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IN THE INDIANA COURT OF APPEALS
CAUSE NO. 18A-EX-141

Citizens Action Coalition of Indiana, Inc.,	)	
Appellant (Intervenor below),	)	**Appeal from the Indiana Utility Regulatory Commission**
v.	)	**Cause No. 43955 DSM 4**
Duke Energy Indiana, Inc.,	)	**The Hon. Sarah Freeman, Commissioner**
Appellee (Petitioner below)	)	**The Hon. David Veleta, Administrative Law Judge**

APPELLANT CAC'S REPLY BRIEF

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SUMMARY OF ARGUMENT

The appealed order approved a lost revenue rate adjustment mechanism, also known as a tracker, pursuant to Indiana Code §8-1-8.5-10 ("Section 10") without any limitation on the length of time by which it could be used for Duke Energy, LLC ("Duke"). This is despite the Indiana Utility Regulatory Commission ("Commission") previously articulating principles to the contrary wherein the Commission called the lost revenue tracker "a tool of limited duration" and limited recovery of lost revenues for installed measures to the shorter of a period of four (4) years, life of the measure, or the utility's next general rate case, due to Indiana's environment of infrequent rate cases. Rather than addressing this precedent and the material issue of the length of the time the lost revenue recovery tool may be used, the Commission accepted the monopoly utility's same evaluation, measurement, and verification ("EM&V") procedures it has always used, which have no relevance to ratemaking, as rationale upon which to find the lost revenue rate adjustment mechanism reasonable.

EM&V is a red herring and has nothing to do with ratemaking. If the Commission is changing the articulated principles from prior orders, it should explain why it is deviating and how EM&V can even serve such a purpose. This strawman argument was unfortunately adopted by the Commission after this Court remanded a case in a Memorandum Decision for a separate utility which is now also on appeal; and the Commission misinterpreted this Court's directive and applied it to all of the cases at that point going forward. The legal principle requiring an agency to explain its departure from precedent was created to avoid situations like this, wherein a strawman, red herring is created to confuse.

Despite Duke's statements to the contrary, CAC is not asking for a full-blown rate case or for more frequent filings of full-blown rate cases. CAC is not debating that Duke used Section

10's option to ask for approval of its plan through an independent proceeding, rather than a rate case. The issue is, regardless of whether it is a full-blown rate case or an independent proceeding, the Commission still needs to continue its recognition of the relationship between rate cases (where rates are reset) and "trackers" (also known as rate adjustment mechanisms). If it is deviating from that previously articulated principle, then the Commission must explain why this precedent is no longer applicable and why it is deviating from it.

Also, Duke argues "[t]he Commission's approval of Duke Energy's [Energy Efficiency] goal was not contrary to law" because it "adhered to Section 10 in approving the [Energy Efficiency] goal." (Appellee-Br. at 42-44). Duke even goes as far as to say that "with respect to its IRP, Section 10 not designed to litigate or approve utility's IRP." *Id*. at 43. This argument reveals Duke's inattention to even the Commission's order on Duke's last Section 10 filing, which rejected Duke's energy efficiency goal on the basis of an IRP that did not optimally balance energy resources. Instead of Duke discussing Section 10(c) related to the definition of "energy efficiency goals" as CAC plainly indicates in its Opening Brief, Duke points to the ten-part factor test in Section 10(j) which also references the utility's IRP. (Appellee-Br. at 43, citing to I.C. § 8-1-8.5-10(j)(3)(B), (j)(9).). To be clear, CAC's appeal on this issue is related to the "energy efficiency goal" definition in Section 10(c).

ARGUMENT

I. Duke fails to rebut that the Order ignored the material issue of precedent previously articulated on ascertaining whether a lost revenue proposal is reasonable without explaining such departure.

Faced with a deficient Order that cannot be reconciled with precedent or the rules governing precedent, Duke attempts to cover all its bases. Duke first argues the Commission did indeed address the subject of pancaking and the frequency of rate cases, i.e. the precedent in place since at least 2015. Duke then argues the Commission did not deviate from said precedent. Next, Duke argues that precedent pre-dating the 2015 enactment of Section 10 is no longer applicable, despite CAC citing many orders from 2015 and 2016 with Duke itself relying on two orders from 2014 and two cases pending on appeal. Finally, Duke argues that while EM&V is the new rationale for ascertaining whether lost revenues are reasonable, "there is nothing new about the Commission's approach." (Appellee-Br., pp.34-39). The fact remains that the Commission had articulated principles in place since the enactment of Section 10, and the Commission ignored the material issue central to the dispute among the parties and failed to explain its departure from such precedent.

A. The Commission's Order Did Not Address the "Pancake Effect" and Issues Related to Periods between General Rate Cases.

Duke first tries to argue the Commission *explained its deviation from past precedent*. It states the "Commission repeatedly discussed the so-called 'pancake effect' and issues purportedly related to periods between general rate cases" in the Order, citing to pages 14, 19, 25, 30, 32, 42, and 43. (Appellee-Br. at 34). Five of the seven citations Duke provides are not even to the correct part of the Order, while the last two citations merely summarize testimony and arguments and do not actually make findings or otherwise address the precedent in place.

Pages 14, 19, 25, 30, and 32 are merely the introductory portions of the Order, clearly prior to and outside the section labeled by the Commission as "Discussion and Findings" which begins on page 33. These portions of the Order make no findings, merely summarizing the evidence and testimony in the record.

Pages 42 and 43 are the right section of the Order, but the Commission still fails to address this material issue or make any factual findings of fact on the matter, again merely summarizing the testimony and consumer parties' arguments, ignoring its precedent and obligation to explain why it is now departing from such. The first two paragraphs of the section entitled "A. Lost Revenues" on page 42 merely state that "lost revenue recovery up to the earlier of measure life or a base rate case, or some other level of lost revenue recovery that is supported by evidence and thought by the Commission to be reasonable" must be approved if the Commission determines it is reasonable. This contains no findings. The next paragraph on page 42 which carries through to page 43 merely summarizes the non-Duke parties' arguments on lost revenue recovery:

> The OUCC, CAC, and the Industrial Group present a number of interrelated arguments to demonstrate the level of recovery of lost revenues proposed by Petitioner is unreasonable. Both the OUCC and Intervenors argue that lost revenues should be authorized only if Petitioner has experienced a reduction in kWh sales compared to the kWh sales used to set rates in its last base rate case. Mr. Gorman argues it is very difficult to accurately isolate the effect of sales declines that are attributable solely to the effect of utility DSM programs, and that it is ultimately a process of estimation subject to errors to a greater or lesser degree. The CAC argues that the baseline against which energy consumption is measured to estimate lost revenues will change over time, and lost revenue calculations don't adequately account for this complication. The implication of the CAC's and Industrial Group's concerns is that the determination of energy savings and lost revenue becomes progressively less reliable and more uncertain in successive years and therefore should not be relied upon. Dr. Stanton argues that if recovery of lost revenue is allowed, it should be limited to three years or the life of the measure, whichever is shorter, to avoid the pancake effect. The pancake effect occurs when lost revenues caused by EE investments in different years aggregate. On rebuttal, Petitioner's witnesses testified that lost revenues are

> only recovered based on measure-level EM&V results, which insure that lost revenues recovered are directly attributable to EE.

Order, pp.42-43. This paragraph also contains no findings. Later on page 43, the Commission finds that "EM&V is the most established approach to reasonably estimating energy savings and lost revenues associated with EE programs" and continues to elaborate on what EM&V does. It then states, "The OUCC, CAC, and Industrial Group offered no basis on which we could make factual findings that a three-year cap, or any other limitation, would allow Petitioner to recover reasonable lost revenues" but offers no further explanation as to why it is departing from its precedent squarely on this subject. It merely repeats similar language about how EM&V, as its name implies, evaluates, measures, and verifies savings. Order at 43. Again, this language reflects no findings or explanation sufficient to provide this Court with an understanding as to why the Commission is now departing from precedent, especially when the Commission rejected the same lost revenue proposal in Duke's prior filing. *In re Duke Energy Indiana, Inc.*, 43955-DSM-3, 2016 WL 1118794 at 49.

At a minimum, the Commission was required to explain why it was departing from precedent:

> It is well-established under federal law that agencies are free to change past rulings and policies. *See Hatch v. Federal Energy Regulatory Comm'n* (D.C.Cir.1981), 654 F.2d 825;*Columbia Broadcasting Sys. v. Federal Communications Comm'n* (D.C.Cir.1971), 454 F.2d 1018. Clearly, an agency should not be bound by prior policy when that policy proves to be flawed or in need of change. However, a change in policy must be explained and the reasons therefor articulated. *See Cheshire Hosp. v. New Hampshire-Vermont Hospitalization Serv., Inc.* (1st Cir.1982), 689 F.2d 1112; *Hatch, supra; Columbia Broadcasting, supra.* As clarified in *Columbia Broadcasting:*
>
> > "We do not challenge the Commission's well established right to modify or even overrule an established precedent or approach,.... Lodged deep within the bureaucratic heart of administrative procedure, however, is the equally essential proposition that, when an agency decides to reverse its course, it must provide an opinion

> or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law."

Id. at 1026.

Cmty. Care Centers, Inc. v. Indiana Dep't of Pub. Welfare, 523 N.E.2d 448, 451 (Ind. Ct. App. 1988). The Commission's Order is contrary to law insofar as it did not adhere to this well-established legal principle governing agency decisions. It also failed to address this material issue of rate case frequency which was a central dispute among the parties.

B. Duke then makes the surprising argument that the Commission did <u>not</u> deviate from prior binding precedent, but it does so by recounting its own incomplete and misleading version of the history of lost revenue recovery.

Duke ignores the Commission's orders and change in direction to limit lost revenue recovery after the legislature enacted Section 10 in 2015. In these post-Section 10 orders, the Commission acknowledges its deviation from prior orders where it had previously awarded lifetime lost revenue recovery. The issue now is the Commission has reversed this direction yet again without explaining why. Duke cites to four cases for the proposition that "the Commission did not deviate from prior binding precedent" in again awarding lifetime lost revenues. (Appellee Br. at 35). Some context is in order to understand why this argument by Duke is invalid.

The first two cases Duke cites are IURC-Cause Nos. 43955-DSM-1 (Duke's 2014 energy efficiency programs) and 43955-DSM-2 (Duke's 2015 energy efficiency programs), which were both decided in 2014, i.e. pre-dating the 2015 enactment of Section 10. These two orders were also prior to the Commission changing course in Duke's next energy efficiency subdocket, IURC-Cause No. 43955-DSM-3 (Duke's 2016-2018 energy efficiency programs) wherein the Commission capped the lost revenue rate adjustment mechanism to the shorter of four (4) years or the life of the measure. As Duke's Brief at 35-36 acknowledges, in 43955-DSM-3, the Commission explicitly explains why it is changing course and now consistently capping the use of the lost revenue rate adjustment mechanism to no more than four years:

> 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. Clearly, pancaking of lost revenue is much less of an issue in an environment where a utility comes in regularly, i.e., every three to five years, for a base rate case. When the Commission's DSM Rules were adopted in the early 1990's, the previous twenty years was characterized by routine and sometimes almost back-to-back rate case filings where utilities' rates were reset on a regular basis. Consequently, recovery of lost revenues at that time was viewed as a tool of limited duration until the utility filed its next base rate case in the not too distant future. However, in the years after adoption of the DSM Rules, utilities have been staying out for ten or more years before filing for a rate case. *E.g., Indianapolis Power & Light,* 19 years between Cause No. 38664 (IURC 8/23/95) and pending Cause No. 44576; *Southern Indiana Gas &Electric Co.*, 12 years between Cause No. 39871 (IURC 6/21/95) and Cause No. 43111 (IURC 8/15/07); *Duke Energy Indiana, Inc.*, last rate case was filed 13 years ago in Cause No. 42359 (IURC 5/18/04, rh'g denied 7/28/04).
>
> Because we believe the parties raise a valid concern, we find that Petitioner's lost revenue recovery should be limited to: (1) four years or the life of the measure, whichever is less, or (2) until rates are implemented pursuant to a final order in Petitioner's next base rate case, whichever occurs earlier.

In re Duke Energy Indiana, Inc., 43955-DSM-3, 2016 WL 1118794 at 49.

Duke also fails to acknowledge that both IURC-Cause Nos. 43955-DSM-1 and 43955-DSM-2 were orders approving settlement agreements. These settlements show that Duke agreed to and the Commission approved provisions explicitly citing the non-precedential nature of settlement agreements. 43955-DSM-1, 2014 WL 253875, at *9 (Jan. 15, 2014) ("The parties agree that the Settlement Agreement should not be used as precedent in any other proceeding or for any other purpose, except to the extent necessary to implement or enforce its terms. Consequently, with regard to future citation of the Settlement Agreement, we find that our approval herein should be construed in a manner consistent with our finding in *Richmond Power & Light*, Cause No. 40434, 1997 Ind. PUC LEXIS 459, at *19-22 (IURC March 19, 1997)."); *see also* 43955-DSM-2, 2014 WL 7525811, at *25 (Dec. 30, 2014).

Next, Duke cites to a 2014 NIPSCO case, IURC-Cause No. 44496 (NIPSCO 2015 energy efficiency programs), where the Commission awarded lifetime lost revenue recovery. But again, this predates the 2015 enactment of Section 10. And in NIPSCO's next Section 10 filing, the Commission limited NIPSCO's lost revenue recovery to the shorter of four (4) years or the life of the measure, consistent with the Commission's other orders during this time, again explaining why it was changing course. 2015 WL 9605053 at 42-43 ("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").

Finally, Duke relies on two cases currently pending on appeal before this Court on the central issue of lost revenue recovery as the Commission made the same deviation from precedent as it did in this Duke case without explanation. (Appellee-Br. at 36-38). *See* Indiana Court of Appeal Cause Nos. 18A-EX-95 and 18A-EX-140. In IURC-Cause No. 44645, this Court reversed and remanded the Commission's order in a Memorandum Opinion, but did not appear to do so in a way that directed the Commission to ignore its available precedent and approve whatever the utility put forward based on any red herring or strawman rationale a utility can dream up. Rather, this Court merely required the Commission to put forth specific findings of fact and to correct the mechanics of its overall statutory interpretation (i.e., to reject the entire plan if the Commission finds the lost revenue proposal to be unreasonable, rather than altering the lost revenue proposal to make it reasonable for approval). *S. Ind. Gas & Elec. Co. v. Ind.*

Util. Regulatory Comm'n, 2017 WL 899947 (Ind. App. 2017). Despite this, the Commission issued a remand order approving the utility's lost revenue recovery without regard to precedent or an explanation as to why it was deviating from precedent, prompting CAC's appeal of that order, as well. IURC-Cause No. 44645-Remand, 2017 WL 6618867, at *11–12 (Dec. 20, 2017). *See* Indiana Court of Appeal Cause Nos. 18A-EX-95. In IURC-Cause No. 44927, just seven days after the Commission approved IURC-Cause No. 44645-Remand, the Commission issued a similar order with the same deficiencies, also prompting CAC's appeal of that order. 2017 WL 6804741, at *24-25 (Dec. 28, 2017). *See* Indiana Court of Appeal Cause Nos. 18A-EX-140.

Again, Duke misses the point. The doctrine of *stare decisis* states that, when a court has once laid down a principle of law to a certain set of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same. *Emerson v. State*, 812 N.E.2d 1090 (Ind. Ct. App. 2004). The Commission stated in its Orders since the enactment of Section 10 (and in some orders prior to that) that lost revenues are to a tool of limited duration because of Indiana's environment of infrequent rate cases. *See* 2011 WL 3346770 (IURC 2011), 2010 WL 4499412 (IURC 2010), 2015 WL 9605053 (IURC, Dec. 12, 2015), and 2016 WL 1118794 (IURC, Mar. 9, 2016)(all limiting lost revenue recovery, given concern about pancaking lost revenue and significant length of time since utility's last rate case). If the Commission wishes to change it course yet again, it must explain its reasons for the change. *Cmty. Care Ctrs., Inc*. 523 N.E.2d at 450-51. The Order has no mention of its articulated principle related to the relationship between lost revenue trackers and general rate cases to ascertain the reasonableness of lost revenue rate proposals. This established material issue was squarely put into dispute before the Commission by the parties and, as precedent, must be addressed.

C. The Commission's failure to address precedent was not just contrary to law, but also demonstrated a failure to make specific findings of fact on the material issue related to precedent.

The frequency of rate cases was material to any decision related to lost revenue recovery proposals. By simply ignoring the central dispute regarding lost revenues, the Commission failed to satisfy its duty "to articulate the policy and evidentiary factors underlying its resolution of all issues which are put in dispute by the parties." *L.S. Ayres & Co. v. Indianapolis Power & Light Co*., 169 Ind. App. 652, 676, 351 N.E.2d 814, 830 (Ind. Ct. App. 1976)). Duke maintains that the Commission is not required to resolve all issues that are put in dispute by the parties, but instead, "The Commission is only required to issue specific findings on the 'factual determinations material to its ultimate conclusions.'" Appellee-Br. at 34 (quoting *L.S. Ayres*, 169 Ind. App. at 661, 351 N.E.2d at 822). Nonetheless, the Commission's Order was deficient under both standards in that the Commission failed to address the issue and failed to articulate the policy and evidentiary factors underlying the issues put in dispute by CAC, Duke, and the other consumer parties. The Commission failed to issue a specific finding on the factual determination of the reasonable length of time a lost revenue rate adjustment mechanism may be used, which was material to its ultimate conclusion insofar as the Commission has previously held this to be a specific determination that must be made.

In testimony, consumer parties, including CAC, testified in great detail and with much emphasis on the length of time by which the lost revenue rate adjustment mechanism may be used, relying on the Commission's prior orders articulating such as the standard. (CAC-Opening-Br. at 13-16). Yet, in its final Order, as explained above, the Commission approved an uncapped length of time for Duke to use the lost revenue rate adjustment mechanism, failing to address why the frequency of rate cases is no longer a consideration for the Commission in awarding the use of a tracker for an indefinite period of time.

The pancaking of lost revenues because of infrequent rate cases was the "central dispute" and the Commission's findings related to this and its impact on ratepayers were "material to [the Commission's] ultimate conclusions." *L.S. Ayres*, 169 Ind. App. at 661, 351 N.E. 2d at 822. At a minimum, the Commission must make findings as to whether the length of time Duke is requesting to use the lost revenue rate adjustment mechanism was reasonable, and if so, what impact that will have Duke's customer's rates.

II. EM&V is a red herring; it has no relationship to determining whether a lost revenue rate adjustment mechanism is reasonable.

For anyone not familiar with the subject matter of utility-sponsored energy efficiency, Duke's argument and the Commission's adoption of such in the underlying proceeding might seem convincing and relevant to the issue at hand; but it is not, and the subject of EM&V is a red herring. Had the Commission addressed its precedent in making its decision, perhaps it would have not fallen into Duke's trap. Instead, the Commission adopted the red herring argument that EM&V somehow serves as a test for reasonableness of lost revenues despite the fact that EM&V has been in effect since 1995 and has never been used in such a way by the Commission.

A. EM&V has always been used for utility-sponsored energy efficiency evaluation, measurement, and verification.

Duke admits that EM&V has not changed—it has not changed before, during, or after the enactment of Section 10. (Tr., vol. 6, at 145, noting that the Commission's rule at 170 IAC 4-8-4(b) related to EM&V "has been in effect since at least 1995 and Duke Energy Indiana proposes to continue to perform EM&V as it has done since the Commission first approved it in Cause No. 43955 in 2012."). In the same brief that Duke opines on the longstanding practices and use of EM&V, Duke implies the legislature created a reasonableness mechanism to limit lost revenue recovery with the requirement of EM&V. As one disassembles Duke's argument, it is easy to see the strawman rationale. Duke wants to argue that "there is nothing new about the Commission's approach" utilizing EM&V for a reasonableness test of lost revenues, yet Duke then states on the next page that the mention of EM&V in one of the ten factors in Section 10(j) "emphasize[s] [that] evaluation, measurement, and verification is essential to ensuring that the lost revenues recovered through utility rates are reasonable." (*Compare* Appellee-Br. p.38 to p.39).

Yes, EM&V has always been used to evaluate, measure, and verify savings from utility-sponsored energy efficiency programs. But, this is the first time the Commission is stating EM&V has a role in ascertaining the reasonableness of utilizing a lost revenue rate adjustment mechanism for an indefinite period of time. EM&V is a red herring and has nothing to do with ratemaking. If the Commission is changing the articulated principles from prior orders, it should explain why it is deviating and how EM&V can even serve such a purpose.

B. EM&V does not address whether lost revenues are needed to make the utility whole.

If the purpose of lost revenues is to make the utility whole, there is no mechanism to ascertain whether these lost revenues are needed for that or not; EM&V simply counts the savings, but has no relationship to revenues lost by the monopoly utility. In other words, it is absurd on its face to say that the amount of energy savings measured should be multiplied by a certain rate and that amount is de facto reasonable, i.e., measured savings do not equate to revenues without some type of reasonableness test applied. Yet, now the Commission's Order is saying if EM&V is in place as it always has been, then virtually all lost revenues can be approved, disregarding any other criteria previously put in place to ascertain whether the quantity and other factors determining the amount of lost revenues is truly reasonably.

CAC does not debate EM&V's necessity, but the Order and Duke mischaracterize the role and purpose of EM&V. Duke asserts that EM&V somehow ensures the lost revenue totals "could not possibly be 'artificially high'" quoting a large amount of its own testimony to assert such an argument. (Appellee-Br. at 29-30). When one examines the testimony Duke quotes, it is answering the question, "Is the Company proposing costs be recovered on an estimated basis or after the fact?" (Tr. Vol. 7 at 150). The testimony excerpted by Duke on pages 29-30 of its brief should not be afforded any weight as it is off topic and irrelevant.

EM&V validates savings, providing critical information to improve program performance and to ensure accuracy for cost recovery aspects. EM&V has always been part of the lost revenue rate reconciliation process in terms of assuring consistency between the forecasted savings and the actual amounts saved by the utility's programs but its purpose is not related to the length of time a lost revenue rate tracker should be used.

Utilities also rely on arithmetic, multiplication, and good recordkeeping, among other sciences and disciplines. This does not mean that because arithmetic was used, the lost revenue rate adjustment mechanism is assumed reasonable. The Commission previously explained how to ascertain the reasonableness of lost revenues: look at the frequency of general rate cases and the length of time by which the utility is asking to recover lost revenues.

III. CAC is not asking for a full-blown rate case or even for more frequently filed full-blown rate cases.

Duke misinterprets CAC's position. CAC is not asking for a full-blown rate case or for more frequent full-blown rate cases, and CAC is not debating that Section 10 here applied to independent proceeding. The issue is, regardless of whether it is a full-blown rate case or an independent proceeding, the Commission still needs to continue its recognition of the relationship between rate cases (where rates are reset) and "trackers" (also known as rate adjustment mechanisms). If it is deviating from that previously articulated principle, then the Commission must explain why this precedent is no longer applicable and why it is deviating from it.

Duke creates a distorted view of CAC's position. (Appellee-Br. at 24-26). Duke attempts to couch CAC's argument as a misunderstanding of or failure to read the entirety of Section 10. Duke says that CAC misunderstands the fact that Duke used an independent proceeding, rather than a rate case, to ask for Section 10 approval of its 2017-2019 programs. *Id*. But that is not the issue. CAC understands and appreciates the opportunity for a utility to ask for energy efficiency plan approval in either a general rate case or an independent proceeding, and CAC certainly understands the difference between the two. Rather, it is Duke who misrepresents general traditional ratemaking's relationship with trackers.

First, to be clear, CAC agrees that utilities may, when appropriate, receive lost revenues to address the financial bias against energy efficiency, ratepayers' least cost resource. *See* I.C. § 8-1-8.5-10(o), 170 IAC § 4-8-3. This has long been the practice, despite Duke implying Section 10 somehow served a role in awarding such treatment to remove the financial bias. (Appellee-Br. at 19 "By requiring that utilities recover their lost revenues resulting from energy efficiency programs, the General Assembly removed the first form of financial bias—the throughput incentive—against energy efficiency."; *see also* Appellee-Br. at 31).

But that is not the issue. Rather, this dispute centers on whether certain lost revenue rate adjustment mechanisms are reasonable and address the particular problem the Commission has previously articulated with regard to the compounding nature of lost revenue trackers in environments like Indiana where rates are not frequently reset in regular rate cases. Notably, the interval between Duke's two rate cases could be as large as twenty-one (21) years "given that [Duke's] last rate case used a test year ending in 2002 and that [Duke] does not expect to file a base rate case until the end of 2022" meaning creating unreasonable lost revenue recovery since "[a]ny 'uncapped' lost revenues would not be 'zeroed out' until new rates went into effect." (Order at 19). Notably, Duke's last rate case was actually Duke's predecessor, Public Service Indiana; thus, technically-speaking, Duke has never even had a rate case in Indiana. *In Re Psi Energy, Inc.*, IURC-Cause No. 42539, 2004 WL 1493966 (Ind. U.R.C.), 234 P.U.R.4th 1 (May 18, 2004). This infrequent rate case interval is the exact situation the Commission was addressing in its 2015 and 2016 cases since Section 10 was enacted. See *In re Duke Energy Indiana, Inc.*, 2016 WL 1118794 at 49 (capping lost revenue recovery at lesser of four years or life of the measure, stating "However, in the years after adoption of the DSM Rules, utilities have been staying out for ten or more years before filing for a rate case. *E.g., … Duke Energy Indiana, Inc.*, last rate case was filed 13 years ago in Cause No. 42359 (IURC 5/18/04, rh'g denied 7/28/04).").

A. Traditional ratemaking versus trackers

Lost revenue recovery stems from how utility rates are set in Indiana. To determine the rates in a general rate case under traditional ratemaking, the Commission first determines a yearly revenue requirement for a typical year. *See generally, L.S. Ayres & Co. v. Indianapolis Power & Light Co.*, 351 N.E.2d 814, 819 (1976); *S. Ind. Gas & Elec. Co*., 2011 WL 1690057, *57-58. (I.U.R.C., Apr. 27, 2011). The revenue requirement, which includes fixed and variable costs, is the allowed (but not guaranteed) gross revenue that the utility may earn in a year. *Id*.

Once the overall revenue requirement is established, ratepayers are separated into customer classes such as residential or commercial classes and each class pays a rate for their proportional share of the revenue requirement. *Id*. at *72-98. This ratemaking process involves multitudes of costs, customer classes, and rate designs, which interrelate and interact with each other. In other words,

> Traditionally, utility rates are adjusted through general ratemaking cases. General ratemaking is a "comprehensive" process, requiring the Commission to "examine every aspect of the utility's operations and the economic environment in which the utility functions to ensure that the data [the Commission] has received are representative of operating conditions that will, or should, prevail in future years." United States Gypsum, 735 N.E.2d at 798 (citation omitted).

NIPSCO Industrial Group v. Northern Indiana Public Service Co., No. 18S-EX-334 ___ N.E.3d ___, 2018 WL 3046242 (Ind. Jun. 20, 2018). However,

> Over the years, the legislature has supplemented traditional ratemaking with various "tracker" procedures that allow utilities to ask the Commission to adjust their rates to reflect various costs without having to undergo a full ratemaking case.

Id. Lost revenue rate recovery is a form of a "tracker" allowing for single issue rate adjustments in isolation of other factors affecting the utility's business and between comprehensive rate cases. *See NIPSCO Industrial Group v. NIPSCO*, 31 N.E.3d 1, 4 (Ind. App. 2015) (differentiating general rate cases from "tracker" proceedings that adjust rates for specific costs).

However, many factors can change between comprehensive rate cases, which affect utility earnings. And viewing just one aspect of electric service rates can create a false picture. Single issue ratemaking is done without regard to the strength of a utility's overall earnings and without the greater context of the environment like when efficiency baselines erode as new federal laws are passed requiring only more efficient boilers or lightbulbs to be in the market.

This could overcompensate the utility when lost revenue rates instituted for a 2018 program are allowed to be collected until the utility comes in for a rate case and a resetting of rates.

On the other hand, if the utility believes it is experiencing losses and needs to reset its revenue requirement, it has the option to do so. A rate case effectively zeroes out lost revenue recovery, since consumption data is updated therein and consequently the utility no longer has any losses from reduced load attributable to efficiency programs since the prior rate case. *See Ind. Gas v. OUCC,* 575 N.E.2d 1044, 1050 (utility "is not without a remedy" as it "may file a general rate case"). In that event, however, the impact of energy efficiency programs would not be addressed in isolation, and instead would be one factor among many affecting the rate computation. *See U.S. Gypsum, Inc., v. Ind.Gas Co.,* 735 N.E.2d 790, 798 (Ind.2000) (describing the "comprehensive" nature of general rate proceedings).

The Commission recognized the issue with this single issue ratemaking problem with the lost revenue rate tracker in precedent under the new statutory framework of Section 10. Its solution was to limit the duration of the lost revenue tracker to a certain amount of time it deemed an acceptable, considering the lack of frequent rate cases in Indiana. Any remaining reasonable lost revenues could then be evaluated in a full and fair examination of base rates and the Company's total, updated revenue requirements. (Compare to Appellee-Br. at 33 (arguing "it is not as if lost revenues disappear in a general rate case"; instead, those "lost revenues are simply built into the base rates as a result of the lower customer energy requirements"). This ensured the Commission could meet its obligation to allow only rates that are just and reasonable and that the use of such a tracker mechanism is not abused in between rate cases.

B. Duke's argument that the length of time between rate cases is not explicitly mentioned in Section 10 should be ignored.

Duke also argues that the Commission's precedent should be ignored insofar as the "length of time between general rate cases is not one of Section 10's statutory reasonableness considerations, nor should it be." (Appellee-Br. at 21; see also Appellee-Br. at 32 and 41). The Commission itself articulated the length of time and frequency of general rate case as a principle for determining lost revenue recovery. In fact, Duke's argument that it should be allowed recovery of lost revenues for the full predicted life of the energy efficiency measure effectively reads the term "reasonable" out of the statute. Duke attempts to equate lost revenues with the amount of energy saved, as though they are one and the same and as though lost revenues at that amount for an indefinite period of time and without regard to rate case frequency is an entitlement. (Appellee-Br. at 8, "No rational economic actor would spend money or undertake efforts to reduce the use of its products and services."). Yet, if the legislature wished to require the Commission to allow lost revenue recovery for the full predicted life span of a measure, it could have done so. Instead, it required such recovery to be "reasonable." The legislature tasked the Commission with determining the reasonableness of both the energy efficiency plan under Section 10(k), and the reasonableness of the lost revenues, Section 10(o); and the Commission did just that in its orders since the enactment of Section 10 in 2015 (except the three cases on appeal including this one, where it suddenly departed from those articulated principles without explanation). The General Assembly's insertion of the word "reasonable" in front of lost revenues implies that "reasonable" does not necessarily mean the life of a measure. *See Andy Mohr West v. Office of Indiana Secretary of State*, 54 N.E.3d 349, 353 (Ind. 2016) ("No word or part should be rendered meaningless if it can be reconciled with rest."). *See also In re Adoption of J.T.D.*, 21 N.E.3d 824, 829 (Ind. 2014). In other words, "reasonable" lost revenues could be considered an entitlement, but not "all of the lost revenues".

3. Duke's attempts to invalidate the persuasive value of the New Mexico case should be ignored.

Duke attempts to discredit the persuasive value of the New Mexico case CAC cited in its Opening Brief. *See* CAC-Opening-Br. at 36. Duke says it should not be relied upon because New Mexico did not have any statutory equivalent to Indiana's Section 10. (Appellee Brief at 27-28). Duke misses the point. Both Indiana and New Mexico's utilities must follow the just and reasonable rates requirement, *compare* N.M. Stat. Ann. §62-8-1 to Ind. Code Section §8-1-2-4, and both State Public Utility Commissions addressed this claimed financial disincentive for utilities sponsoring energy efficiency programs. *Compare* N.M. Stat. Ann. §§62-17-1 to -11, 62-17-2(E), and 62-17-3, to Indiana Code §8-1-8.5-10(o)(1)(B) and 170 IAC 4-8-6(c).

Duke also states, "And unlike in this case, the record in the New Mexico case established that the utilities likely would receive millions of dollars above and beyond their lost revenues", yet Duke does not even bother to provide citations to Indiana caselaw or to the record at issue in this case on appeal for CAC to examine such a conclusory statement. (Appellee Br. at 28). Thus, this Court should disregard Duke's statement here.

Duke also argues that the New Mexico case is different because the New Mexico rates "were arbitrary and unlawful in that they were not evidence-based, cost-based, or utility-specific", arguing that is not a problem here. (Appellee Br. at 28). Yet, Duke fails to define what these terms mean and how it is using them to support its argument that these problems are not at issue before our Indiana Utility Regulatory Commission. The fact that the Indiana Commission is ignoring the evidence of infrequent rate cases in this State does not make their orders "evidence-based." The fact that the Indiana Commission allows a utility to get the full revenue equated to an amount of savings deemed appropriate for an installed LED light bulb or HVAC system does not mean their orders awarding untethered lost revenues is "utility-specific" or "cost-based." In fact, that is one common theme one can observe in all three of the cases on appeal: there is no analysis by the Indiana Commission that the lost revenue amount or mechanism is based on evidence, costs, or utility-specific information.

Finally, Duke argues that a balancing between shareholder and customer interests does not need to occur in Indiana, like it does in New Mexico. (Appellee-Br. at 28). This is news to CAC. The Indiana Supreme Court recently explained that:

> The State regulates utilities through the Commission, which is authorized by statute to act with "technical expertise to administer the regulatory scheme designed by the legislature ... to insure that public utilities provide constant, reliable, and efficient service to the citizens of Indiana." *N. Ind. Pub. Serv. Co. v. United States Steel Corp.*, 907 N.E.2d 1012, 1015 (Ind. 2009) (citation omitted). See Ind. Code §§ 8–1–1–1 to 8–1–1–15. When exercising this authority, the Commission balances the public's need for adequate, efficient, and reasonable service with the public utility's need for sufficient revenue to meet the cost of furnishing service and to earn a reasonable profit. *United States Gypsum*, 735 N.E.2d at 797–98. "Proper rates are those which produce a fair and nonconfiscatory return, and such as will enable the company, under efficient management, to maintain its utility property and service to the public, and provide a reasonable return upon the fair value of its used and useful property." *Pub. Serv. Comm'n of Ind. v. Ind. Bell Tel. Co.*, 235 Ind. 1, 15, 130 N.E.2d 467, 473 (1955) (citations omitted).

NIPSCO Indus. Grp. v. N. Indiana Pub. Serv. Co., 100 N.E.3d 234, 238 (Ind. 2018)

The Court should consider the persuasive authority from the New Mexico Supreme Court, despite Duke's statements to the contrary. *In AG of N.M. v. N.M. Pub. Regulation Comm'n*, 150 N.M. 174, 2011-NMSC-034, 258 P.3d 453, 2011 N.M. LEXIS 386.

Although CAC is not asking for more frequent rate cases or for a rate case in this proceeding, it is asking for recognition of the relationship between trackers and rate cases. This lost revenue rate adjustment mechanism, or tracker, is particularly susceptible to misuse in an environment like Indiana with infrequent rate cases.

IV. Duke ignores the statutory definitional threshold of "energy efficiency goals" in Section 10(c).

Duke argues "[t]he Commission's approval of Duke Energy's EE goal was not contrary to law" because it "adhered to Section 10 in approving the EE goal." (Appellee-Br. at 42-44). Duke even goes as far as to say that "with respect to its IRP, Section 10 not designed to litigate or approve utility's IRP." *Id*. at 43. This argument reveals Duke's inattention to even the Commission's order on Duke's last Section 10 filing, which rejected Duke's EE goal on the basis of an IRP that did not optimally balance energy resources.

The Commission found in Duke's last Section 10 filing that Duke did not meet the definition of Section 10(c) regarding energy efficiency goal and rejected it as such:

> it stands to reason that an optimal balance can only result from a well-developed and reasoned IRP that evaluates the appropriate balance of new supply-side and demand-side resources taking account of risks and uncertainty. Petitioner's EE goals and plan are not based on an IRP as Petitioner acknowledges, instead the goals and EE plan were "informed" by the 2013 IRP. Petitioner's 2013 IRP developed three scenarios used to evaluate resource requirements and choices. However, in each scenario Petitioner assumed a given level of EE and then allowed the model to optimize the generation resource selection. In the 2013 IRP report Petitioner even explicitly refers to the "assumed" levels of EE. Thus the 2013 IRP cannot be said to have developed an optimal balance of energy resources.

43955-DSM-3, 2016 WL 1118794 at 45. Instead of Duke discussing Section 10(c) as CAC plainly indicates in its Opening Brief, Duke points to the ten-part factor test in Section 10(j) which also references the utility's IRP. (Appellee-Br. at 43, citing to I.C. § 8-1-8.5-10(j)(3)(B), (j)(9).). To be clear, CAC's appeal on this issue is related to the "energy efficiency goal" definition in Section 10(c).

In order to meet the definition of "energy efficiency goals" in Section 10(c), Duke must show that its energy efficiency goals meet the criteria of all energy efficiency produced by cost effective plans that are (a) reasonably achievable, (b) consistent with Duke's most recently filed

IRP, and (c) designed to achieve an optimal balance of energy resources in Duke's service territory. Duke's plan fails to meet the definition of "energy efficiency goals" in several respects.

CAC's Opening Brief at 38-39 explained how the Commission failed to consider CAC's discrediting evidence showing that Duke assumed in its resource planning model the same energy efficiency goals that were previously rejected by the Commission in the last filing for that very basis. The Commission failed to consider the mounting evidence that Duke, yet again, rigged its model to have the same output of energy efficiency goals, rather than letting the model run without the many acts of manipulation as CAC demonstrated. *See* CAC-Opening-Br. at 38-39. This time, however, the Commission approved it.

CAC agrees with the Order that "this does not require the utility EE plan be identical to or reconciled with the amount of energy savings in the utility's IRP plan," Order at 37, but there is a great distinction between that and why the Commission rejected Duke's prior Section 10(c) energy efficiency goals. At a minimum, Duke cannot manipulate the model and assume the outputs of the model, even before the model is allowed to run its course. Unfortunately for ratepayers, that is what Duke did and that is what the Commission allowed, despite its rejection of such practices in its last filing. (*See* CAC Brief at 16-19 and 38, noting discrediting evidence as to how Duke translated the energy efficiency goals from the IRP to the plan, forced in a natural gas power plant rather than allowing the model to economically select such, modeled far more load than it needs to serve customers and meet its requirements with the grid operator, and more). At a minimum, the Commission should have evaluated this discrediting evidence as it did in its Section 10 first impression cases.

It is not clear why the Commission lowered its standard with this new statute and new way in which energy efficiency goals will be determined through the resource modeling exercise. But, it was contrary to the Commission's previously articulated principles, was based on meager and conflicting evidence, and failed to address major central disputes in the record on whether Duke met its "energy efficiency goals" statutory threshold.

CONCLUSION

Wherefore, for all the reasons stated, CAC respectfully requests this Court to determine that the Commission's December 28, 2017 Order fails the standard of just and reasonable, ignores critically material issues including precedent, is not supported by substantial evidence, and is otherwise not in compliance with the law.

Respectfully submitted,

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WORD COUNT CERTIFICATE

The undersigned hereby verifies, in accordance with Ind. Appellate Rule 44, that the foregoing Appellant's Reply Brief contains no more than 7,000 words as calculated by the word count function of the word processing software used to prepare the brief, excluding those parts of the brief exempted by Ind. Appellate Rule 44C.

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CERTIFICATE OF SERVICE

The undersigned certifies that, on July 23, 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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