

BEFORE THE

INDIANA UTILITY REGULATORY COMMISSION

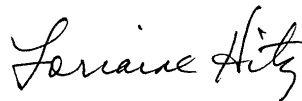
**VERIFIED PETITION OF NORTHERN INDIANA PUBLIC)
SERVICE COMPANY LLC FOR (1) APPROVAL OF AND A)
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY)
FOR A FEDERALLY MANDATED ASH POND COMPLIANCE)
PROJECT; (2) AUTHORITY TO RECOVER FEDERALLY)
MANDATED COSTS INCURRED IN CONNECTION WITH)
THE AS POND COMPLIANCE PROJECT; (3) APPROVAL OF)
THE ESTIMATED FEDERALLY MANDATED COSTS)
ASSOCIATED WITH THE ASH POND COMPLIANCE)
PROJECT; (4) AUTHORITY FOR THE TIMELY RECOVERY)
OF 80% OF THE FEDERALLY MANDATED COSTS)
THROUGH RIDER 887 – ADJUSTMENT OF FEDERALLY)
MANDATED COSTS AND APPENDIX I – FEDERALLY)
MANDATED COST ADJUSTMENT FACTOR (“FMCA)
MECHANISM”); (5) AUTHORITY TO DEFER 20% OF THE)
FEDERALLY MANDATED COSTS FOR RECOVERY IN)
NIPSCO’S NEXT GENERAL RATE CASE; (6) APPROVAL OF)
SPECIFIC RATEMAKING AND ACCOUNTING TREATMENT;)
(7) APPROVAL TO AMORTIZE THE ASH POND)
COMPLIANCE PROJECT COSTS THROUGH 2032; (8))
APPROVAL OF ONGOING REVIEW OF THE ASH POND)
COMPLIANCE PROJECT; ALL PURSUANT TO IND. CODE §)
8-1-8.4-1 ET SEQ., § 8-1-2-19, § 8-1-2-23, AND § 8-1-2-42; AND,)
TO THE EXTENT NECESSARY, APPROVAL OF AN)
ALTERNATIVE REGULATORY PLAN PURSUANT TO IND.)
CODE § 8-1-2.5-6.)**

CAUSE NO. 45700

**INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR’S
PUBLIC’S EXHIBIT NO. 1
TESTIMONY OF OUCC WITNESS
CYNTHIA M. ARMSTRONG**

September 7, 2022

Respectfully submitted,



Lorraine Hitz
Attorney No. 18006-29
Deputy Consumer Counselor

TESTIMONY OF OUCC WITNESS CYNTHIA M. ARMSTRONG
CAUSE NO. 45700
NORTHERN INDIANA PUBLIC SERVICE COMPANY

I. INTRODUCTION

1 **Q: Please state your name and business address.**

2 A: My name is Cynthia M. Armstrong, and my business address is 115 W. Washington
3 St., Suite 1500 South, Indianapolis, IN, 46204.

4 **Q: By whom are you employed and in what capacity?**

5 A: I am employed as a Chief Technical Advisor in the Electric Division for the Indiana
6 Office of Utility Consumer Counselor ("OUCC"). A summary of my qualifications
7 can be found in Appendix A.

8 **Q: Have you previously provided testimony to the Indiana Utility Regulatory**
9 **Commission ("Commission")?**

10 A: Yes.

11 **Q: What have you done to evaluate issues presented in this Cause?**

12 A: I read and reviewed all materials presented in this docket, including Northern
13 Indiana Public Service Company's ("NIPSCO" "Company," or "Petitioner")
14 petition, pre-filed verified direct testimony and exhibits, and responses to data
15 requests. I also participated in a pre-filing informational video conference regarding
16 the Project with NIPSCO staff on April 27, 2022. While I was unable to attend the
17 in-person meeting and tour of the Michigan City Generating Station on August 1,
18 2022, I participated remotely via video conference.

19 **Q: What is the purpose of your testimony in this proceeding?**

20 A: The purpose of my testimony is to present an overview of the OUCC's position
21 regarding NIPSCO's request for a Certificate of Public Convenience and Necessity

1 (“CPCN”) and associated cost recovery under Ind. Code ch. 8-1-8.4 (“the Federally
2 Mandated Requirements statute”) for the Michigan City Generating Station Ash
3 Pond Compliance Project (“the Project”) and Alternative Regulatory Plan (“ARP”)
4 treatment under I.C. § 8-1-2.5-6. I also introduce other OUCC witnesses and
5 respective testimonial topics.

6 **Q: What is the OUCC’s overall position regarding the Project?**

7 A: The OUCC agrees the Project is necessary to comply with federal environmental
8 rules, and also agrees that NIPSCO has selected the most reasonable option for
9 compliance. However, the OUCC’s position is that NIPSCO did not meet the
10 requirements for cost recovery under the Federal Mandated Requirements statute,
11 as it will incur the majority of the Project’s costs before it will receive a CPCN for
12 the Project.¹ NIPSCO recognized these costs in past base rates via Asset Retirement
13 Obligations (“AROs”), but removed them from its most recent rate case, Cause No.
14 45159. If NIPSCO has under-recovered coal combustion residuals (“CCR”)²
15 closure costs due to this omission, then allowing NIPSCO to recover any such loss
16 incurred prior to the Commission issuing a Federally Mandated CPCN constitutes
17 retroactive ratemaking. Furthermore, NIPSCO’s request disregards any costs the
18 Company has recovered through past rates and could lead to the Company partially
19 recovering these costs from customers twice. Finally, using I.C. ch. 8-1-2.5 (“the
20 ARP Statute”) to allow NIPSCO to by-pass the pre-approval requirements of the

¹ NIPSCO states the Project is planned to be substantially complete by December 9, 2022. (Direct testimony of Robert Ridge, p. 4, lines 10-11). I.C. § 8-1-8.4-6(a) requires an energy utility seeking to recover costs under I.C. § 8-1-8.4-7(c) to obtain a certificate from the Commission that states that public convenience and necessity *will* be served by a compliance project proposed by the energy utility.

² CCRs include fly ash, bottom ash, boiler slag, and flue gas desulfurization materials generated from burning coal for the purpose of generating electricity by electric utilities and independent power producers.

1 Federally Mandated Requirements statute is inappropriate, and NIPSCO's request
2 for an ARP and associated recovery should be denied.

3 Alternatively, should the Commission issue a CPCN for the Project and
4 grant NIPSCO's request for an ARP for Project costs incurred prior to the
5 Commission issuing a final order in this Cause, the OUCC recommends Project
6 cost recovery be structured in a manner that mitigates costs to consumers. This
7 would include crediting any ash pond closure costs NIPSCO recovered through past
8 rates, requiring the Company to conduct a comprehensive analysis of all current
9 and past insurance policies and file reimbursement claims under each applicable
10 policy, to treat these costs as expenses, not capital projects, and therefore only allow
11 a return "of" but not a return "on" Project costs. Any Project costs included in
12 "owner's costs" that include NIPSCO employee time, benefits and the like should
13 also be removed, as NIPSCO already receives recovery through base rates.
14 NIPSCO should not be allowed to double recover such costs.

15 **Q: Who are the other OUCC witnesses testifying in this Cause?**

16 A: The other OUCC witnesses testifying and their respective testimonial topics
17 include:

- 18 • Brian Wright: Mr. Wright discusses the environmental regulatory history and
19 requirements leading to the Project, the compliance alternatives NIPSCO
20 considered, and the reasonableness of the Project's cost estimate.
- 21 • Kaleb Lantrip: Mr. Lantrip discusses NIPSCO's proposed ratemaking treatment
22 and recovery of the Project's costs. He recommends denial of the utility's
23 proposed cost recovery, but proposes alternative ratemaking treatment of the

1 Project should the Commission grant NIPSCO's requested CPCN and ARP for
2 the Project.

**II. RETROACTIVE RATEMAKING CONCERNS AND PETITIONER'S
REQUEST FOR AN ALTERNATIVE REGULATORY PLAN**

3 **Q: Please explain NIPSCO's request for an ARP in this proceeding.**

4 A: Pursuant to I.C. § 8-1-2.5-6, NIPSCO requests an ARP to confirm that all federally
5 mandated costs associated with the Project are authorized to be recovered in the
6 requested accounting and ratemaking treatment described in its case-in-chief. These
7 costs include those incurred throughout most of 2022,³ prior to NIPSCO receiving
8 a CPCN in this Cause under I.C. § 8-1-8.4-6. NIPSCO Witness Alison Becker cites
9 the recent Indiana Supreme Court decision regarding Duke Energy Indiana's
10 ("DEI") recovery of CCR closure costs as the reason for this request.⁴

11 **Q: Please explain the Supreme Court decision Ms. Becker refers to in her**
12 **testimony.**

13 A: In *Indiana Office of Utility Consumer Counselor v. Duke Energy Ind., LLC*
14 (*"OUCC v. DEI"*),⁵ the OUCC appealed the Commission's Final Order in Cause
15 No. 45253, challenging the allowed recovery of DEI's past CCR closure costs as a
16 regulatory asset included in DEI's rate base. DEI did not seek prior approval of its
17 CCR closure costs before they were incurred and recorded unilaterally by DEI as a
18 regulatory asset. DEI also included ash pond closure costs in the decommissioning
19 studies used in setting depreciation rates in its previous rate case. The Court found
20 recovery of coal ash costs incurred before the Commission issued its Cause No.

³ Direct Testimony of NIPSCO Witness Alison M. Becker, pp. 20-22.

⁴ *Id.*, pp. 21-22.

⁵ *Ind. Off. of Util. Consumer Couns. v. Duke Energy Ind., LLC*, 183 N.E.3d 266 (Ind. 2022), *reh'g denied*.

1 45253 order in June 2020 was unlawful because it constituted retroactive
2 ratemaking:

3 Applying here the principle that a utility cannot recover
4 unforeseen past losses, we hold that the commission's order
5 is retroactive ratemaking. This is so because the commission
6 established Duke's rate in 2004, which governed the period
7 from 2010 until the current order in June 2020. Duke
8 acknowledges that the commission already adjudicated
9 depreciation rates in its 2004 rate order. The actual costs
10 turned out to be more than Duke expected. Duke then sought
11 re-adjudication through its 2019 rate case. But we have
12 already held that utilities may not re-adjudicate costs for a
13 time period governed by a prior order...Here the
14 commission violated the bar against retroactive ratemaking
15 by re-adjudicating in 2020 coal-ash costs governed by its
16 2004 rate order.

17 *OUCC v. DEI*, 183 N.E.3d at 270.

18 When examining arguments regarding pre-authorization of CCR closure costs, the
19 Court discussed the Federal Mandate Statute (I.C. ch. 8-1-8.4):

20 [H]ad Duke properly sought recourse under Indiana's
21 federal mandate statute, I.C. ch. 8-1-8.4, the result may have
22 been different, at least for the costs Duke incurred to comply
23 with the EPA's 2015 rulemaking. This statute permits
24 utilities to recover costs incurred due to changes in federal
25 regulations. Although we have not yet interpreted the statute,
26 we note it is framed in the future tense and speaks of
27 "projected" costs for "proposed" projects, see *id.* §§ 8-1-8.4-
28 6(a), 6(b), 6(b)(1), 7(b)(1), 7(b)(2), which would seem to
29 require commission approval **before** a utility incurs the
30 costs. Where another statute authorizes the commission's
31 action, and specifically contemplates prior approval for
32 certain types of expenses, the statutory prohibition against
33 retroactive ratemaking may not apply. Here, however, Duke
34 did not seek prior approval of its coal-ash costs. Thus what
35 governs here is not the federal mandate statute but the
36 prohibition against retroactive ratemaking.

37 *Id.* (emphasis in original).

1 Although the Court's decision did not center on the federal mandate statute's
2 interpretation, it indicated Commission approval was a pre-requisite to recover
3 federally mandated costs, and that the statute is "framed in the future tense and
4 speaks of 'projected' costs for 'proposed' projects[.]" *Id.*

5 **Q: Has the Commission previously ruled on recovering costs prior to receiving a**
6 **CPCN under I.C. § 8-1-8.4-7?**

7 A: Yes. In Cause No. 44367 FMCA-4, the Commission rejected DEI's request to
8 collect costs related to a vegetation management project to comply with federal
9 transmission requirements, as these costs were incurred before the utility sought a
10 CPCN. The Commission stated:

11 Allowing the recovery of costs incurred before the Commission has
12 authorized the utility to do so undoes the purpose of oversight. The
13 point of a CPCN proceeding is to determine whether the project and
14 its attendant costs are prudent *before* the utility passes such costs to
15 consumers...

16 Had the legislature intended utilities to be able to recover federally
17 mandated costs that were already spent, it would have said so. There
18 is no such language in Ind. Code ch. 8-1-8.4. Applying for a CPCN
19 and disclosing project specifics, including costs and alternatives,
20 before performing the project is part of the regulatory bargain
21 engraved in Ind. Code ch. 8-1-8.4 for an energy utility to receive
22 authorization to recover its prospective costs. The Commission and
23 interested stakeholders should have an opportunity to review the
24 project before the energy utility incurs costs that it desires to recover
25 through rates.⁶

26 **Q: Why is NIPSCO requesting alternative rate recovery under an ARP?**

27 A: In testimony, Ms. Becker expresses concerns over the interpretation of the Court's
28 decision:

⁶ *In re Duke Energy Indiana LLC*, Cause No. 44367 FMCA-4, Final Order at 29, 2019 WL 4600201 (Ind. Util. Regul. Comm'n Sep. 18, 2019), *aff'd on recon.*, 2019 WL 6683737 (Ind. Util. Regul. Comm'n Dec. 4, 2019).

1 While this proceeding involves a request for the recovery of
2 federally mandated compliance costs pursuant to Indiana
3 statute providing for such recovery, and is therefore different
4 in terms of the applicable law and the timely nature of
5 NIPSCO's request for cost recovery, given the potential
6 uncertainty related to the interpretation of this recent court
7 decision, NIPSCO has included this request for approval of
8 an alternative regulatory plan to confirm that its federally
9 mandated costs, which include costs that must be incurred
10 throughout most of 2022 related to compliance
11 requirements, are authorized to be recovered.

12 Becker Direct, pp. 21, ll. 10-18 - p. 22, line 1.

13 While Ms. Becker attempts to differentiate NIPSCO's situation from the Court's
14 decision, the Project's costs are being incurred under the same scenario as DEI's
15 past closure costs. In NIPSCO's most recent rate case, Cause No. 45159, NIPSCO
16 removed CCR closure costs from the decommissioning costs used to calculate net
17 salvage value for the purposes of determining depreciation rates.⁷ However, ash
18 pond closure costs were accounted for in depreciation rates proposed and approved
19 in rate cases Cause Nos. 43969 and 44688.⁸ NIPSCO could have requested
20 recovery of CCR closure costs by including them in its calculation of depreciation
21 rates, but NIPSCO chose to exclude these costs from its most recent depreciation
22 study. NIPSCO cannot change depreciation rates or expense between rate cases, so
23 seeking recovery of them now would constitute retroactive ratemaking.

⁷ Cause No. 45159, Testimony of Kelly R. Carmichael, p. 23, ll. 14-19.

⁸ Cause No. 43969, Direct Testimony of John J. Spanos, p. 11, ll. 10-16.

Cause No. 43526, Direct Testimony of Victor F. Ranaletta, Petitioner's Exhibits VFR-2, p. 3-4; VFR-3, pp. 3-4; and VFR-7, pp. 3-4.

Cause No. 44688, Direct Testimony of John J. Spanos, pp. 14-15.

Cause No. 44688, Direct Testimony of Victor F. Ranaletta, p. 11, ll. 6-9.

1 As the Court indicated in its decision, I.C. ch. 8-1-8.4 offered an alternative
2 route to recover these types of costs if they were found to be “federally mandated.”
3 But as both the Indiana Supreme Court⁹ and Commission¹⁰ noted, the statute
4 requires the Commission to approve the utility’s compliance plan *prior* to their
5 recovery. Since NIPSCO has not yet received approval for the Project under I.C. §
6 8-1-8.4-6, and most of the Project’s costs will be incurred before the Commission
7 can approve them, they are disqualified from recovery under I.C. § 8-1-8.4-7(c).
8 Therefore, the Company is seeking to recover these unqualified Project costs in the
9 same manner as recovery authorized under I.C. § 8-1-8.4-7(c), instead using an
10 alternative regulatory practice or mechanism under I.C. § 8-1-2.5-6.

11 **Q: Is NIPSCO an “energy utility”?**

12 A: Yes. Based on the information presented in this Cause and my reading of relevant
13 statutes and previous Commission decisions, I.C. § 8-1-2.5-2 defines “energy
14 utility,” in part, as a public utility within the meaning of I.C. § 8-1-2-1.

15 **Q: What powers does the Commission have in approving an ARP?**

16 A: According to I.C. § 8-1-2.5-6(a),

17 [I]n approving retail energy services or establishing just and
18 reasonable rates and charges, or both for an energy utility electing
19 to become subject to this section the commission may...

20 1. Adopt alternative regulatory practices, procedures, and
21 mechanisms, and establish rates and charges that:
22 (A) Are in the public interest as determined by consideration of the
23 factors described in section 5 of this chapter; and

⁹ “[T]he commission shall determine and by order fix just and reasonable rates ... to be imposed, observed, and followed in the future[.]” *OUC v DEI*, 183 N.E.3d at 268 (citing I.C. § 8-1-2-68); noting that the Federal Mandate statute “is framed in the future tense and speaks of ‘projected’ costs for ‘proposed’ projects, see *id.* §§ 8-1-8.4-6(a), 6(b), 6(b)(1), 7(b)(1), 7(b)(2), which would seem to require commission approval before a utility incurs the cost.” *Id.* at 270.

¹⁰ See, *FMCA 4*.

1 (B) Enhance or maintain the value of the energy utility's retail energy
2 services or property; including practices, procedures, and
3 mechanisms focusing on the price, quality, reliability, and efficiency
4 of the service provided by the energy utility.

5 **Q: What factors must the Commission consider in determining whether a utility's**
6 **ARP is in the public interest?**

7 A: In determining whether the public interest will be served, the Commission must
8 consider:

- 9 1. Whether technological or operating conditions, competitive
10 forces, or the extent of regulation by other state or federal
11 regulatory bodies render the exercise, in whole or in part, of
12 jurisdiction unnecessary or wasteful.
- 13 2. Whether the Commission's declining to exercise, in whole, or in
14 part, its jurisdiction will be beneficial for the energy utility, the
15 energy utility's customers, or the state.
- 16 3. Whether the Commission's declining to exercise, in whole or in
17 part, its jurisdiction will promote energy utility efficiency.
- 18 4. Whether the exercise of commission jurisdiction inhibits an
19 energy utility from competing with other providers of
20 functionally similar energy services or equipment.¹¹

21 **Q: Does NIPSCO's request meet the above factors showing an ARP to be in the**
22 **public interest?**

23 A: No. Although I am not an attorney, the plain language of the ARP statute involves
24 the Commission declining to exercise its jurisdiction over a utility because it will
25 be selling wholesale power, offering a voluntary retail service or program, or
26 offering a retail service that is ill-suited for traditional regulation. It is not intended
27 to be used by utilities to obtain special ratemaking treatment afforded in other
28 statutes while circumventing their requirements or caselaw prohibiting retroactive
29 ratemaking.

¹¹ I.C. § 8-1-2.5-5(b).

1 The above factors contemplate situations where a utility's power in setting
2 rates for services will be checked either through regulation by another entity (such
3 as FERC) or subject to competition through market forces (such as the wholesale
4 market). In NIPSCO's case, customers cannot opt out of paying for the Project—
5 it will be a charge on their monthly bills through the Federally-Mandated Cost
6 Adjustment ("FMCA"). NIPSCO is not competing against another utility or
7 business in this situation. Therefore, the Commission exercising its jurisdiction
8 over the Project's approval, costs, and associated rate recovery is necessary and
9 will promote utility efficiency.

10 While the second factor requires the Commission to consider if the plan is
11 beneficial for the utility, it also requires consideration of the benefits for the energy
12 utility's customers. Ms. Becker states recovery of the federally mandated costs as
13 NIPSCO has proposed is in the public interest and maintains the value of NIPSCO's
14 utility service,¹² but NIPSCO's request will benefit the Company more than its
15 customers because the Company will be allowed to retroactively recover increased
16 expenses tied to one specific cost while ignoring possible decreases in other types
17 of costs currently embedded in rates.

18 **Q: Has NIPSCO recovered costs associated with the Project's activities in the**
19 **past?**

20 **A:** Yes. NIPSCO Witness Gunnar J. Gode indicates the associated retirement costs of
21 the ash ponds due to the CCR Rule have not previously been included in NIPSCO's
22 depreciation rates, nor has NIPSCO collected or recovered any amounts associated

¹² Becker Direct, p. 22, ll. 1-5.

1 with the CCR Rule-related closures through base rates or otherwise.¹³ This is not
2 completely accurate. While the costs were not specifically tied to the CCR Rule or
3 the Project, NIPSCO included costs to close ash ponds in previous
4 decommissioning cost studies, including:

- 5 • Cause No. 43969: NIPSCO depreciation witness John J. Spanos based the final
6 net salvage value of steam production units on decommissioning cost studies
7 offered in Cause No. 43526.¹⁴ The costs to restore the Schahfer, Bailly, and
8 Michigan City Generating sites to industrial conditions included costs to drain,
9 grade, and cap on-site ash settling ponds.¹⁵ The final cover system described in
10 these studies is identical to the final cover system required under “the closure
11 in place” (“CIP”) option under the CCR Rule. Environmental remediation costs
12 (which included asbestos, lead paint, arsenic, and mercury removal alongside
13 closing ash ponds and coal yards¹⁶) were \$56,686,616 for Schahfer,
14 \$18,130,257 for Bailly, and \$14,667,806 for Michigan City.¹⁷ The Commission
15 approved a Settlement Agreement between NIPSCO, the OUCC, and several
16 Intervenors, where the parties agreed to Mr. Spanos’ recommended
17 depreciation accrual rates with a pro-forma depreciation expense reduction of
18 \$4.9 million.¹⁸
- 19 • Cause No. 44688: NIPSCO’s depreciation witness John J. Spanos based the
20 final net salvage value of steam production units on decommissioning cost
21 studies offered by witness Victor F. Ranaletta.¹⁹ The costs to restore the
22 Schahfer, Bailly, and Michigan City Generating sites to industrial conditions
23 included costs to drain, grade, and cap on-site ash settling ponds.²⁰ The final
24 cover system described in these studies are identical to the final cover system
25 required under “the closure in place” (“CIP”) option under the CCR Rule.
26 Environmental remediation costs (which included asbestos, lead paint, arsenic,
27 and mercury removal alongside closing ash ponds and coal yards²¹) were
28 \$87,511,804 for Schahfer, \$35,155,557 for Bailly, and \$26,008,438 for
29 Michigan City.²² The Commission approved a Settlement Agreement between

¹³ Direct Testimony of Gunnar J. Gode, p.10, lines 15-16, through p. 11, ll. 1-4.

¹⁴ Cause No. 43969, Direct Testimony of John J. Spanos, p. 11, ll. 10-16.

¹⁵ Cause No. 43526, Direct Testimony of Victor F. Ranaletta, Petitioner’s Exhibits VFR-2, pp. 3-4; VFR-3, pp. 3-4; and VFR-7, pp. 3-4.

¹⁶ Cause No. 43526, Ranaletta Direct, p. 7, ll. 8-10.

¹⁷ Cause No. 43526, Petitioner’s Exhibits VFR-2, Table A.1., VFR-3, Table A.1., and VFR-7, Table A.1.

¹⁸ Cause No. 43969, Final Order (Approved December 11, 2011), Settlement Agreement, pp. 5-6.

¹⁹ Cause No. 44688, Direct Testimony of John J. Spanos, pp. 14-15.

²⁰ Cause No. 44688, Direct Testimony of Victor F. Ranaletta, Attachment 9-A, p. 14, Attachment 9-B, pp. 12-13, and Attachment 9-C, pp. 13-14.

²¹ *Id.*, p. 11, ll. 6-9.

²² *Id.*, Attachment 9-A, p. 18; Attachment 9-B, p.16; and Attachment 9-C, p. 17.

1 NIPSCO, the OUCC, and several Intervenors, where the parties agreed to Mr.
2 Spanos' recommended depreciation accrual rates with a pro-forma depreciation
3 expense reduction of \$17.3 million.²³

4 The question of whether NIPSCO has not recovered costs related to the Project
5 cannot be limited to the narrow scope of its previous rate case, Cause No. 45159.
6 Nor can it be limited to whether the Project was specifically named and included in
7 previous rates. There was always an expectation that NIPSCO's ash ponds would
8 have to close, and the costs for plant retirement or asset closure activities have
9 traditionally been accounted for in depreciation. The actual costs to close the ponds
10 may increase as time progresses and regulations change, but the Company has the
11 opportunity to adjust them with every rate case. Additionally, the Commission may
12 take the utility's future remediation obligations into account when determining the
13 utility's risk and deciding the utility's appropriate authorized return on equity
14 ("ROE"). This risk could also influence the Commission's decision to accept a
15 settlement agreement between the parties. It becomes complicated to cleanly
16 separate these costs into a tracked federally mandated compliance project because
17 it is difficult to know how demolition costs factored into previous Commission base
18 rate case decisions for determining the utility's overall revenue requirement.

19 **Q: What does the OUCC recommend regarding NIPSCO's request for an ARP**
20 **to recover the Project's costs in the same manner as federally-mandated costs**
21 **under I.C. ch. 8-1-8.4?**

22 A: The OUCC recommends the Commission deny NIPSCO's request for an ARP for
23 the Project and its associated cost recovery. The ARP statute does not and should
24 not apply to CCR closure costs. The OUCC further recommends the Commission

²³ Cause No. 44688, Final Order (approved July 18, 2016), Settlement Agreement, pp. 9-10.

1 deny Project costs incurred prior to a final Commission order approving a CPCN
2 for the Project, as NIPSCO's request does not meet the requirements of pre-
3 approval pursuant to I.C. § 8-1-8.4-6(a) and would allow NIPSCO to retroactively
4 recover costs outside the confines of a base rate case that should have been
5 accounted for in accumulated depreciation.

III. ADDITIONAL RATE RECOVERY ISSUES

6 **Q: If the Commission decides to award NIPSCO its requested ratemaking**
7 **treatment, does the OUCC have any additional concerns regarding NIPSCO's**
8 **proposed ratemaking treatment?**

9 A: Yes. Although Mr. Lantrip and I have explained why NIPSCO's requested recovery
10 of Project costs incurred prior to Commission approval should be denied, the
11 OUCC has additional concerns with NIPSCO's proposed cost recovery for the
12 Project. As Mr. Lantrip explains in his testimony, these concerns are:

- 13 1. Although NIPSCO removed pond closure costs from its depreciation
14 study in Cause No. 45159, NIPSCO has already recovered costs toward
15 closing the ponds in past rates. NIPSCO's request makes no attempt to
16 account or credit customers for the costs it has already recovered for
17 CCR closure.
- 18 2. NIPSCO's Project cost estimate includes expenses associated with
19 labor, benefits, and other costs that are already being recovered in base
20 rates.
- 21 3. NIPSCO should not be allowed to earn a return "on" CCR closure costs,
22 as they are not capital expenditures.

1 As Mr. Wright discusses, the Project is necessary to comply with federal mandates.
2 However, CCR closure costs are different from other federally mandated projects
3 awarded CPCNs under I.C. § 8-1-8.4-7. The types of projects approved under the
4 Federal Mandate statute include an addition or an integrity, enhancement, or
5 replacement project to a utility's facilities. Often, there is a new piece of pollution
6 control equipment, such as a new wastewater treatment plant or an upgrade to
7 existing pollution controls. These projects usually allow the facility to continue
8 operating without having to shut down due to not meeting compliance obligations.
9 In contrast, ash pond closures involve an asset being removed from service, and
10 there is no new piece of equipment or value being added to the facility to serve
11 ratepayers into the future. As discussed above, since asset removal and
12 decommissioning costs have traditionally been accounted for in depreciation rates,
13 there is a risk for double recovery if a closure project is tracked separately through
14 a federally mandated cost adjustment mechanism.

15 Even if these concerns regarding double recovery of decommissioning costs
16 were addressed by reducing the Project's costs by the amount NIPSCO has
17 previously recovered for decommissioning ash ponds, allowing NIPSCO to recover
18 closure costs as capital investments and earn a profit on them is still problematic.

19 **Q: Why is it problematic to allow NIPSCO to recover the Project as a capital**
20 **investment?**

21 A: Mr. Lantrip's testimony discusses how these projects would not qualify as capital
22 investments under traditional ratemaking. However, allowing utilities to recover
23 waste remediation or costs of removal as a capital investment creates a perverse
24 incentive to not address waste concerns earlier or to pursue other cost reduction

1 options. The utility would be incentivized to remove or decrease its estimated
2 decommissioning costs included in depreciation studies, as it will earn a return on
3 these costs if they are tracked as capital expenses through a federally-mandated cost
4 adjustment. The utility would also be discouraged from aggressively pursuing
5 reimbursement from insurance policies, as this would reduce the amount the utility
6 would be entitled to earn a “return on” through the tracker. Finally, it creates
7 intergenerational equity issues, as current customers are paying a greater portion of
8 CCR closure costs without receiving the benefits from CCR disposal facilities.

9 The OUCC acknowledges that the CCR Rule and NIPSCO's Agreed Orders
10 with IDEM are causing the Company to incur ash pond closure costs much sooner
11 and at a greater cost than originally anticipated in previous depreciation studies.
12 However, it must be noted that NIPSCO has been aware of its need to do CCR
13 remediation since entering into an Agreed Order with IDEM in October 2013.²⁴
14 NIPSCO could have also included the estimated costs of closure in depreciation in
15 Cause No. 45159, but it chose not to include these costs and recover them through
16 traditional ratemaking means. By the time the Commission issues an order in this
17 Cause, three years will have passed since the Commission issued its final order in
18 Cause No. 45159. There have been many opportunities for NIPSCO to recover
19 these costs through traditional ratemaking means, which would not have involved
20 the Company earning a return “on” closure costs.

²⁴ Petitioner's Attachment 2-A. The Agreed Order was amended in September 2015.

1 Given the challenges customers currently face regarding the affordability of
2 basic needs such as food, fuel, housing, and utilities due to recent high inflation,
3 CCR closure costs should be recovered in a manner resulting in the least impact to
4 customers' bills. Adopting Mr. Lantrip's alternative recovery recommendations
5 accomplishes this objective while providing NIPSCO the necessary funds to close
6 the ash ponds appropriately.

7 **Q: Are there other utilities that do not recover CCR closure costs through the**
8 **Federally Mandated Statute?**

9 A: Yes. Indiana Michigan Power Company ("I&M") and Indianapolis Power & Light
10 d/b/a AES Indiana ("AES Indiana") currently recover CCR closure costs through
11 base rates. I&M has recorded asset retirement obligations ("AROs") for Rockport's
12 ash ponds and recovers accretion expense on ash pond AROs through O&M.²⁵ AES
13 Indiana²⁶ included the costs of ash pond closures in the decommissioning studies
14 in its previous rate case, Cause No. 45029,²⁷ which was incorporated into
15 depreciation.²⁸

16 **Q: Are you aware of other utilities the Commission has permitted recovery for**
17 **ash pond closure costs as capital costs under I.C. ch. 8-1-8.4?**

18 A: Yes. The Commission approved CenterPoint Energy Indiana South's ("CEIS") and
19 DEI's plans to recover CCR closure costs approved under I.C. ch. 8-1-8.4 as capital
20 costs.

²⁵ Cause No. 45576, Direct Testimony of I&M Witness Jennifer C. Duncan, Attachment JCD-1, p. 11. I&M Witness Ross also sponsors RB-2, which removes non-cash assets and related accumulated depreciation for AROs.

²⁶ Indianapolis Power and Light Company ("IPL") has recently changed its name to AES Indiana.

²⁷ Cause No. 45029, Direct testimony of IPL Witness Paula M. Guletsky, pp. 5-6, 10-11, and PMG Attachment 1.

²⁸ Cause No. 45029, Direct testimony of John J. Spanos, pp. 11-12. With the exception of Eagle Valley CCGT depreciation expense, IPL and interested parties settled to accept IPL's originally-proposed depreciation rates. (Cause No. 45029, Settlement Agreement, p. 3).

- 1 • In Cause No. 45052, the Commission approved \$19.969 million to
2 cover CEIS's²⁹ costs to close the Culley East Ash Pond. Vectren
3 proposed closing the Culley East Ash Pond ("EAP") to construct a new
4 lined process and storm retention pond. CEIS indicated it would be
5 closing the Culley EAP by removal so it could have the space to build a
6 Zero Liquid Discharge ("ZLD") system and continue operating Culley
7 Unit 3. The Commission's approval of this project noted there were no
8 alternatives to the Culley projects closing the ash pond, and that the ash
9 pond closure will extend the useful life of Culley Unit 3.³⁰
- 10 • In Cause No. 45280, the Commission approved a CPCN under I.C. §
11 ch. 8-1-8.4 for the Brown Ash Pond Compliance Project in the amount
12 of \$156,200,000 as part of a settlement among CEIS, the OUCC, and
13 the Citizens Action Coalition ("CAC").³¹ As part of the Brown Ash
14 Pond Compliance Project, CEIS is constructing an above-ground
15 conveyor system to move the ponded ash to the existing tube conveyor
16 for handling dry fly ash. CEIS also modified its current barge loading
17 system to allow handling of the ponded ash. CEIS will ship the ash
18 downstream for beneficial reuse. Any ponded ash that does not meet the
19 ash reuser's specifications will either be placed in the landfill or moved
20 to another part of the Brown Ash Pond and closed in place.³² As part of
21 the Settlement Agreement, CEIS will offset the Brown Ash Pond
22 Compliance Project costs with cash proceeds from the ash reuser and
23 total insurance proceeds CEIS will receive from insurance settlements.
24 The total amount of these offsets will be at least \$25 million.³³
- 25
- 26 • In Cause No. 45253 S1, the Commission approved a CPCN under I.C.
27 ch. 8-1-8.4, authorizing recovery of \$302 million in DEI's CCR closure
28 expenses and \$35 million in related coal ash management costs.³⁴ The
29 OUCC appealed this decision, and the case is pending before the Indiana
30 Court of Appeals.
- 31

32 **Q: Are the circumstances surrounding CEIS's ash pond closure project in Cause**
33 **No. 45052 different from NIPSCO's request for the Project in this cause?**

²⁹ Vectren South Electric ("VSE") originally applied for and received approval of the CPCN in Cause No. 45052. VSE has since been acquired by CenterPoint Energy and re-named to CenterPoint Energy South ("CEIS").

³⁰ *In re S. Ind. Gas & Elec. Co.*, Cause No. 45052, Order at 28-32 (Ind. Util. Regulatory Comm'n Jan. 22, 2019).

³¹ *In re S. Ind. Gas & Elec. Co.*, Cause No. 45280, Order at 15-21. (Ind. Util. Regulatory Comm'n May 13, 2020).

³² *Id.* at 4-7.

³³ *Id.*, Settlement Agreement at 3.

³⁴ *In re Duke Energy Indiana, LLC*, Cause No. 45253 S1, Order at 6 and 16-21.

1 A: Yes. CEIS's situation is different because it did not have enough space at the facility
2 to comply with the CCR and Steam Electric Generation Effluent Limitation
3 Guidelines (ELGs) requirements without closing the ash pond, which would have
4 prevented Culley Unit 3 from continuing to operate. Closure was necessary to
5 construct the ZLD system and resulted in an additional project that extended the
6 life of the Culley Generating site, allowing the plant to remain "used and useful."
7 In this case, the Project is not related to another addition at the Michigan City
8 Generating site and will not extend the useful life of Michigan City Unit 12.

9 **Q: Are the circumstances surrounding CEIS's Brown Ash Pond Compliance**
10 **project in Cause No. 45280 different from NIPSCO's request for the Project**
11 **in this cause?**

12 A: Yes. First, the OUCC settled with the Company in that case, and Settlement
13 Agreements are non-precedential. Second, the Brown Ash Pond Compliance
14 project requires CEIS to erect *new* equipment to close the pond by removing and
15 processing the ash for beneficial reuse. Ratepayers will receive the proceeds from
16 the payments CEIS receives for the ash's beneficial reuse. Thus, in the OUCC's
17 view, CEIS's plan required utility investment in a new capital project that would
18 benefit ratepayers and mitigate compliance costs. Third, CEIS actively pursued
19 insurance claims and received significant reimbursement for these claims. CEIS
20 committed to apply all insurance reimbursements to offset closure costs.

21 **Q: What about differences between the Project and DEI's closure costs approved**
22 **in Cause No. 45253 S1?**

23 A: While there may be factual differences between the two cases, the OUCC's appeal
24 of the DEI case will argue as it did before the Commission that DEI needed to have

1 received prior approval for recovery of the costs. Therefore, the OUCC's position
2 will be congruent with that taken in this case.

3 **Q: Do you have any additional concerns regarding the Project?**

4 A: Yes. NIPSCO has not sought reimbursement through insurance policies for closure
5 costs related to the CCR rule or the Resource Conservation and Recovery Act
6 ("RCRA"). NIPSCO indicates these costs are not reimbursable under its current
7 insurance policies.³⁵ However, due to the issues I noted previously regarding the
8 recovery of CCR closures as capital projects, I am concerned the Company is
9 unmotivated to pursue insurance claims as a cost reduction strategy. Even if it may
10 appear that a policy does not cover CCR closure costs, it is worth filing a claim to
11 receive confirmation the insurance company will not cover them. Additionally, the
12 CCR wastes have been generated and disposed of for decades in the ponds, and the
13 Company may hold legacy policies that would apply to waste disposed of during
14 past time periods.

15 I recommend NIPSCO be required to comprehensively re-evaluate all
16 current and past insurance policies, file claims under each policy for CCR closure
17 costs, and offset Project costs by any insurance proceeds NIPSCO receives. Should
18 the Commission allow Project costs to be tracked through the FMCA, NIPSCO
19 should provide regular updates of its progress on insurance reimbursement in
20 FMCA filings.

IV. RECOMMENDATIONS

21 **Q: Please summarize your recommendations:**

³⁵ OUCC Attachment CMA-1, NIPSCO's responses to OUCC Data Requests 1-4 and 1-5.

1 A: My recommendations are that:

2 1. The Commission deny NIPSCO's request for an ARP for Project costs incurred
3 prior to the Commission's issuance of a final decision awarding a CPCN under
4 I.C. § 8-1-8.4-7.

5 2. If the Commission approves NIPSCO's request for a CPCN for the Project and
6 allows recovery of Project costs incurred prior to Commission approval, then it
7 accept Mr. Lantrip's proposed accounting and ratemaking recommendations
8 including: a) classification of these costs as expenses on which the Company
9 may earn a return "of" but not a return "on;" b) denial of the Project's indirect
10 costs or any other costs currently embedded in rates; and c) reducing Project
11 costs to account for previous ash pond closure costs recovered in rates.

12 3. NIPSCO be required to comprehensively re-evaluate all current and past
13 insurance policies, file claims under each policy for CCR closure costs, and
14 offset Project costs by any insurance proceeds NIPSCO receives.

15 **Q: Does this conclude your testimony?**

16 A: Yes.

APPENDIX A

1 **Q: Summarize your professional background and experience.**

2 A: I graduated from the University of Evansville in 2004 with a Bachelor of Science
3 degree in Environmental Administration. I graduated from Indiana University,
4 Bloomington in May 2007 with a Master of Public Affairs degree and a Master of
5 Science degree in Environmental Science. I have also completed internships with
6 the Environmental Affairs Department at Vectren in the spring of 2004, with the
7 U.S. Environmental Protection Agency in the summer of 2005, and with the U.S.
8 Department of the Interior in the summer of 2006. During my final year at Indiana
9 University, I served as a research and teaching assistant for a Capstone course
10 offered at the School of Public and Environmental Affairs. I also have obtained my
11 OSHA Hazardous Operations and Emergency Response ("HAZWOPER")
12 Certification. I have been employed by the OUCC since May 2007, and I was
13 promoted to my current position of Chief Technical Advisor in June 2022. As part
14 of my continuing education at the OUCC, I attended both weeks of the National
15 Association of Regulatory Utility Commissioners' ("NARUC") seminar in East
16 Lansing, Michigan, completed 8-hour OSHA HAZWOPER refresher courses, and
17 attended the Indiana Chamber of Commerce's Environmental Permitting
18 Conference and annual Environmental Conferences.

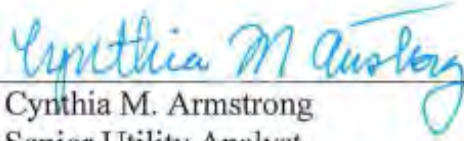
19 **Q: Describe some of your duties at the OUCC.**

20 A: I review and analyze utilities' requests and file recommendations on behalf of
21 consumers in utility proceedings. Depending on the case at hand, my duties may
22 also include analyzing state and federal regulations, evaluating rate design and

1 tariffs, examining books and records, inspecting facilities, and preparing various
2 studies. Since my expertise lies in environmental science and policy, I assist in
3 many cases where environmental compliance is an issue.

AFFIRMATION

I affirm, under the penalties for perjury, that the foregoing representations are true.



Cynthia M. Armstrong
Senior Utility Analyst
Indiana Office of Utility Consumer Counselor

Cause No. 45700
NIPSCO, LLC

Date: September 7, 2022

Cause No. 45700
Northern Indiana Public Service Company LLC's
Objections and Responses to
Indiana Office of Utility Consumer Counselor's First Set of Data Requests

<u>OUCC Request 1-004:</u>
Has NIPSCO sought or is NIPSCO seeking insurance or reinsurance proceeds related to CCR and SWMU unit closures and remediation? Please provide the amount of any proceeds received to date.
<u>Objections:</u>
<u>Response:</u>
No.

Cause No. 45700
Northern Indiana Public Service Company LLC's
Objections and Responses to
Indiana Office of Utility Consumer Counselor's First Set of Data Requests

<u>OUCC Request 1-005:</u>
If NIPSCO has not sought reimbursement through any of its insurance policies, please explain why not.
<u>Objections:</u>
<u>Response:</u>
NIPSCO has not sought reimbursement through its insurance policies because these costs are not reimbursable under its current insurance policies.

CERTIFICATE OF SERVICE

This is to certify that a copy of *OUCC Public's Exhibit No. 1 Testimony of OUCC Witness Cynthia M. Armstrong* has been served upon the following parties of record in the captioned proceeding by electronic serve on September 7, 2022.

Petitioner-NIPSCO

Robert Heidorn

Bryan Likins

Debi McCall

NIPSCO, LLC

rheidorn@nisource.com

blikins@nisource.com

demccall@nisource.com

Intervenor-CAC

Jennifer A. Washburn

CITIZENS ACTION COALITION

jwashburn@citact.org

Copy to:

Reagan Kurtz

rkurtz@citact.org

Intervenor-IG


Todd A. Richardson

Joseph P. Rompala

LEWIS-KAPPES, P.C.

trichardson@lewis-kappes.com

jrompla@lewis-kappes.com



Lorraine Hitz

Deputy Consumer Counselor

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR

PNC Center

115 West Washington Street, Suite 1500 South

Indianapolis, Indiana 46204

317-232-2494 Main Office

317-232-2775 Lorraine's Direct Line

317-232-5923 Facsimile

infomgt@oucc.in.gov