204 N.E.3d 947
Court of Appeals of Indiana.

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR, et al., Appellants-Respondents,
v.
DUKE ENERGY INDIANA, LLC, and Indiana Utility Regulatory Commission, Appellees-Petitioners.

Court of Appeals Case No. 21A-EX-2702
|
Filed February 21, 2023
|
Rehearing Denied April 27, 2023

Synopsis

Background: Indiana Office of Utility Consumer Counselor and others filed appeal of order issued by Indiana Utility Regulatory Commission, which concluded that energy company's coal ash-related compliance costs were recoverable through rates via the federal mandate statute.

[Holding:] The Court of Appeals, Riley, J., held that under federal mandate statute, energy company was not permitted to recover federally mandated coal ash costs incurred prior to date of Commission's order.

Reversed.

Procedural Posture(s): Review of Administrative Decision.

West Headnotes (15)

[1] **Administrative Law and Procedure**⇨Standard of review in general

Under prevailing law, the Court of Appeals applies three levels of review to an administrative ruling: first, it upholds findings of fact supported by substantial evidence, which the court does not reweigh; second, it reviews the conclusions of ultimate facts, or mixed questions of fact and law, for their reasonableness, with greater deference to matters within the agency's expertise and jurisdiction; and third, it determines whether the agency's decision is contrary to law.

[2] **Administrative Law and Procedure**⇨Review for arbitrary, capricious, unreasonable, or illegal actions in general

Determination of whether an agency's decision is contrary to law evaluates whether the agency stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision, ruling, or order.

[3] **Public Utilities**⇨Review and determination in general

An order of the Utility Regulatory Commission should be set aside if it is found to be contrary to law.

[4] **Public Utilities** ⇒Review and determination in general

When it comes to technical expertise, the Utility Regulatory Commission is entitled to great deference, and Court of Appeals will not substitute its judgment for its; so long as experts act within limits of discretion given them by statute, their decision is final.

[5] **Constitutional Law** ⇒Public utilities
Public Utilities ⇒Review and determination in general

When it comes to whether the Utility Regulatory Commission acted within its legal guardrails, e.g., whether it acted within statutory limits, Court of Appeals is presented with a matter into which it may always properly inquire; such inquiry is not only within the Court's prerogative and competence, it is the Court's constitutional duty.

[6] **Public Utilities** ⇒Nature and extent in general

Rate making is prospective in nature, not retroactive, with demarcation between retroactive and prospective costs being the date of the Utility Regulatory Commission's order, not the filing date of the utility's petition.

[7] **Public Utilities** ⇒Operating expenses
Public Utilities ⇒Rate of return

Past losses of a utility cannot be recovered from consumers nor can consumers claim return of profits and earnings which may appear excessive.

[8] **Public Utilities** ⇒Rate of return

In determining rate making, chances of loss or profit from operations is one of risks a business enterprise must take; the company must bear loss and is entitled to gain depending upon the efficiency of its management and economic uncertainties of the future after the rate is fixed.

[9] **Public Utilities** ⇒Operating expenses

Under traditional rate regulation, a

utility must first make improvements to its infrastructure before it can recover their cost through regulator-approved rate increases; the process for recouping these costs, sometimes not until years after they were incurred, is an expensive, onerous rate making case, which involves a comprehensive review of the utility's entire business operations.

[10] Public Utilities⚖Operating expenses

Under the federal mandate statute, which governs a utility's ability to track and recover 80% of certain federally mandated costs via periodic rate adjustments, utilities must identify the desired project, submit it to the Utility Regulatory Commission for review, and then proceed with the project if and when the Commission issues the certificate. Ind. Code Ann. § 8-1-8.4-1 et seq.

[11] Public Utilities⚖Operating expenses

The Federal Mandate Statute, which governs a utility's ability to track and recover 80% of certain federally mandated costs via periodic rate adjustments, encourages and facilitates utility compliance with federal environmental and other mandate, benefiting utilities, ratepayers, and the public at large, under approval procedures that evaluate the compliance program, enhance cost predictability, and protect the interests of all involved. Ind. Code Ann. § 8-1-8.4-1 et seq.

[12] Public Utilities⚖Certificates, permits, and franchises
Public Utilities⚖Operating expenses

The clear purpose of a certificate of public convenience and necessity (CPCN), which a utility must obtain from Utility Regulatory Commission before seeking to recover projected costs of complying with a federal mandate through rates as contemplated in federal mandate statute, is to determine whether the proposed compliance project and its attendant costs are prudent before the utility passes such costs to ratepayers. Ind. Code Ann. § 8-1-8.4-1 et seq.

[13] Public Utilities⚖Operating expenses

Under the federal mandate statute, which governs a utility's ability to track and recover 80% of certain federally mandated costs via periodic rate adjustments, only projected costs of a proposed compliance project are subject to the Utility Regulatory Commission's approval and are recoverable. Ind. Code Ann. § 8-1-8.4-1 et seq.

[14] **Electricity** ⇒Operating expenses

Under the federal mandate statute, energy company was not permitted to recover, through rate adjustment, coal ash-related federal compliance costs incurred prior to the date of the Utility Regulatory Commission's order granting company's certificate of public convenience and necessity (CPCN) and finding that company's proposed federally mandated coal ash costs were appropriate to recover through rates via the federal mandate statute. Ind. Code Ann. § 8-1-8.4-1 et seq.

[15] **Public Utilities** ⇒Operating expenses

Tracker statutes, such as the federal mandate statute, which governs a utility's ability to track and recover 80% of certain federally mandated costs via periodic rate adjustments, are statutory exceptions to the general rule prohibiting retroactive rate making and are effective only to the extent that there is pre-authorization or pre-approval of the projected costs via a certificate of public convenience and necessity (CPCN) approved by the Utility Regulatory Commission. Ind. Code Ann. § 8-1-8.4-1 et seq.

***949** Appeal from the Indiana Utility Regulatory Commission, The Honorable James F. Huston, Chairman, Trial Court Cause No. 45253-S1

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Riley, Judge.

STATEMENT OF THE CASE

[1] Appellants-Statutory Representatives ***950** and Intervenors,[1] Indiana Office of Utility Consumer Counselor (IOUCC) and Duke Industrial Group (Duke Industrial) (collectively, Appellants), appeal the Order issued by the Indiana Utility Regulatory Commission (Commission), which concluded that Appellee's-Petitioner's, Duke Energy Indiana, LLC (Duke), coal ash-related compliance costs were recoverable under the Federal Mandate Statute.[2]

[2] We reverse.

ISSUE

[3] Appellants present this court with one issue on appeal, which we restate as: Whether the Commission's Order violated the prohibition against retroactive ratemaking in so far as the Order allowed Duke to recover costs that were incurred before or during the pendency of the proceeding, prior to the issuance of the Order.

FACTS AND PROCEDURAL HISTORY

[4] Duke is an Indiana limited liability corporation, engaged in the business of generating and supplying electric utility service to approximately 840,000 customers located in sixty-nine counties in Indiana. Duke provides electricity through generating plants and other transmission and distribution facilities it owns. In its production of electricity, Duke uses coal, which causes a toxic byproduct known as coal ash. Historically, Duke disposed of its coal ash in ash ponds or other ash-management areas on its production sites. In 2015, the federal Environmental Protection Agency promulgated new rules for treating coal ash and remediating ash ponds. Immediately after this promulgation, Duke began remediating its sites in an attempt to bring them in compliance with state and federal requirements.

[5] On July 2, 2019, Duke filed a petition with the Commission, requesting a rate increase for retail customers in Cause No. 45253. This request for a rate increase was Duke's first since 2004 and sought to recover about $212 million for coal ash site closures, remediation, and financing costs it had incurred from 2010 through 2018 and expected to incur from 2019 forward, with the bulk of these coal ash costs incurred between 2015 and 2018. Duke proposed amortizing these costs over eighteen years. Appellants intervened in the proceeding on behalf of ratepayers.

[6] On December 5, 2019, the Commission created a subdocket proceeding—Cause No. 45253 S1—representing the instant Cause, for consideration of Duke's "future Coal Combustion Residuals closure costs." (Appellants' App. Vol. II, p. 9). Accordingly, Cause 45253 represented Duke's traditional base rate case which included Duke's costs incurred through December 2018; whereas Cause 45253 S1 requested relief based on the Federal Mandate Statute for Duke's costs incurred in 2019 through 2028. As part of Cause 45253 S1, Duke specifically requested a certificate of public convenience and necessity (CPCN) pursuant to Indiana Code section 8-1-8.4-7(b) for its estimated federally mandated coal ash costs and closure plans incurred in 2019, as well as its ongoing post-closure maintenance costs through 2028.

[7] Duke and IOUCC pre-filed their respective testimony, and the Commission conducted an evidentiary hearing on September *951 14, 2020. At IOUCC's request, the parties jointly agreed to multiple extensions of time to file proposed orders to allow for the resolution of Appellants' separate appeal in Duke's traditional base rate case. On August 23, 2021, IOUCC filed its proposed order with the Commission, focusing on the perceived prospective nature of the Federal Mandate Statute and contending that the Commission could not award Duke any costs that were incurred prior to the Commission's approval. On November 3, 2021, the Commission issued its Order in the current cause, finding that Duke's proposed federally mandated coal ash costs were appropriate to recover through rates via the Federal Mandate Statute. Specifically, the Commission concluded that Duke's "proposed closure, post-closure and coal ash related compliance projects detailed in the testimony in this proceeding constitute a

'federally mandated compliance project' as defined by "Indiana Code [section] 8-1-8.4-2." (Appellants App. Vol. II, p. 28). The Commission granted Duke its requested CPCN pursuant to Indiana Code sections 8-1-8.4-6 and -7.

[8] Appellants timely appealed. At IOUCC's request, the appeal was held in abeyance pending the Indiana Supreme Court's decision in the traditional rate case, *Ind. Off. Of Util. Consumer Couns. v. Duke Energy Ind. LLC.*, 183 N.E.3d 266 (Ind. 2022) (*DEI*). On March 10, 2022, the supreme court issued its opinion in *DEI*, concluding that the Commission's decision to allow rate recovery for costs incurred in the past was a violation of the ban against retroactive ratemaking pursuant to Indiana Code section 8-1-2-68. In reaching that decision, the supreme court touched on the Federal Mandate Statute, noting the prospective nature of its language:

> We note that the parties raise various arguments pertaining to pre-authorization. It is true that some statutes expressly permit a utility to recoup certain expenses after incurring them—when there is pre-authorization to track the expenses for future rate cases. For instance, had Duke properly sought recourse under Indiana's federal mandate statute, I.C. Ch. 8-1-8.4, the result may have been different, at least for the costs Duke incurred to comply with the EPA's 2015 rulemaking. This statute permits utilities to recover costs incurred due to changes in federal regulations. Although we have not yet interpreted the statute, we note it 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. Where another statute authorizes the [C]ommission's action, and specifically contemplates prior approval of certain types of expenses, the general statutory prohibition against retroactive ratemaking may not apply. Here, however, Duke did not seek prior approval of its coal-ash costs. Thus, what governs here is not the federal mandate statute but the prohibition against retroactive ratemaking.

Id. at 270 (emphasis in original). The supreme court remanded the case to the Commission, and on remand the Commission established a schedule to recalculate Duke's rates to remove any coal ash costs incurred before June 29, 2020, the date of the Commission's final order, and to order Duke to refund the difference back to its customers.

[9] The stay of the current subdocket Cause 45253 S1 to recover coal ash costs pursuant to the Federal Mandate Statute was lifted after certification of *DEI*. Additional facts will be provided if necessary.

*952 DISCUSSION AND DECISION

[10] Focusing on the supreme court's decision in *DEI* and its dicta with regard to the Federal Mandate Statute, Appellants contend that the Commission's decision to allow Duke to recover certain federally mandated costs—specifically, costs incurred in 2019 and through the date of the Commission's Order on November 3, 2021—was a violation of the Federal Mandate Statute and constituted impermissible retroactive ratemaking. Appellants maintain that the Federal Mandate Statute under which Duke sought recovery is phrased in prospective language, such that it anticipates approval of a project before a utility can recover costs and therefore, the Commission's interpretation of the statute to allow recovery for past costs prior to the project's approval is a violation of the rules of statutory construction.

I. *Standard of Review*

[1] [2][11] Under prevailing law, we apply three levels of review to an administrative ruling. *Ind. Gas Co. v. Ind. Fin. Auth.*, 999 N.E.2d 63, 66 (Ind. 2013). First, we uphold findings of fact supported by substantial evidence, which the court does not reweigh. *Id.* Second, we "review the conclusions of ultimate facts, or mixed questions of fact and law, for their reasonableness, with greater deference to matters within the [commission]'s expertise and jurisdiction." *Id.* Third, we determine whether the commission's decision is contrary to law. *Id.* This third category of review evaluates "whether the commission stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision, ruling, or order." *Id.*

[12] Here, Appellants present one issue, questioning whether the Commission's Order, approving Duke's petition to recover coal ash costs from 2019 through the date of its Order under the Federal Mandate Statute, amounted to retroactive ratemaking. Phrasing the issue as to whether Duke's coal ash-related compliance project is a federally mandated compliance project, for which costs are recoverable under the Federal Mandate Statute, Duke argues that we instead should defer to the Commission's decision under our tiered standard of review because the issue before us is a mixed question of law and fact which is subject to a reasonableness standard of review. However, on appeal Appellants do not challenge either the Commission's finding that Duke's projects were federally mandated compliance projects or the reasonableness of Duke's claimed costs. Rather, their focus is on whether the Commission can approve the reimbursement of already incurred costs without violating the perceived prospective language of the Federal Mandate Statute. This question is a question of law.

[3] [4] [5][13] In *Public Service Commission v. City* of Indianapolis—also relied upon by our supreme court in *DEI*—we explained that whether "the Commission ... conform[ed] to the statutory standards and legal principles involved" is "purely a legal question." *Pub. Serv. Comm'n v. City of Indianapolis*, 235 Ind. 70, 131 N.E.2d 308, 313 (1956). Because we face a question of law here, we owe the Commission no deference: "[T]he order of the Commission should be set aside ... if it is found to be contrary to law." *Id.* at 314. When it comes to technical expertise, on the other hand, the Commission is entitled to great deference, and we will not substitute our judgment for its: "[s]o long as the experts act within the limits of the discretion given them by ... statute, their

decision is final." *Id.* at 311. "But when it comes to whether the [C]ommission acted within its legal guardrails—*e.g.*, whether it acted within statutory limits—we are presented with a matter in[to] which [we] may always properly inquire." ***953** *DEI*, 183 N.E.3d at 269 (emphasis in original). Such inquiry is not only within our prerogative and competence; it is our constitutional duty. *Id.*

II. *Duke's Costs under the Federal Mandate Statute*

[14] Although presented under a different legal theory, the cause before us is closely intertwined with *DEI*, its companion case, as both arose from the same factual background and administrative proceeding. Specifically, *DEI* addressed the historical costs incurred for coal ash remediation efforts from 2010 to 2018, while the current cause concerned the coal ash remediation efforts starting in 2019 through the date of the Commission's Order on November 3, 2021. *See DEI*, 183 N.E.3d at 270. In *DEI*, the coal ash costs and remediation efforts at issue were incurred at a time when the rates established by the Commission in 2004 were in effect. *Id.* Duke's request in 2019 to add those historical costs to its proposed rate increase was an effort to "re-adjudicate costs for a time period covered by a previous order." *Id.* Our supreme court explained that Duke acknowledged that the Commission had "already adjudicated depreciation rates for the cost of decommissioning its plant assets, including coal-ash costs, in its 2004 order." *Id.* However, because the actual costs turned out to be more than Duke expected, Duke sought re-adjudication through its 2019 rate case. The court concluded that "reimbursement of forecasted expenses is retroactive ratemaking," and held that "[b]ecause the [C]omission acted without statutory authority to re-adjudicate expenses already governed by a prior rate order, it violated the statutory prohibition against retroactive ratemaking under section 8-1-2-68." *Id.*

[6] [7] [8][15] Our supreme court's rationale in *DEI* is grounded in the principle that ratemaking is prospective in nature, not retroactive, with the demarcation between retroactive and prospective costs being the date of the Commission's order, not the filing date of the utility's petition. *See id.* at 268, 270. "Past losses of a utility cannot be recovered from consumers nor can consumers claim a return of profits and earnings which may appear excessive." *Id.* at 269 (quoting *City of Indianapolis*, 131 N.E.2d at 315).

> The chances of a loss or profit from operations is one of the risks a business enterprise must take. The Company must bear the loss and is entitled to the gain depending upon the efficiency of its management and the economic uncertainties of the future after a rate is fixed.

City of Indianapolis, 131 N.E.2d at 315.

[16] Duke now contends that *DEI* is neither binding nor dispositive because the Commission's Order granting Duke recovery of its federally mandated costs incurred between 2019 through the Commission's Order is not a readjudication of previous orders. The costs in the current cause were carved out from the underlying traditional rate base case as the Commission wanted the additional review of these projects in the subdocket and

reimbursement thereof was pursued under the parameters of the Federal Mandate Statute.

[9][17] Under traditional rate regulation, a utility must "first make improvements to its infrastructure before it can recover their cost through regulator-approved rate increases." *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 100 N.E.3d 234, 238-39 (Ind. 2018). "The process for recouping these costs, sometimes not until years after they were incurred, is an expensive, onerous ratemaking case, which involves a comprehensive review of the utility's entire business operations." *Id.* This process "sometimes result[s] in large, ***954** sudden rate hikes for customers." *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 197 N.E.3d 316, 323 (Ind. Ct. App. 2022).

[18] Recognizing these problems, the General Assembly has authorized "tracker proceedings, which allow smaller increases for specific projects and costs" and reduce the need for expensive rate cases. *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 31 N.E.3d 1, 4 (Ind. Ct. App. 2015). These statutory trackers allow for the recovery of certain pre-approved categories of costs, without the need for a general rate case proceeding. *See* I.C. § 8-1-8.4-7(c)(1). By statute, these trackers adjust rates, but they do not readjudicate costs. One such tracker proceeding is the Federal Mandate Statute, Indiana Code sections 8-1-8.4-1 *et seq.*, adopted by the General Assembly in 2011, which permits a utility, subject to the Commission's approval of the utility's compliance program, to track and recover 80% of such federally mandated costs via periodic rate adjustments, with recovery of the remaining 20% deferred to the utility's next general rate case. A compliance program is defined as a project "related to the direct or indirect compliance by the energy utility with one (1) or more federally mandated requirements." I.C. § 8-1-8.4-2(a). A "federally mandated requirement" is one that the Commission "determines is imposed on an energy utility by the federal government in connection with" listed federal environmental laws and other statutory or regulatory provisions. I.C. § 8-1-8.4-5.

[19] In its proposal for the Commission's approval of a compliance project, a utility must file a detailed application, describing (a) "the federally mandated requirements;" (b) the "projected federally mandated costs associated with the proposed compliance project;" and (c) "how the proposed compliance project allows the energy utility to comply with the federally mandated requirements." I.C. § 8-1-8.4-6(b). The application also has to present "[a]lternative plans that demonstrate that the proposed compliance project is reasonable and necessary," and provide data on "whether the proposed compliance project will extend the useful life of an existing energy utility facility and, if so, the value of that extension." I.C. § 8-1-8.4-6(b). To approve a utility's proposal, the Commission conducts a public hearing, after which it must (1) find that "public convenience and necessity will be served by the proposed compliance project;" (2) "approve[ ] the projected federally mandated costs associated with the proposed compliance project;" and (3) make "a finding on each of the factors set forth in section 6(b)[ ]." I.C. § 8-1-8.4-7(b).[3]

***955** [20] Our supreme court interpreted the Federal Mandate Statute in *DEI* and noted that the 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 [C]omission approval **before** a utility incurs the cost." *DEI*, 183 N.E.3d at 270 (emphasis in original). Although we agree with Duke that the statement just quoted is dicta and we must consider the question actually presented before

us to its fullest extent, we nevertheless view *DEI*'s dicta as an indication that our supreme court believes a utility can only recoup certain expenses incurred under the Statute after gaining authorization from the Commission to track the expenses.

[10][21] The logical and plain reading of the Federal Mandate Statute results in a prospective nature of cost recovery. The Statute mandates that a utility that "seeks to recover federally mandated costs" "must obtain" a CPCN from the Commission. *See* I.C. § 8-1-8.4-6(a). Once the Commission grants approval of the CPCN after concluding that "the proposed compliance project will allow the energy utility to comply directly or indirectly with" the federally mandated requirements, here, the EPA requirements, the "projected costs" are recoverable. *See* I.C. §§ 8-1-8.4-6(b). The Federal Mandate Statute does not grant specific authorization to recover costs prior to a utility's receipt of the Commission's CPCN. Accordingly, the manifest intention of the legislature reflects that utilities must identify the desired project, submit it to the Commission for review, and then proceed with the project if and when the Commission issues the certificate. *See Ind. Assn. Beverage Retailers, Inc. v. Ind. Alcohol & Tobacco Comm'n*, 945 N.E. 2d 187, 198 (Ind. Ct. App. 2011) (A statute that is clear and unambiguous must be read to mean what it plainly expresses, and its plain and obvious meaning may not be enlarged or restricted), *trans. denied.*

[22] Duke now takes the position that a utility is entitled to recover not only costs incurred while the CPCN proceeding is ***956** pending, prior to regulatory approval, but also pre-petition costs associated with preparing the application and the supporting evidence needed to satisfy the statutory factors. We disagree. The costs recoverable under the Federal Mandate Statute are those incurred to comply with federally mandated requirements. *See* I.C. § 8-1-8.4-4. The relevant federal mandates are listed in the statute, and they include federal environmental statutes and regulations and other federal provisions applicable to energy utilities. *See* I.C. § 8-1-8.4-5. However, a utility's litigation expenses and pre-petition costs are not federally mandated costs covered by the Statute and are not included in the statutory language. "We may not read into the statute that which is not the expressed intent of the legislature." *Blackmon v. Duckworth*, 675 N.E.2d 349, 352 (Ind. Ct. App. 1996), *reh'g denied.*

[23] Our interpretation today is further bolstered by an earlier Duke proceeding, *Duke Energy Indiana*, 2019 WL 4600201 (Ind. U.R.C. Sept. 18, 2019), *reconsideration denied*, 2019 WL 6683737 (Dec. 4, 2019). In *Duke Energy Indiana,* Duke sought recovery under the Federal Mandate Statute with respect to previously incurred expenses for vegetation management from 2013 to the time Duke sought recovery in 2019. *See* *Duke Energy Indiana*, 2019 WL 4600201 at *28-29. The Commission concluded:

> [W]e reject [Duke's] request to collect costs absent prior authorization. Had the legislature intended utilities to be able to recover federally mandated costs that were already spent, it would have said so. There is no such language in Ind. Code Ch. 8-1-8.4. Applying for a CPCN and disclosing project specifics, including costs and alternatives, before performing the project is part of the regulatory bargain engraved in Ind. Code Ch. 8-

> 1-8.4 for an energy utility to receive authorization to recover its prospective costs. The Commission and interested stakeholders should have an opportunity to review the project before the energy utility incurs costs that it desires to recover through rates.

Duke Energy Indiana, 2019 WL 4600201 at *28-29.

[11] [12] [13][24] Statutory trackers, like the Federal Mandate Statute, allow for the recovery of certain pre-approved categories of costs, without the need for a general rate case proceeding. *See* I.C. § 8-1-8.4-7(c)(1). By statute, these trackers adjust rates, but they do not re-adjudicate costs. Thus, tracker statutes incentivize utility action the General Assembly wanted to encourage, benefitting customers as well as the utility, subject to the Commission's approval. In this light, the Federal Mandate Statute encourages and facilitates utility compliance with federal environmental and other mandates—benefitting utilities, ratepayers, and the public at large—under approval procedures that evaluate the compliance program, enhance cost predictability, and protect the interests of all involved. The clear purpose of a CPCN is to determine whether the proposed compliance project and its attendant costs are prudent before the utility passes such costs to ratepayers. Nothing in the statute indicates that all costs must be recoverable; to the contrary, only the "projected" costs of a "proposed compliance" project are subject to the Commission's approval and are recoverable.

[25] Once the Commission approves a utility's compliance project, the Federal Mandate Statute allows the utility to recover 80% of its costs "through a periodic retail rate adjustment mechanism," while the other 20% is "deferred and recovered by the energy utility as part of the next general rate case." I.C. § 8-1-8.4-7(c)(1)-(2). Allowing recovery of costs incurred prior to the Commission's authorization would undo the purpose of Commission oversight *957 and would present a disservice to the utility's customers.

[14] [15][26] Accordingly, while we agree with Duke that tracker statutes permit rate adjustments in between general rate cases, such trackers are nevertheless statutory exceptions to the general rule prohibiting retroactive ratemaking and are effective only to the extent that there is pre-authorization or pre-approval of the projected costs via a CPCN approved by the Commission. Absent pre-approval, the risk of loss remains on the utility during the period between rate orders. *See City of Indianapolis*, 131 N.E.2d at 315. Therefore, interpreting the clear words of the Statute, and in so far as the Commission granted Duke recovery of costs incurred before the date of the Commission's Order, the Commission failed to follow the prospective strictures of the Federal Mandate Statute and we reverse its Order.

CONCLUSION

[27] Based on the foregoing, we reverse the Commission's Order in so far as it allowed Duke to recover costs incurred prior to the Commission's Order pursuant to the Federal Mandate Statute.

[28] Reversed.

[29] Altice, C. J. and Pyle, J. concur 204 N.E.3d 947, Util. L. Rep. P 27,578

All Citations

Footnotes

1 The third Statutory Representative and Intervenor, Nucor Steel – Indiana Citizens Action Coalition of Indiana, Inc., filed an appearance before this court but did not file an appellant's brief.

2 The Indiana Energy Association filed a brief of *Amicus Curiae.*

3 The complete statute reads as follows:

> **Necessity for public convenience and necessity certification; considerations for issuing a certificate**
>
> Sec. 6. (a) Except as provided in subsection (c), or unless an energy utility has elected to file for:
>
> (1) a certificate of public convenience and necessity; or
>
> (2) the recovery of costs;
>
> under another statute, an energy utility that seeks to recover federally mandated costs under section 7(c) of this chapter must obtain from the commission a certificate that states that public convenience and necessity will be served by a compliance project proposed by the energy utility.
>
> (b) The commission shall issue a certificate of public convenience and necessity under section 7(b) of this chapter if the commission finds that the proposed compliance project will allow the energy utility to comply directly or indirectly with one (1) or more federally mandated requirements. In determining whether to grant a certificate under this section, the commission shall examine the following factors:
>
> (1) The following, which must be set forth in the energy utility's application for the certificate sought, in accordance with section 7(a) of this chapter:
>
> (A) A description of the federally mandated requirements, including any consent decrees related to the federally mandated requirements, that the energy utility seeks to comply with through the proposed compliance project.
>
> (B) A description of the projected federally mandated costs associated with the proposed

compliance project, including costs that are allocated to the energy utility: [ ]

(C) A description of how the proposed compliance project allows the energy utility to comply with the federally mandated requirements described by the energy utility under clause (A).

(D) Alternative plans that demonstrate that the proposed compliance project is reasonable and necessary.

(E) Information as to whether the proposed compliance project will extend the useful life of an existing energy utility facility and, if so, the value of that extension.

(2) Any other factors the commission considers relevant.

Application for certificate; public hearing; granting certificate; recovery of costs

Sec. 7. (a) As a condition for receiving the certificate required under section 6 of this chapter, an energy utility must file with the commission an application that sets forth the information described in section 6(b) of this chapter, supported with technical information in as much detail as the commission requires.

(b) The commission shall hold a properly noticed public hearing on each application and grant a certificate only if the commission has:

(1) made a finding that the public convenience and necessity will be served by the proposed compliance project;

(2) approved the projected federally mandated costs associated with the proposed compliance project; and

(3) made a finding on each of the factors set forth in section 6(b) of this chapter.

I.C. §§ 8-1-8.4-6; -7

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