence exists.

Vectren's Director of Energy Efficiency, Rina Harris, testified that Vectren has calculated the revenues it will lose as a result of adopting energy efficiency programs, and that this calculation was performed on a conservative basis. (Order at 4; R. Harris, Tr. Vol. 1 at pg. 123; Tr. Vol. 7 at pg. 9.) She testified that Vectren uses the latest Indiana Technical Resource Manual as a basis for its calculation, and that recovery is limited to 90% of the estimated savings—thereby providing a "statistical certainty" that lost revenues can be confirmed by the company's statutorily-required evaluation,

measurement, and verification provider. (Order at 4; R. Harris, Tr. Vol. 1 at pgs. 124–127; *see* Tr. Vol. 7 at pgs. 10 & 13.) In other words, the calculated lost revenues are nearly guaranteed to match or underrepresent the utility's actual lost revenues. Vectren's proposed recovery of lost revenues is therefore reasonable.

In addition, Vectren provided testimony from Dr. Sami Khawaja, an economist and nationwide expert on EM&V. (*See* S. Khawaja, Tr. Vol. 1 at pgs. 149–150 (describing Dr. Khawaja's expertise); Tr. Vol. 2 at pgs. 131–132.) Dr. Khawaja has more than 35 years of experience evaluating the energy savings and lost revenues produced by energy efficiency programs. He has personally led "over 100 energy efficiency evaluation projects." (*Id.*) Dr. Khawaja testified that Vectren's plan, which is based upon the life of the energy-saving measures, is appropriate. (Order at 7–8; *see* S. Khawaja, Tr. Vol. 1 at pg. 155; Tr. Vol. 2 at pgs. 136–137.) It is appropriate because "as long as the measure is installed and is saving energy, the utility is losing revenue." (Order at 7; S. Khawaja, Tr. Vol. 1 at pg. 154; Tr. Vol. 2 at pg. 136.) He also testified that the measurement Vectren proposes is a "conservative estimate" of the time period during which Vectren would lose revenues. (Order at 8; *see* S. Khawaja, Tr. Vol. 1 at pg. 157; Tr. Vol. 2 at pgs. 133 & 138.) He testified his statistical confidence in Vectren's lost-revenue

projections is very high, at approximately 95%. (S. Khawaja, Tr. Vol. 1 at pgs. 151 & 157; Tr. Vol. 2 at pgs. 133 & 138.)

Finally, Vectren's Vice President of Regulatory Affairs and Gas Supply, Scott Albertson, testified that when DSM programs are successfully implemented year after year, the utility's lost revenues stack up or "pancake" year after year. (Order at 7; S. Albertson, Tr. Vol. 1 at pg. 166; Tr. Vol. 2 at pg. 108.) This represents "a real harm to the utility," that needs to be remedied by lost revenue recovery. (*Id.*) He, like Dr. Khawaja and Ms. Harris, rebutted arguments by CAC in favor of cap (*e.g.* a four-year cap) on the recovery of lost revenues, because such a cap prevents the utility from recovering its actual lost revenues. (*Id.*; *see generally* S. Albertson, Tr. Vol. 1 at pgs. 171–184.) He also testified that the costs of lost revenues due to energy efficiency will be reflected in a consumer's utility bills even if a utility files more frequent rate cases, as CAC seems to recommend, because energy efficiency savings do not reduce the current fixed costs of providing electricity to the public. (Order at 7 ("He said that while the costs recovered via an LRAM would be lessened if rate cases were filed more frequently, the revenues lost as a result of EE are included in base rates each time the utility files a rate case. In either case, the appropriate level of fixed costs will be included in customers' bills."); *see also id.* at 12–13 (summarizing rebuttal testimony); S. Albertson, Tr. Vol. 1 at pg. 167; Tr. Vol. 2 at pg. 109.)

In summary, substantial evidence supports the Commission's finding with respect to lost revenues, and the Order is appropriate under this portion of the multi-tiered standard of review.

5.2.3. The Commission's Order is not contrary to law.

The final part of the multi-tiered standard of review asks whether the Commission's order is contrary to law, "but this constitutionally preserved review is limited to whether the Commission stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision, ruling, or order." *NIPSCO*, 907 N.E.2d at 1016.

Here, the Commission's order is overtly asking whether the proposal to recover lost revenues is "reasonable," and this is precisely its statutory duty under Section 8-1-8.5-10(j)(8) and (o).

In addition, the Commission followed the guidance of the Court of Appeals in the Memorandum Decision. (Order at 24, n. 5.) The Commission observed, based upon the Memorandum Decision, that its conclusions with respect to lost revenues "would have to be supported by specific facts that demonstrate [the ruling] would allow the utility to recover reasonable lost revenues." The Commission opined that Vectren had provided it with specific, relevant facts and that—with respect to lost revenues—the OUCC and CAC had not. (Order at 24.) The facts provided by Vectren include the magnitude

of lost revenues, their verification under EM&V, the relationship between the energy efficiency measures proposed and the revenues lost, and the conservative methodology used to protect consumers and ensure lost revenues are based upon actual consumer savings. (*Id.* at 22–24.)

The Commission entered specific factual findings and then approved the plan with respect to lost revenues, all as contemplated by the statutory framework of Section 10(j) and 10(k). Because the Commission followed the statute, its order is not contrary to law.

* * *

This ends Vectren's argument that the Commission's Order is lawful and should be affirmed under the appropriate standard of review. Vectren will now address the argument made in CAC's Brief of Appellant.

5.3. This Court should not apply a separate, "just and reasonable" standard of review that requires the Commission to examine a utility's total revenue and expenses under Section 10.

Although CAC identifies the correct standard of review on Page 21 of its Appellant's Brief, its first argument entirely disregards this standard.

Section V(B)(1) of the Brief asks the Court to review the Order on the basis of whether it is "just and reasonable," under a 1913 statute. (CAC Br. at 22–28.) It goes on to cite decisions from the Supreme Court of the United

States, issued in 1923 and 1944 on the Takings Clause of the federal Constitution, *id.* at 24, and a telephone exchange case from the Indiana Court of Appeals, which said, in passing, that "in determining what is a reasonable and just rate, the IURC reviews the utility's overall financial condition including total revenue and expenses." *Prior v. GTE N. Inc.*, 681 N.E.2d 768, 773 (Ind. Ct. App. 1997). The citation to *Prior*, however, was commenting on traditional ratemaking under Ind. Code § 8-1-2-4, and not the statute most relevant to this appeal: Indiana Code Section 8-1-8.5-10.

CAC's argument is that the Commission commits error when it fails to examine a utility's overall financial condition. (CAC Br. at 27.) As stated above, this argument is not well supported. And it actually asks the Court of Appeals to commit a serious error that would imperil multiple pieces of utility regulatory legislation, including Section 10, that have been duly enacted by the General Assembly.

Here is the explanation of this bold statement: "Traditionally, a utility's rates charged to customers are adjusted through periodic rate cases, which are expensive, time consuming, and sometimes result in large, sudden rate hikes for customers." *NIPSCO Indus. Grp. v. N. Indiana Pub. Serv. Co.*, 31 N.E.3d 1, 4 (Ind. Ct. App. 2015). In these periodic rate cases, or base rate cases, "the Commission must examine ***every aspect of the utility's operations and the economic environment in which the utility***

functions to ensure that the data it has received are representative of operating conditions that will, or should, prevail in future years." *United States Gypsum, Inc. v. Indiana Gas Co.*, 735 N.E.2d 790, 798 (Ind. 2000) (emphasis supplied). That is precisely why base rate cases are cumbersome.

"Another way to set rates is through 'tracker' proceedings, which allow smaller increases for specific projects and costs between general rate case proceedings." *NIPSCO*, 31 N.E.3d at 4. "The General Assembly has authorized several trackers, including a fuel charge tracker, *see* Ind. Code § 8-1-2-42(d), a tracker for qualified pollution control projects under construction, *see* Ind. Code § 8-1-2-6.8, a tracker for federally mandated costs, *see* Ind. Code § 8-1-8.4-7, and a tracker for clean energy projects, *see* Ind. Code §§ 8-1-8.8-11 and 8-1-8.8-12." *Id.* "In 2013, the General Assembly enacted Indiana Code Chapter 8-1-39, which allows a utility to petition for a tracker for certain proposed new or replacement electric or gas transmission, distribution, or storage projects." *Id.*

Section 10 is also a tracker—it tracks costs related to energy-efficiency projects. By legislative design, these statutes *do not* require the Commission to examine every aspect of the utility's overall financial condition. Indeed, if these tracker statutes required such an examination, then they would be no different from a base rate case and would therefore serve no purpose. "It is a basic tenet of statutory construction that [a court] will strive to avoid a

construction that renders any part of the statute meaningless or superfluous." *Hizer v. Holt*, 937 N.E.2d 1, 7 (Ind. Ct. App. 2010).

Section 10 indicates ten factors the Commission must examine when determining whether to approve an energy efficiency plan. Ind. Code § 8-1-8.5-10(j). None of these factors is, as CAC urges, "the utility's overall financial condition, including total revenue and expenses." (*See* CAC Br. at 27.) For this reason, CAC's argument that the Commission must consider the utility's overall financial condition is wrong and contrary to this State's utility regulatory statutes.

The statute that CAC relies upon was enacted more than century before Section 10 and does not address energy efficiency or demand-side management. Another canon of statutory construction is that "specific statutory provisions take priority over general statutory provisions." *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1199 (Ind. 2016). This rule of construction is so ancient that it has a Latin moniker, "*generalia specialibus non derogant*," meaning, "if there is a conflict in a legal instrument between a general provision and a specific provision, the specific provision prevails." *Id.* at n.8.

In this instance, Section 10 is the more specific statute and should govern the Court's analysis. Section 10 itself requires energy efficiency plans, related procedures, and lost revenues all to be "reasonable." I.C. § 8-1-8.5-

10(j)–(o). This requirement of reasonableness is in line with the directive in Section 8-1-2-4 that utility rates be "reasonable and just."

Finally, Vectren does not disagree that utility rates must be reasonable and just, pursuant to Indiana Code Section 8-1-2-4. However, Vectren's rates were reset to a reasonable and just level during its last base rate case for electric rates in 2011, which involved an examination of every aspect of the utility's operations. *In re S. Indiana Gas & Elec. Co.*, Cause No. 43839, 2011 WL 1690057 (I.U.R.C. Apr. 27, 2011). Base rates that the Commissions finds to be reasonable and just are presumed to remain reasonable and just, until the Commission re-determines them upon a proper application. *See Indiana Tel. Corp. v. Pub. Serv. Comm'n of Ind.*, 131 Ind. App. 314, 341 (1960) ("It is therefore our opinion … those rates will remain the legal, effective and only rates which appellant may charge until the Commission finds from evidence submitted that those rates are unreasonable and unjust and fixes new rates to be charged in the future which are reasonable and just.").

Section 10 recognizes that energy savings will result in lost revenues to the utility. Again, "the purpose of lost revenue recovery is to return the utility to the position it would have been in absent implementation of DSM … ." *In re Vectren*, Cause No. 44645, 2016 WL 1179962, at *28. The recovery of lost revenues attempts to return *the utility* to a level of rates already deemed reasonable and just by the Commission during its last base rate case. It

attempts to return the utility to this reasonable and just position by adjusting for measurable revenues lost due to energy efficiency programs.

Section 8-1-2-4 supplies no reason for the Court to apply a standard of review different than the one mandated by the Supreme Court and routinely applied to orders in utility cases. It provides no reason for the Court to evaluate an order predicated upon Section 10 through a statute that is not Section 10.

5.4. Lost revenues and savings in energy efficiency programs should exceed program costs.

As part of this Section V(B)(1) argument, and throughout the Appellant's Brief, CAC criticizes Vectren for sponsoring and the Commission for approving an energy efficiency program in which the proposed recovery of lost revenues exceeds program costs. (*See, e.g.*, CAC Br. at 26.) Although CAC's factual predicate is largely correct, its argument is misleading and wrong.

Vectren's program costs for 2018–2020 are $28.6 million. This is the amount of money it will spend on actual energy-saving measures and on encouraging ratepayer adoption of them. Vectren predicts the actual energy savings caused by these energy-saving measures, for as long as they last, will be $73.6 million. (Order at 22; R. Harris, Tr. Vol. 7 at pg. 6.) This is the

amount of lost revenue Vectren likely will incur as a result of the energy efficiency programs conducted during these two years. As explained above, Vectren is now seeking to recover only $54.8 million of these lost revenues. (*Id.*)

CAC assumes the fact that lost revenues are larger than program costs means that the lost revenues are *per se* unreasonable. (Order at 24.) But this assumption does not withstand scrutiny. The purpose of an energy-efficiency program is to reduce electricity use and thereby generate savings for consumers.

It would be wildly inefficient for a program to spend, for example, $30 million on energy-saving measures that will generate only $15 million in energy savings. Such a program would not be approved under the EM&V and cost-benefit analysis required by Section 10. Instead, an efficient program, like Vectren's will spend money on energy-saving measures that produce about twice their cost in estimated savings. The numbers cited above mean that Vectren's programs will spend $28.6 million on energy-saving measures to produce about $73.6 million in energy savings. This latter number, consumer savings, directly corresponds to Vectren's lost revenues. The natural result will therefore be that a utility's lost revenues exceed its program costs if the program is efficient.

The Commission dismissed CAC's argument for the same reason. It wrote: "Rather than providing a reasoned explanation or analysis … CAC instead offers a conclusory opinion that the magnitude of lost revenues exceeds the program costs, and therefore this must result in it being an unreasonable proposal." (Order at 24.) "It is inherent that energy savings validated by EM&V will create lost revenues. ***Consequently, cost-effective EE programs*** should have lower programs costs with larger energy savings, which does result in higher lost revenues relative to program costs." (*Id.* (emphasis supplied).)

Of course, there is also no legal authority in Section 10 requiring lost revenue recovery to be smaller than program costs. Because CAC's argument is unsupported by law or sound reasoning, it provides no basis to overturn the Order.

5.5. CAC's argument about precedent misstates the law regarding precedent, is factually wrong, and is irrelevant to the standard of review.

CAC's next argument, in Section V(B)(2), is that the Commission erred by failing to address a precedent that CAC believes exists with respect to the frequency of rate cases. (CAC Br. at 29–33.) This argument is not presented in line with the multi-tiered standard of review that governs this appeal.

CAC first defines and praises the doctrine of *stare decisis* by citing Indiana criminal cases and cases from the Supreme Court of the United States. (*Id.*) It states that "any departure from the doctrine demands special justification" and that a court (or in this case, an agency) should consider "the antiquity of the precedent, the reliance interests at stake, and whether the decision was well reasoned."

The law here is slightly different, and the Court of Appeals need not look far to find it. In the previous appeal of its energy efficient plan, Vectren argued that the imposition of a cap on lost revenue recovery "effectively throws out twenty years of the Commission's own precedent regarding lost-revenue recovery." Memorandum Decision at *7. Vectren still believes this was true. However, the Commission observed that Vectren's energy efficiency plan for 2016–2017 was the first plan under the new statutory framework of Section 10. *Id.* at n.10. The Court also acknowledged the Commission's argument that "an agency may change its course and is not forever bound by prior policy or precedent as long as it explains its reasons for the change." *Id.* (citing *Cmty. Care Ctrs., Inc. v. Ind. Dep't of Pub. Welfare*, 523 N.E.2d 448, 450-51 (Ind. Ct. App. 1988).)

CAC argues the relevant precedent here is that the Commission may consider "the reasonableness of a lost revenue proposal in relation to periods between rate cases." (CAC Br. at 30.) However, CAC cites no authority

stating the Commission *must* look at the period between rate cases when it assesses the reasonableness of lost revenues. Of the four cases CAC cites to establish a precedent, two were decided in 2011 and two were decided alongside the order on appeal in the Memorandum Decision. Four recent cases relating to a new statute hardly constitutes compelling precedent, and there are several other cases in which the frequency of base rate cases was not a factor considered by the Commission. *See In re Duke Energy Indiana, Inc.*, Cause No. 43955 DSM 02 at 5 & 23–24, 2014 WL 7525811, at *4 & *23 (I.U.R.C. Dec. 30, 2014); *In re Indiana Michigan Power Co.*, Cause No. 44486 at 14–15, 2014 WL 7006337 at *15 (I.U.R.C. Dec. 3, 2014); *In re N. Indiana Pub. Serv. Co.*, Cause No. 44496 at 22, 2014 WL 6466719 at *22 (I.U.R.C. Nov. 12, 2014); *In re N. Indiana Pub. Serv. Co.*, Cause No. 44154 at 9, 2012 WL 3523626 (I.U.R.C. Aug. 8, 2012).

Moreover, Vectren submits that the philosophy CAC now labels as a precedent is itself a break from precedent. The Commission's rationale in the portion of its order that was reversed recognized its precedent was to approve lost revenues over the life of an energy-saving measure. *See* Memorandum Decision at *4. The Commission disregarded *this* precedent in light of what CAC is now calling a precedent. The Commission wrote:

> Although we have previously approved lost revenues over a measure's life or until a utility's next base rate case, whichever is shorter, Ms. Mims' and the other parties' concerns with

> pancaking and the increased length of time between base rate cases for utilities in Indiana raise a valid concern.

Id. (quoting the Commission's order).

Regardless of what is and is not a precedent, the relevant statute does not require the Commission to address the time between base rate cases. I.C. § 8-1-8.5-10(j). It does require the Commission to allow a utility to recover "[r]easonable lost revenues." *Id.* § 10(o). Stating that the Commission failed to follow a precedent does not equate to showing that Vectren's proposal fails to limit recovery to reasonable lost revenues, or that CAC's proposal of a 4-year cap allows the recovery of reasonable lost revenues.

As the Commission stated in its current order: "Neither CAC nor the OUCC provided us with sufficient evidence demonstrating that Vectren South's proposal is unreasonable. Nor did they provide us with sufficient facts from which we could determine that either of their alternative proposals for caps on lost revenue recovery would allow Vectren South to recover reasonable lost revenues. Therefore, we find Vectren South's modified proposal for lost revenue recovery is reasonable." (Order at 24.)

Vectren must also emphasize that although the frequency of rate cases does not appear to be primary factor in the Commission's Order, the Commission did receive substantial testimony on this subject from Vectren as well as from CAC. Vectren showed that CAC's statements about the

infrequency of rate cases were incorrect; Vectren provided a chart to show the actual frequency of rate cases; and Vectren showed how a relatively-new statute (called TDSIC) will require electric utilities to appear more frequently for base rate cases in the future. (S. Albertson, Tr. Vol. 1 at pgs. 163–165.)

CAC's argument about precedent, which is not tied to the appropriate standard of review, presents no reason to reverse the Commission's Order.

5.6. CAC misapplies the substantial-evidence standard of review.

In Section V(B)(3), CAC argues that the Order is not supported by substantial evidence. (CAC Br. at 33–36.) The legal premise of this argument is faulty. As stated above, during substantial evidence review, the reviewing Court "consider[s] only the evidence ***most favorable to the Commission's findings***." *Mullett*, 2018 WL 2293647 at *2 (emphasis supplied). The Commission enjoys "wide discretion," as a factfinder, and the reviewing court does not "reweigh the evidence or asses the credibility of witnesses." *Id.*

CAC's argument, however, is that the Commission "dismissed evidence" that CAC believes favors its position and "fails to mention or weigh any of the critical cross-examination" that CAC believes favors its position. This argument does not examine the evidence most favorable to the Commission's finding—it asks the reviewing Court to look specifically at the evidence most

favorable to CAC's proposed finding. The legal basis for CAC's argument in this section is therefore deficient.

In this section of the Appellant's Brief, CAC also argues that the Commission does not understand that cross-examination is evidence. (CAC Br. at 35–36 (citing the Indiana Rules of Evidence).) CAC's basis for this extraordinary claim is that the Commission's Order did not directly list cross-examination of Vectren's witnesses that CAC believes favors CAC. Respectfully, the argument that an Administrative Law Judge at an agency charged with conducting evidentiary hearings does not understand that cross-examination is evidence is not credible.

The argument also lacks legal merit. The Commission is not required to recite all the evidence it considered. The Commission is not a court reporter, and the Commission's order is not a transcript of all proceedings.

No rule compels the Commission to describe in its order a particular piece of evidence or a particular Perry-Mason moment the losing party's attorney believes occurred with the winning party's witness. An appellate court's review for "substantial evidence" depends upon what is in the record, not upon the written findings of an agency. *Mullett*, 2018 WL 2293647 at *2 (asking "whether substantial evidence within the record as a whole supports the [Commission's written] findings of fact").

In another administrative law context, the Court of Appeals has stated that "findings of fact need not recite every piece of evidence admitted at the hearing, but they must contain the basic facts that formed the basis for the ultimate decision." *Pack v. Indiana Family & Soc. Servs. Admin.*, 935 N.E.2d 1218, 1222–23 (Ind. Ct. App. 2010), *clarified on reh'g*, 940 N.E.2d 369 (Ind. Ct. App. 2011). This holding should transfer to utility law as well, because the standard of review requires the Commission to make findings of fact only on issues that are "material" to the agency's ultimate conclusions. The standard then asks whether those material findings of fact are supported by substantial evidence.

CAC's argument amounts to no more than a complaint that the Commission *credited* the wrong testimony. The Commission credited the testimony Vectren elicited, and CAC believes it should have credited the testimony CAC elicited. CAC is entitled to that opinion, as is its witness, Mr. Rábago, whose testimony mirrors the arguments presented in the Brief of Appellant. This Court, however, does not reweigh evidence. *Indiana Gas Co.*, 999 N.E.2d at 66.

CAC's arguments about what constitutes "substantial evidence" provides no basis for reversal of the Order.

5.7. CAC's assertion of inconsistency is not cogent argument and does not present grounds for reversal.

In its last argument on lost revenues, Section V(B)(4), CAC argues that the Order "misinterprets and misconstrues" Section 10, through the "fundamental error in establishing rates … without any reference or consideration of ratemaking practices and the requirements of Indiana's Public Service Commission Act." (CAC Br. at 36.) CAC believes "the Commission must examine every aspect of the utility operations and the economic environment in which the utility functions," before issuing an order under Section 10. (*Id.*) As argued above in Section 5.3, this proposition is not supported by Indiana law and would contravene the General Assembly's statutory framework for adjusting utility rates outside of a base rate case (where all operations and costs are considered). Also, the statute that CAC cites here, Section 8-1-2-68, does not convey anything about the consideration of "every aspect" of a utility's operations—nor is it part of the specific Section 10 that governs this case.

The Court also should not consider one cited decision from New Mexico. Utility regulation is a creature of state statute and those statutes vary from state to state. Indiana law provides ample precedent on how to review an order from the Indiana Utility Regulatory Commission.

Finally, CAC provides multiple statements that have no legal or factual support. It asserts without support that the Commission "fails to consider ratepayers in making a determination as to the reasonableness of this rate." (CAC Br. at 36.) It asserts without support that the Order "hinders, rather than promotes, the overall goal of Section 10." (*Id.* at 37.) It asserts without support that the Order "provides utilities with windfall gains." (*Id.*) It asserts, without support, that "62.9% of the total request from ratepayers to run these programs is pure profit for the utility." (*Id.* at 37–38 (the provided citation to the transcript, Vol. 8 at pg. 126, only shows this amount is "lost revenues").) The last statement, for example, is irresponsibly false. Lost revenues are, by definition, not profits. They are revenues. A utility's revenues, whether realized or lost, must cover the utility's costs before any portion of them can be considered to be profits. "[T]he purpose of lost revenue recovery is to return the utility to the position it would have been in absent implementation of DSM … ." *In re Vectren*, Cause No. 44645, 2016 WL 1179962, at *28. It is not to generate profits for the utility.

As argued above in Section 5.3, CAC's assertion that the Commission erred by not evaluating every aspect of Vectren's operations is not supported by Section 10, departs from the relevant standard of review, and would undermine this State's statutory framework for utility regulation outside of a base rate case. CAC's other arguments in Section V(B)(4) are not supported

by cogent reasoning or citations to relevant authorities, in derogation of Appellate Rule 46(A)(8). In summary, CAC's arguments provide no basis for the Court of Appeals to reverse the Commission's Order.

5.8. CAC's dispute over the credibility of a piece of evidence provides no ground for reversal.

CAC raises one additional argument, mislabeled as Section V(B), at pages 38–41 of its Brief. CAC essentially asserts that the Commission did not rely upon a piece of evidence it supplied, a draft report produced by the staff of the Commission, outside of a docketed setting, with no oath, due process, or cross-examination. (*See* CAC Br. at 39 (referring to the Director's Draft Report).)

CAC's argument does not identify how it fits into the multi-tiered standard of review appropriate for judicial scrutiny of a Commission order. CAC does not identify which element, if any, in Section 10(j) the report relates to. It appears to relate to none.

This argument is a credibility challenge. CAC complains that it put evidence into the record "disput[ing] the credibility of an analysis by one of Vectren's witnesses" that the Commission relied upon." (CAC Br. at 38.) CAC states the importance of the Draft Report is that it "raised the same credibility questions that CAC did." (*Id.* at 39.) Vectren provided its own

evidence on this subject, which CAC's Brief ignores but the Commission apparently did not. (*See generally* R. Stevie, Tr. Vol. 2 at pgs. 5–28 & 177–189.) However, the Court of Appeals does not "reweigh the evidence or asses the credibility of witnesses." *Mullett*, 2018 WL 2293647 at *2. It should not do so here, and should defer to the Commission about which evidence is credible and not credible.

Because CAC's argument about the Draft Report is not submitted in line with Section 10(j) or the appropriate standard of review, and because it calls upon the Court of Appeals to perform a credibility assessment, it provides no reason to reverse the Commission Order.

6. Conclusion.

Vectren respectfully submits that the Order, on the sole disputed issue of whether lost revenue recovery is reasonable, easily passes this Court's standard of review. The Order provides a finding of fact on the one relevant issue needed to approve Vectren's energy efficiency plan. That finding of fact is supported by testimony from multiple witnesses. And the Commission followed the statute (and this Court's direction in its Memorandum Decision) when issuing its order. The Order should be affirmed.

CAC's arguments are not rooted in the correct standard of review. Many of them misapply the law and ask this Court to issue an opinion that

would undermine the State's statutory framework for utility rate regulation. They ask the Court to rely upon the evidence most favorable to CAC and to find CAC's evidence credible and Vectren's evidence not credible—all of which is contrary to the standard of review, which requires the Court to consider the evidence most favorable to the agency's decision. These arguments provide no reason to set aside the Commission's Order.

This Court should affirm.

Respectfully submitted,

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Certificate Of Service

The undersigned certifies that, on June 25, 2018, the foregoing was filed electronically using the Court's IEFS pursuant to Rule 68(C) and that service was made on the following through E-service using the Public Service Contact List in accordance with Rules 24(C) and 68(F)(1):

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