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IN THE
INDIANA COURT OF APPEALS

CAUSE NO. 93A02-1608-EX-1854

CITIZENS ACTION COALITION OF INDIANA, INC.,	)	**Appeal from the Indiana Utility Regulatory Commission**
Appellant (Intervenor Below),	)	**Cause No. 44688**
v.	)	**The Hon. Carol Stephan Chair**
NORTHERN INDIANA PUBLIC SERVICE COMPANY, et al.	)	**The Hon. James Huston**
	)	**The Hon. Angela Weber**
Appellees (Petitioner and Parties Below).	)	**The Hon. David E. Ziegner Commissioners**
	)	**The Hon. David Veleta, Administrative Law Judge**

AMENDED APPELLANT'S BRIEF

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I. STATEMENT OF THE ISSUES

Nonprofit organization Citizens Action Coalition of Indiana, Inc. ("CAC"), appeals the Indiana Utility Regulatory Commission's ("Commission") final order approving Northern Indiana Public Service Company's ("NIPSCO") partial settlement with some parties, which punishes low volume users by approving a 27% increase to the fixed customer charge for residential customers, from $11 per month to $14 per month and a similar increase, from $20 to $24, for small commercial customers, without the Commission making specific findings of fact material to ultimate conclusions, without substantial evidence within the record as a whole to support the findings of fact that it did make, and without abiding by federal law and Commission rule, all of which violates the well-defined and long-established requirements of the applicable standard of judicial review for Commission final orders, a standard which is not lowered when a settlement is at issue.

In particular, Appellant CAC presents the following issues for the Court's review:

1. Whether the Commission erred in approving the increased fixed customer charges because:
    a. The Commission's IPL 2016 Order was not valid precedent and should not have been reasonably extended to this case;
    b. Substantial evidence in the record does not support approving the increase to the fixed customer charge;
    c. The Commission erred in failing to make any specific findings of fact or make an ultimate finding of reasonableness as to the material issue raised by CAC (as well as the OUCC) regarding whether increasing the fixed customer

charge while limiting an increase to the volumetric energy charge discourages energy conservation and utility-sponsored energy efficiency programs;

d. The Commission erred in failing to make any specific findings of fact or make an ultimate finding of reasonableness as to the material issue raised regarding whether increasing the fixed customer charge disproportionately harms low income consumers, elderly consumers and African American consumers, who use 27.7%, 48.4% and 24.6% less respectively than their counterparts; and

e. The Commission approved the increase in the fixed customer charge despite its deleterious effect on conservation and utility-sponsored energy efficiency programs, which is contrary to federal law and state rule.

2. Whether the Commission erred in denying either of the low-income payment assistance program proposals because:

    a. The Commission's denial of CAC's comprehensive low-income payment assistance program proposal lacks a reasonably sound basis of evidentiary support; and

    b. The Settlement did not expressly or implicitly eliminate NIPSCO's low-income payment assistance program.

3. Whether the Commission erred by failing to require the reporting of basic customer data.

II. STATEMENT OF THE CASE

NIPSCO is an investor-owned public utility that is the exclusive monopoly service provider of electricity to more than 461,000 customers in northern Indiana including members of the appellant organization in this proceeding. *Northern Indiana Public Service Company*, Cause No. 44688, Order at 4 (IURC Jul. 18, 2016) (Recons. Den.) [hereinafter "Order"]; (Tr. Vol. 1, p. 19). On October 1, 2015, NIPSCO petitioned the Commission for a base rate case[1] to adjust or maintain its basic rates and charges previously approved by the Commission on December 21, 2011, as modified by various riders also approved by the Commission in the interim. *Id.* at 1, 5. CAC, Environmental Law & Policy Center ("ELPC"), Wal-Mart Stores East, LP and Sam's East, Inc. ("Walmart"), NIPSCO, Office of Utility Consumer Counselor ("OUCC"), County Board of Commissioners ("LaPorte"), Indiana Municipal Utilities Group ("IMUG"), United States Steel Corporation ("U.S. Steel"), NLMK Indiana ("NLMK") all submitted testimony. *Id.* at 2–4.

On February 19, 2016, a partial settlement was reached between some of the parties. NIPSCO excluded CAC, ELPC, Walmart, LaPorte, and IMUG from the settlement discussions until after most of the substantive items were already decided; thus a majority of the settlement discussions excluded the representatives of purely residential customers, purely commercial customers, and purely municipal customers. *Id.* at 4; (Hr. Tr. Vol. 1, p. 95, line 12—p. 100, line 9). Although the OUCC was a party to the settlement, it is an executive branch agency and charged with representing all of the various and often-competing consumer interests in Indiana. (Ind. Code § 8-1-1.1-5.1(e)).

[1] A base rate case provides ratepayers the opportunity to review and evaluate a comprehensive statement of the utility's current costs, capital expenditures and other projections that constitute the basis for the utility's proposed rates and charges.

CAC, ELPC, and Walmart filed testimony opposing the Settlement, and some of the Settling Parties filed rebuttal testimony on the Settlement. Order at 4. A hearing was conducted by the Commission on April 13, 2016, where the following stipulation of facts was agreed to by NIPSCO and admitted into the evidentiary record:

> The Settlement Agreement filed on February 19, 2016, settlement testimony and evidence filed on March 4,2016, settlement rebuttal testimony evidence filed on March 24,2016, associated Settlement workpapers, and discovery request responses provided to CAC and ELPC after February 19, 2016, do not offer any new evidence beyond that provided in the prefiled direct testimony addressing why the cost structure should be reflected in rate design, or why increased costs could not be addressed in volumetric charges.

(Tr. Vol. 18, p. 111). The Commission issued its final Order approving the Settlement without any modification on July 18, 2016, and denied reconsideration on September 21, 2016. Order at 95–96. CAC filed a notice of appeal on August 17, 2016.

III. STATEMENT OF THE FACTS

A. NIPSCO's Proposal to Increase the Fixed Customer Charge

The electric bills of NIPSCO's residential customers generally speaking consist of a fixed monthly customer charge plus a variable energy charge for the amount of energy used, and any applicable riders. *Id*. at 8. The fixed customer charge is a flat fee that each customer pays even if they consume no energy in a month. (Tr. Vol. 13, p. 176). The energy charge is a volumetric rate equal to the approved rate multiplied by the number of kilowatt hours ("kWh") consumed. (Tr. Vol. 13, pp. 141–42). The Settlement increases both NIPSCO's volumetric energy rate and its fixed customer charge for residential customers. Order at 90.

NIPSCO's initial proposal was to increase non-bypassable customer charges for its residential customers by approximately 82%, from $11 to $20 per month. (Tr. Vol. 7, p. 149). NIPSCO attempted to justify its residential customer charge proposals by pointing to its cost of

service analysis, which allocates fixed costs to residential customers. *Id*., pp. 166-189. NIPSCO's cost of service classification and allocation methodologies, which were disputed by CAC, have the effect of assigning $22.51 per customer per month to the customer charge classification, and $83.95 per customer per month as "fixed" costs for residential customers. (Tr. Vol. 25, p. 96). NIPSCO stated that increasing fixed charges for customers "simply improves recovery of the fixed costs," citing a goal of "fixed-variable alignment," tempered only by a "spirit of gradualism." *Id*.

On February 19, 2016, a settlement was reached between some of the parties ("Settlement"). The proposed Settlement included an increase in the fixed customer charge from $11 to $14 per month per residential customer, representing an increase of 27% and significantly out of proportion to other proposed rate increases in this case. Order at 107. NIPSCO excluded the only parties representing purely residential customers in this proceeding, CAC and ELPC, until after most of the substantive items were already decided. (Hr. Tr. Vol. 1, pp. 95-100).

1. Issue and evidence presented as to whether increase to the fixed customer charge discourages conservation and undermines utility-sponsored energy efficiency programs

CAC[2] testified that the NIPSCO rate proposals violated Indiana Code § 8-1-2-4 because they are unreasonable and unjust for several reasons. First, CAC explained how NIPSCO's basic ratemaking theory is flawed, and that there is no fundamental principal of rate design suggesting that "fixed" costs should generally be collected through "fixed" charges. (Tr. Vol. 17, p. 19). CAC then showed how NIPSCO failed to carry its burden of proof, as NIPSCO failed to demonstrate any economic inefficiency, under-recovery, or threat to its financial integrity as a result of incorrectly set customer fixed charges.

[2] Although CAC and ELPC filed testimony jointly, ELPC was not able to join the appeal.

CAC demonsrated how the NIPSCO rate proposals to increase the fixed customer charge would erect barriers to energy efficiency investments because higher fixed charges send a price signal to customers that it matters less how they change their level of consumption. (Tr. Vol. 17, p. 24). CAC recommended assigning revenues to volumetric energy rates instead of fixed customer charges, which would have the dual benefits of supporting growth in energy efficiency while also lessening the burden on low-income customers, as described below. *Id*. Therefore, CAC concluded that the Commission should reject residential rate proposal to increase the fixed customer charge and that if any additional revenue requirement is ultimately approved, it should be collected through variable energy charges in those rates.

Before the settlement was reached, the OUCC's testimony on this subject was directly on par with CAC's. The OUCC testified against the proposed increase to the fixed customer charge, stating that it was not reasonable or in the public interest. The OUCC noted that such proposals "violate the regulatory principle of gradualism, violate the economic theory of efficient competitive pricing, and are contrary to effective conservation efforts." (Tr. Vol. 23, pp. 186–87). The OUCC explained why "pricing policy for a regulated public utility should mirror those of competitive firms to the greatest extent practical" and how costs are variable in the long run. *Id*. The OUCC summarized its expert witness' testimony as follows:

> It must be remembered that my proposed rate design will allow the Company a reasonable opportunity to recover all of its costs and earn a fair rate of return. Utility's advocate higher fixed customer charges in order to minimize their risks by guaranteeing revenue recovery through fixed charges. Whether electricity rates are largely volumetric priced or largely based on fixed charges, the reality is that the utility will collect its required revenues. This is particularly relevant in this case since the Company has adjusted actual test year energy usages (kWh) for normal weather. Rate designs structured largely based on volumetric charges promote conservation, are efficient, and are in accordance with pricing practices in competitive markets. Finally, no cross-subsidization issues are created across customers within the same class as long as the fixed customer charge recovers the incremental cost of connecting and maintaining each customer's account. Indeed,

> the incremental cost of connecting and maintaining a residential customer's account is under $6.00 per month. My recommendations to maintain the current customer charge of $11.00 for residential customers and $20.00 for small commercial customers is considerably higher than this incremental cost.

Id. at 193.

2. Issue and evidence presented as to whether increases to the fixed customer charge disproportionately impact low income, elderly, and African American consumers who use less energy on average

CAC demonstrated that NIPSCO's plan to significantly increase fixed charges would disproportionately impact the poor, the elderly, racial minorities, and customers on fixed incomes, i.e. those customers who are low volume users. (Tr. Vol. 17, pp. 13, 23, 25–27). CAC provided an analysis of U.S. residential energy consumption data which reveals that low-income, African-American and elder households use less electricity than their counterparts, and are therefore disproportionately harmed by shifting utility cost recovery from volumetric to monthly customer charges. *Id*. CAC showed that low income households must devote a higher proportion of total household income to basic home electricity service than their higher-income counterparts. For example, a two person household living at 75% of the federal poverty guideline shoulders a home electricity burden about nine (9) times higher than a household with an annual income of $100,000. *Id*. Thus, CAC recommended that the proposal to increase the fixed customer charge be rejected in lieu of recovering NIPSCO's revenue through the volumetric energy charge.

NIPSCO presented a curious attachment, which charts NIPSCO's *gas* customers who participate in a federally funded low income home energy assistance program ("LIHEAP") and who also receive NIPSCO electric service. (Tr. Vol. 25, p. 146). NIPSCO used this chart to assert its position (which is disputed by CAC) that low income customers do not, on average, use less electricity than those for the "normal" population. *Id*. at 96. This chart shows:

- NIPSCO customers who actually receive LIHEAP for gas service and who also have NIPSCO for their electricity provider (Hr. Tr. Vol. 1, p. 48, line 3-p.49, line 8); and
- Only NIPSCO customers with twelve monthly bills (Tr. Vol. 17, p. 26, lines 13-14.)

However, this chart does not show:

- NIPSCO's gas customers who are eligible for LIHEAP for gas service but for reasons such as funding and other availability issues might not be able to participate (Tr. Vol. 17, p. 26, lines 13-14; Tr. Vol. 1, p. 51, lines 19-25, p. 52, line 8, p. 53, line 13; Tr. Vol. 26, p. 93)
- NIPSCO's electric customers who are eligible for or actually receive LIHEAP for electricity service (Tr. Vol. 17, p. 26, lines 13-14; Hr. Tr. Vol. 1, p. 51, lines 1-6); and
- Whether the relatively large number of "normal" residential customers in the 25 kWh/month, 100 kWh/month, and 200 kWh/month bins include vacation or second home bills (Tr. Vol. 17, p. 102).

3. Issue and evidence presented after the Settlement

The Settlement and testimony supporting the Settlement contained no new evidence to justify the proposed increase in the fixed customer charge. As noted in the Stipulation of Facts that NIPSCO agreed to:

> The Settlement Agreement filed on February 19, 2016, settlement testimony and evidence filed on March 4,2016, settlement rebuttal testimony evidence filed on March 24,2016, associated Settlement workpapers, and discovery request responses provided to CAC and ELPC after February 19, 2016, do not offer any new evidence beyond that provided in the prefiled direct testimony addressing why the cost structure should be reflected in rate design, or why increased costs could not be addressed in volumetric charges.

(Tr. Vol. 18, p. 111). CAC testified that NIPSCO still failed to elaborate on: the impact of the proposed rate change on low-income customers, the adverse policy consequences, and any economic theory evidence that would support the fixed rate increase. (Tr. Vol. 18, p. 78). Additionally, CAC noted how NIPSCO erred by failing to provide any evidence or statistics to support its assertion that low income customers use the same average amounts of electricity as other residential customers. *Id*., pp. 79-80. CAC showed that the proposed fixed rate increase

was regressive because it would have a more significant impact on low-income, low-use customers, and that this class of customer is also disproportionately impacted by a fixed charge increase because they have higher household energy burdens. CAC testified that this Settlement lacked legitimacy because it excluded key parties, and thus was not a product of fair negotiation and compromise. *Id*.; (Tr. Vol. 25, p. 198, lines 5-6; Tr. Vol. 26, p. 112, line 22).

The following was presented to compare the bills currently in place with the bills that would occur due to the Settlement:

Bill Comparison - Rate 611 to Settlement Proposed Rate 711

Monthly Billed Amount			Increase in Billed Amount		
Monthly kWh	**Present Rates**	**Proposed Rates**	**Amount**	**Percent**	**Proposed c/kWh**
100	$20.78	$25.04	$4.26	20.5%	$25.04
200	$30.57	$36.09	$5.52	18.1%	$18.04
300	$40.35	$47.13	$6.78	16.8%	$15.71
400	$50.13	$58.17	$8.04	16.0%	$14.54
500	$59.92	$69.22	$9.30	15.5%	$13.84
600	$69.70	$80.26	$10.56	15.1%	$13.38
700	$79.49	$91.30	$11.82	14.9%	$13.04
800	$89.27	$102.35	$13.08	14.6%	$12.79
900	$99.05	$113.39	$14.34	14.5%	$12.60
1000	$108.84	$124.43	$15.60	14.3%	$12.44
1500	$157.75	$179.65	$21.90	13.9%	$11.98
2500	$255.59	$290.08	$34.49	13.5%	$11.60
5000	$500.18	$566.17	$65.99	13.2%	$11.32

Customer Charge	$11.00	$14.00
Energy Charge	$0.097836	$0.110433

(Tr. Vol. 18, p. 82).

B. Proposal for a Low-Income Payment Assistance Program

NIPSCO proposed a low-income payment assistance program in its original petition to raise rates and charges to the Commission wherein qualified residential customers would receive a $50.00 credit on their June bills each year. (Tr. Vol. 25, pp. 97–98). NIPSCO was arguing for their low-income program just days prior to the Settlement. *Id*. at 165-172. The Settlement was filed with the Commission on February 19th, 2016. (Tr. Vol. 26, p. 23).

Before the Settlement, the OUCC filed written testimony opposing NIPSCO's low-income proposal. (Tr. Vol. 22, p. 167–170). The OUCC did not like that NIPSCO would be benefiting from the program in ways such as reducing expenses and lower uncollected revenue, but NIPSCO would not be lowering its charges to reflect those reduced costs. *Id.* at 168-69. The OUCC advocated for a voluntary donation program targeted at ratepayers, shareholders, employees with a match from NIPSCO. *Id.* at 169-70.

CAC provided evidence that there is an affordability problem for NIPSCO low-income ratepayers. (Tr. Vol. 17, pp. 132-38, 170-83). CAC recommended a different design for a comprehensive proposal that includes both a low-income rate class and an arrearage program to help low-income ratepayers have an opportunity to have those balances written down over time through timely payments on more affordable current bills." *Id.* at 138. CAC provided written testimony that NIPSCO's program would help low-income ratepayers, but it would not go far enough to make low-income ratepayers energy burden affordable. *Id.* at 140. CAC also provided evidence of other states that have such a comprehensive low-income ratepayer program. *Id.* at 149. The Settlement does not address or otherwise eliminate NIPSCO's original low-income payment assistance proposal, an issue which CAC raised and the Commission did not squarely address in its Order. *Id.* In paragraph 19 of the Settlement, it states:

> The Settling Parties agree that all other components of NIPSCO's filed tariff shall be approved as NIPSCO filed in its case-in-chief as corrected during the course of this proceeding.

Order at 107. There are then a few items listed after that statement where again the low-income payment assistance program is not mentioned. *Id*. However, NIPSCO did file testimony in support of the Settlement on March 4th, 2016, stating NIPSCO is no longer proposing a low-income program. (Tr. Vol. 25, p. 208).

The Commission was confounded as to why NIPSCO was not able to reach a compromise concerning a low-income payment assistance program. Order at 90–91. The Commission also stated that CAC did not provide enough of a record or good enough rationale for the Commission to adopt CAC's proposed low-income payment assistance program design, which was more comprehensive than NIPSCO's. *Id.* at 90. The Commission referenced *Indianapolis Power & Light Co.*, Cause No. 44576, 2016 WL 1118795 (IURC Mar. 16, 2016) ("IPL 2016 Order"), which is currently on appeal on similar grounds, to deny CAC's specific proposal. *Id.* Yet, the Commission did not address the discrepancy relating to NIPSCO's proposed program in that the plain language of the Settlement agreed that "[a]ll other components of NIPSCO's filed cost allocation and rate design shall be as NIPSCO filed in its case-in-chief with the following exceptions or adjustments," the silence in the Settlement on the low income program proposal in NIPSCO's case-in-chief meaning it as neither an exception or an adjustment, and the fact that NIPSCO's case-in-chief on this matter was still admitted into the record.

C. Proposal to Report Basic Customer Data

CAC presented the material issue of whether the Commission should require NIPSCO to report very basic affordability information that is critical not just for NIPSCO to understand

affordability issues, but also the general public, service organizations, and NIPSCO's ratepayers. (Tr. Vol. 17, pp. 149–56). These data points included: number of general residential and low-income customer accounts, bills, receipts, arrearages, notices of disconnections, bill payment agreements, disconnections of service for nonpayment, reconnections of service after disconnection for non-payment, accounts written off as uncollectible, and accounts sent to collection agencies. *Id.* at 152-53. CAC testified that without timely trend data, it is not possible to appropriately respond to the payment troubles increasingly experienced within the low-income population. *Id.* at 150-51. CAC showed data reporting models from Ohio, Illinois, Pennsylvania, and Iowa, and noted that both the National Association of Regulatory Utility commissioners ("NARUC") and the National Association of State Utility Consumer Advocates ("NASUCA") adopted resolutions calling for the collection and reporting of this information. *Id.*, pp. 151, 153–56. CAC also testified it would be unfeasible to satisfy one of the possible statutory criteria permitting the release of federal emergency contingency funds under LIHEAP because the LIHEAP statute defines "emergency" to include "a significant increase in hoe energy disconnections reported by a utility, a State regulatory agency, or another agency with necessary data." *Id.*, p. 151, footnote 16; (42 U.S.C. § 8622(1)(D)).

No other party presented evidence for or against CAC's data reporting proposal, yet the Commission nonetheless denied the proposal. Order at 91. However, the Commission also was confounded at how CAC and other parties were not included in the initial negotiations for settlement. *Id.*, pp. 90–91. Again, the Commission referenced IPL 2016 Order where CAC offered a similar proposal. But, CAC is appealing the IPL 2016 Order, including the denial of CAC's low-income payment assistance program proposal and CAC's request for the monopoly

utility to report basic customer data.[3] In the IPL 2016 Order, the Commission specifically said a problem with adopting the low-income payment assistance program is not having enough data to determine what is appropriate, but then the Commission as in this case failed to order that more data be collected.[4]

IV. SUMMARY OF THE ARGUMENT

The Commission's July 18, 2016 Order should be reversed and remanded as it relates to its decision to approve the Settlement's proposed increase to the fixed customer charge, deny CAC's proposed low income rate, and deny CAC's requested reporting requirement from NIPSCO.

There are four arguments. One is that the Commission did not provide substantial evidence for increasing the fixed charge, and the fixed charge is against stated public policy and the inherent objectives and goals of state and federal statute. The Commission failed to make a specific finding of fact regarding evidence presented that shows increasing the residential fixed charge harms conservation and energy efficiency. The Commission also failed to make a specific finding on evidence presented that captive low-income customers, elderly customers, and African American customers, who use 27.7%, 48.4% and 24.6% less respectively than their counterparts, will be disproportionately affected by the increase in the residential fixed charge.

Two and three are that the Commission did not provide specific findings in regards to the denial of both CAC's low-income payment assistance proposal or CAC's request for data. By referencing the IPL 2016 Order for reasoning to deny CAC's requests, the Commission is again

[3] *Citizens Action Coalition v. Indianapolis Power & Light*, Amended Joint Appellants' Brief, Indiana Court of Appeals, Cause No. 93A02-1604-EX-00804.
[4] *See Indianapolis Power & Light Co.*, Cause No. 44576, 2016 WL 1118795, at *72 (IURC Mar. 16, 2016).

telling CAC that there is not enough data in order for the Commission to adopt CAC's low-income proposal, but yet the Commission does not adopt CAC's data request proposal in order to be able collect more data.

And finally, the fourth issue is that even though NIPSCO told the Commission that it dropped its proposed low-income program, the Settlement does not expressly eliminate their low-income proposal. The Settlement's language adopts NIPSCO's low-income program by virtue of negotiating some items but then accepting "[a]ll other components of NIPSCO's filed cost allocation and rate design shall be as NIPSCO filed in its case-in-chief." (Tr. Vol. 26, p. 33). The Commission in its Order accepted that NIPSCO was no longer offering its low-income program but the Commission also approved the Settlement Agreement (which adopts NIPSCO's case-in-chief without expressly eliminating NIPSCO's low-income program) and the Commission attached Settlement to its Order. Order at 90–91.

V. ARGUMENT

A. Standard of Review

The Indiana Supreme Court expressly and fully articulated the "multi-tiered" standard of judicial review for Commission orders in *NIPSCO v. U.S. Steel*, 907 N.E.2d 1012, 1015-16 (Ind. 2009):

> On the first level, it requires a review of whether there is substantial evidence in light of the whole record to support the Commission's findings of basic fact. *Citizens Action Coalition of Ind., Inc. v. N. Ind. Pub. Serv. Co.,* 485 N.E.2d 610, 612 (Ind.1985). Such determinations of basic fact are reviewed under a substantial evidence standard, meaning the order will stand unless no substantial evidence supports it. *McClain,* 693 N.E.2d at 1317–18. In substantial evidence review, "the appellate court neither reweighs the evidence nor assesses the credibility of witnesses and considers only the evidence most favorable to the Board's findings." *Id.* The Commission's order is conclusive and binding unless (1) the evidence on which the Commission based its findings was devoid of probative value; (2) the quantum of legitimate evidence was so proportionately meager as to

> lead to the conviction that the finding does not rest upon a rational basis; (3) the result of the hearing before the Commission was substantially influenced by improper considerations; (4) there was not substantial evidence supporting the findings of the Commission; (5) the order of the Commission is fraudulent, unreasonable, or arbitrary. *Id.* at 1317 n. 2. This list of exceptions is not exclusive. *Id.*
>
> At the second level, the order must contain specific findings on all the factual determinations material to its ultimate conclusions. *Citizens Action Coalition,* 485 N.E.2d at 612. McClain described the judicial task on this score as reviewing conclusions of ultimate facts for reasonableness, the deference of which is based on the amount of expertise exercised by the agency. *McClain,* 693 N.E.2d at 1317–18. Insofar as the order involves a subject within the Commission's special competence, courts should give it greater deference. *Id.* at 1318. If the subject is outside the Commission's expertise, courts give it less deference. *Id.* In either case courts may examine the logic of inferences drawn and any rule of law that may drive the result. *Id.*
>
> Additionally, an agency action is always subject to review as contrary to law, but this constitutionally preserved review is limited to whether the Commission stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision, ruling, or order. *Citizens Action Coalition,* 485 N.E.2d at 612–13.

NIPSCO v. U.S. Steel, 907 N.E.2d 1012, 1015-16 (Ind. 2009).[5] *See also Dep't of Waterworks v. Community School Corp.*, 933 N.E.2d 880 (Ind. Ct. App. 2010). This standard of review of Commission decisions is not lowered when the Commission evaluates or approves a settlement as it too becomes a Commission order.

Based on this multi-stage review, the reviewing court may vacate a Commission decision if the order lacks a factual basis or is contrary to law. *Ind. Bell Tel. Co. v. Ind. Util. Reg. Comm'n*, 855 N.E.2d 357, 362 (Ind. Ct. App. 2006). This Court has remanded orders to the Commission where the Commission failed to make findings on contested issues that were material to the Commission's ultimate conclusions or where the Commission failed to reach any

[5] It should be noted that the Court's review of the Commission order involved in the *NIPSCO* decision was especially deferential not because the order *approved* a settlement but because it *interpreted a previously approved* settlement. *See id.*

conclusion regarding a significant issue disputed by the parties. *See, e.g.*, *Citizens Action Coalition of Ind., v. Duke Energy Ind., Inc.*, 16 N.E.3d 449, 460, 462 (Ind. Ct. App. 2014) (remanding an order because the Commission failed to make factual findings on issues disputed by the parties that were material to the Commission's ultimate conclusions); *City of Evansville*, 339 N.E.2d at 577 ("we are compelled to require the Commission to articulate the policy and evidentiary factors underlying its resolution of all issues which are put in dispute by the parties." (citing *Indianapolis & S. Motor Express, Inc. v. Public Serv. Comm'n*, 112 N.E.2d 864 (1953))).

If a court finds agency action to be unlawful, a court may remand the matter to the agency, or, "where it would be pointless to remand, the trial court may compel agency action." *Ind. State Bd. of Health Facility Adm'rs v. Werner*, 841 N.E.2d 1196, 1209 (Ind. Ct. App.), aff'd on reh'g sub nom. *Indiana State Bd. of Health Facility Adm'rs v. Werner*, 846 N.E. 2d 669 (Ind. Ct. App. 2006).

B. APPLICABLE STATUTORY FRAMEWORK

Any change to a charge, as required by Ind. Code § 8-1-2-4, "shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful." Ind. Code § 8-1-2-68 also requires that:

> Whenever, upon an investigation, the commission shall find any rates, tolls, charges, schedules, or joint rate or rates to be unjust, unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of this chapter, the commission shall determine and by order fix just and reasonable rates, tolls, charges, schedules, or joint rates to be imposed, observed, and followed in the future in lieu of those found to be unjust, unreasonable, insufficient, or unjustly discriminatory or preferential or otherwise in violation of any of the provisions of this chapter.

Ind. Code § 8-1-2-25 further notes the Commission's "right and power to make such other and further changes in rates, charges and regulations as the commission may ascertain and determine to be necessary and reasonable." Importantly, pursuant to General Administrative Order (GAO)

of the Commission 2013-5, "a utility petitioning for a change in its rates and charges bears the burden of proof and must submit sufficient evidence as part of its case in chief to satisfy its burden of proof."

Another important statutory provision is Ind. Code § 8-1-2-42.7(d), which afforded NIPSCO the opportunity to designate a test period that is either a forward looking test period, a historic test period, or a hybrid test that combines historic and projected data.

The Commission also created a framework to comply with the Utility Powerplant Construction Act (Ind. Code 8-1-8.5) and the National Energy Policy Act of 1992 (16 U.S.C. 2621 and 16 U.S.C. 2622 effective October 24, 1992, P.L.102-486 Stat. 2795) as found at 170 IAC 4-8-3, which states in part:

> The regulatory framework attempts to eliminate or offset regulatory or financial bias against DSM, or in favor of a supply-side resource, a utility might encounter in procuring least-cost resources. The commission, where appropriate, will review and evaluate the existence and extent of regulatory or financial bias.

16 U.S.C. 2621(d)(17)(A)(ii) encourages state regulators of utilities, like the Commission, to consider setting rates to "promote energy efficient investments," and 16 U.S.C. 2621(d)(17)(B)(iii)–(B)(iv) encourages authorities similar to the Commission to both consider including energy efficiency as one of the goals of ratemaking, and to consider "adopting rate designs that encourage energy efficiency."

Finally, the General Assembly of the State of Indiana recently passed Senate Bill 383 to be codified at Ind. Code § 8-1-2-0.5, which provides for the following policy statement:

> The general assembly declares that it is the continuing policy of the state, in cooperation with local governments and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to create and maintain conditions under which utilities plan for and invest in infrastructure necessary for operation and maintenance while protecting the affordability of utility services for present and future generations of Indiana citizens.

All of these policy considerations are relevant to the Commission's review of NIPSCO's proposal to increase fixed charges, the parties' proposals for a low income payment assistance program, and CAC's proposal to collect data on the affordability of utility services provided by the monopoly utility NIPSCO.

C. The Commission Erred in Approving the Increased Fixed Customer Charge

CAC (and prior to the Settlement Agreement the OUCC) properly raised the material issues that NIPSCO's proposal to increase the fixed customer charge discourages energy conservation and utility-sponsored energy efficiency programs and disproportionately harms low-income customers, elderly customers, and African American customers; yet, the Commission failed to make a finding of fact or conclusion of law on that issue and approved the increase to the fixed charge despite it being contrary to federal law and state rule.

1. *The Commission's IPL 2016 Order was not valid precedent and should not have been reasonably extended to this case*.

The Commission cites the IPL 2016 Order as the primary reason for approving a higher fixed charge here. However, the Commission's Order in the IPL 2016 Order was based on a different record, for a different utility, and was approved under different circumstances. First, respectfully, the IPL 2016 Order has been appealed and is currently pending before this Court. Cause No. 93A02-1604-EX-00804. Some concerns from the Commission's IPL 2016 Order include the absence of an ultimate conclusion or finding of fact in the Commission's Order on the material issue raised that the increase in fixed customer charge disproportionately harms elderly and African American customers, and the absence of an ultimate conclusion or finding of fact in the Commission's Order with regard to the material issue raised about the detrimental

effects of increased fixed customer charges on conservation efforts. IPL 2016 Order, pp. 69-72. *Cf. NIPSCO v. U.S. Steel*, 907 N.E.2d 1012, 1015-16 (Ind. 2009) (articulating the "multi-tiered" standard of judicial review for Commission orders, including that "the order must contain specific findings on all the factual determinations material to its ultimate conclusions").

Second, the present case is one in which a settlement, with less than all the parties invited for substantial discussions, was reached. The settlement fails to elaborate on the need for increased fixed charges or their impact on NIPSCO's customers, and the Commission here failed to note the absence of a fully developed record with appropriate data to support NIPSCO beginning going down the road of increased fixed charges, particularly in light of NIPSCO's stated intent to seek further and substantial fixed charge increases in the future.

Finally, in the IPL 2016 Order, the Commission relied in part that: "IPL's proposed customer charge represents the first increase in the customer charge since base rates were last changed in 1995." *Indianapolis Power & Light Co.*, Cause No. 44576, 2016 WL 1118795, at *72 (IURC Mar. 16, 2016). NIPSCO, on the other hand, just raised its fixed customer charge in 2011, from $5.95 to $11 for residential customers. *Northern Ind. Public Service Co.*, Cause No. 43969, 2011 WL 6837714 (IURC Dec. 21, 2011). Now, with the Commission approving the Settlement, NIPSCO is again increasing its customer charge by 27% with no evidence to support the need for such a move. NIPSCO implies that this case is only a first step (although it is arguably the second step considering the increase in 2011), and that it will seek further and dramatic fixed charge increases in the future. NIPSCO asserted that because of the way NIPSCO performed its Allocated Cost of Service Study, it finds that customer and fixed costs for the residential and small business classes would be $83/month and $218/month, respectively. (Tr. Vol. 25, p. 96). The Commission appears to have approved the fixed customer charge not

because that is what the evidence supported, but because of NIPSCO's self-serving statements about "gradualism" or because the settlement has limited the increase to less than what NIPSCO originally or could have proposed. The Commission approved NIPSCO's increase to the fixed customer charge over collecting such revenues through the volumetric charge, despite NIPSCO's failure to satisfy the burden to produce evidence and prove that such standards for just and reasonable rates have been satisfied and despite the Commission failing to address material issues brought before it.

2. *Substantial evidence in the record does not support approving the increase to the fixed customer charge.*

The record did not support approving the increase to the fixed customer charge for residential (and commercial) ratepayers. NIPSCO had a burden to produce evidence and prove that its proposals are just and reasonable.[6] NIPSCO failed to meet this burden: it produced no evidence of actual cost shifts or "cross subsidies" resulting from its existing rate design that would require raising fixed charges for all residential and small commercial customers. NIPSCO has further failed to demonstrate that it faces any financial harm due to current fixed cost recovery mechanisms that would justify its attempt to guarantee earnings through fixed charges.

The Commission's Order confuses the issue. The Commission touts its desire for "gradualism" and that this will somehow help with "efficient price signals," yet the evidence in the record shows otherwise. Order at 88. In approving the Settlement without any modification, the Commission advances the common, but flawed, ratemaking premise that fixed *costs* should be collected through fixed *charges*. Yet, NIPSCO offered no evidence to support the concept that the nature of a cost, as either fixed or variable, should dictate the form of the charge used to

[6] Ind. Code § 8-1-2-42.7; Commission's General Administrative Order 2013-5 ("A utility petitioning for a change in its rates and charges bears the burden of proof and must submit sufficient evidence as part of its case in chief to satisfy its burden of proof.")

recover such a cost. (Tr. Vol. 17, pp. 15-17). Although NIPSCO's argument that aligning fixed costs and fixed charges will help align cost recovery with cost causation creates an appealing and neat symmetry in nomenclature only, whether a cost is labeled as fixed or as variable tells nothing about the most economic, just, and reasonable way to collect the cost from the customer class that caused it. *Id*., pp. 19-20. At the core, the Commission approval of NIPSCO's proposals regarding "fixed-variable alignment" is actually based upon NIPSCO's desire to shift risk from its shareholders to its customers. In approving the Settlement wherein the only parties representing purely residential interests were left out, the Commission harms residential customers so that other customer classes may benefit and so that the utility is guaranteed revenue recovery, an especially worrisome conclusion considering: the lack of and contradicting evidence in the record; the absence of basic findings of fact on the issue of the deleterious effect on conservation and utility-sponsored energy efficiency; the absence of basic findings of fact on the issue of the harm caused to low volume users like low income customers, elderly customers and African American customers; and the fact that NIPSCO is a monopoly electric utility with the exclusive right to provide electric service to those in its service territory. (Ind. Code § 8-1-2.3-3(a)).

The Commission failed to even consider the issue raised by CAC that NIPSCO did not explain why raising fixed charges to ensure revenue recovery is preferable to any number of other alternatives available to NIPSCO to ensure adequate revenue in a more just and reasonable way. Namely, CAC argued that (1) NIPSCO could set a volumetric rate adequate to ensure full recovery of justifiable fixed costs as suggested by CAC and the OUCC, (2) NIPSCO could use forecasting to better take into account variations in consumption levels against forecasts, (3) NIPSCO has access to lost revenue adjustments associated with reductions in sales due to energy

efficiency measures and programs,[7] (4) NIPSCO has broad discretion to request rate case adjustments when necessary,[8] (5) NIPSCO has the ability to request a future test year forecast to address future sales volatility,[9] and (6) NIPSCO can petition the Commission for relief any time that it faces a real and measurable threat to its financial integrity due to revenue recovery shortfalls.[10] The Commission failed to address any of these alternatives available to NIPSCO that would have ensured adequate revenue in a more just and reasonable way, and substantial evidence in the record supports denial, not approval, of any increase to the fixed customer charge.

> *3. The Commission erred in failing to make any specific findings of fact or make an ultimate finding of reasonableness as to the material issue raised by CAC (as well as the OUCC) regarding whether increasing the fixed customer charge while limiting an increase to the volumetric energy charge discourages energy conservation and utility-sponsored energy efficiency programs.*

The Commission approved the Settlement's increase in NIPSCO's fixed customer charge for residential customers from $11.00 to $14.00 by citing the Commission's IPL 2016 Order, which is also under appeal. Order at 88. The Commission did not make a basic finding of fact or conclusion of law on the material issue raised of how an increased fixed customer charge is detrimental to energy conservation efforts and utility-sponsored energy efficiency programs. By

[7] But *see Northern Ind. Public Service Co.*, Cause No. 44634, 2015 WL 9605053 at *37-40, 42 (IURC Dec. 30, 2015)(awarding NIPSCO with lost revenues associated with its energy efficiency programs).
[8] There appears to only be one slight restriction regarding frequency that contains several exceptions for the utility, just in case. *See* Ind. Code § 8-1-2-42.
[9] *See* Ind. Code § 8-1-2-42.7(d) (where utilities, including NIPSCO, are afforded the opportunity to designate a test period that is either a forward looking test period, a historic test period, or a hybrid test that combines historic and projected data).
[10] *See* Ind. Code § 8-1-2-42(a) ("A public, municipally owned, or cooperatively owned utility may not file a request for a general increase in its basic rates and charges within fifteen (15) months after the filing date of its most recent request for a general increase in its basic rates and charges, except that the commission may order a more timely increase if… (2) the commission finds that the utility's financial integrity or service reliability is threatened...")

increasing the fixed customer charge and limiting the increase in the volumetric energy charge, the Commission allows NIPSCO to shift cost recovery more to the flat fee for all customers which limits a customer's ability to reduce his bill by reducing consumption and discourages energy conservation by reducing the economic incentive for efficiency. (Tr. Vol. 17, pp. 28–35**)**.

Although the Commission relied upon its decision in the IPL 2016 Order, it still did not address this issue as to increased fixed customer charges having a deleterious effect to energy conservation efforts and utility sponsored energy efficiency programs. Curiously, the Commission stated that cost causation approach does "send[] efficient price signals to customers" but this is nonsensical and not explained in the Order. Order at 88. Increases in non-bypassable fixed customer charges create powerful price signals *against* investment in energy efficiency, distributed generation, and other distributed energy resources products and services. However, affected customers cannot avoid customer charges with more efficient energy use or deployment of other distributed generation like solar panels.

The fixed monthly customer charge increase for NIPSCO is the equivalent of about 27 kWh of volumetric delivery charges each month. (Tr. Vol. 18, p. 82). NIPSCO's proposal means that low use customers (using 500 kWh or fewer per month) will have to first reduce or offset consumption by at least 15% (based on NIPSCO's bill impact assessments) to offset the bill impact of the increased fixed customer charge before they can even start thinking about reducing their overall bill through energy efficiency or other investments. *Id*. Fixed customer charges are "unavoidable" and reduce the marginal value and the ultimate bill value to those customers who have taken action to reduce their energy consumption. These changes will also have a chilling impact on customers who are contemplating such energy efficiency investments,

especially in light of NIPSCO's explicit intentions to further increase customer charges to further its pursuit of guaranteed revenues through what it calls "fixed-variable alignment." (Tr. Vol. 25, p. 96). As explained above, NIPSCO's increased fixed customer charge is like taking almost 324 kWh per year out of the planned savings stream for those customers, extending the payback period they had planned upon, and frustrating their investment economics.[11] (Tr. Vol. 18, p. 82). The higher customer charge is a non-bypassable connection tax that makes serious investment in energy efficiency less cost-effective and potentially futile, and the Commission never addressed this very material issue raised and argued before it.

The Commission statement in the Order at 88 about "sending efficient price signals to customers" would have made sense if it had altered the Settlement to recover increased revenue requirements through the volumetric rate recovery (i.e., the variable energy charge) of fixed costs for residential and small business customers, which actually accomplishes this result and properly aligns rate design with sound policy objectives. Properly designed rates reflect properly allocated costs and send signals for efficient consumption in the future. Sunk fixed costs, the focus of NIPSCO's concern in its customer charge proposals, can be reflected in either the fixed charge or a volumetric charge. An efficient price signal (that is, one that customers can respond to without disconnecting from all service) can only be communicated with a volumetric charge. To meet sound public policy and ratemaking objectives, it is very important to send price signals that can motivate and reward economically efficient consumption decisions.

Unfortunately, despite the Commission stating that it aims to "send[] efficient price signals to customers," there is no evidence or analysis in the record that increasing fixed customer charges improves system-wide economic efficiency or the efficiency of customer

[11] 27 kWh per month (based on $0.1104 charge divided into $3 month increase in fixed customer charge) x 12 months = 324 kWh per year.

decisions. Order at 88. What the Commission did not do is make a basic finding of fact or conclusion of law on the material issue raised of how an increased fixed charge is detrimental to energy conservation efforts and utility-sponsored energy efficiency programs. Order 82–96. Its nod to the word "efficient" is entirely arbitrary.

CAC properly raised the material issue that the increase in the residential fixed charge discourages conservation and energy efficiency. By increasing the fixed customer charge and limiting the increase in the volumetric charge, NIPSCO shifts its cost recovery closer to a flat fee for all customers which limits a customer's ability to reduce his or her bill by reducing his consumption and discourages energy conservation by reducing the economic incentive for efficiency. (Tr. Vol. 17, pp. 28-35). The Commission's silence on the effects of the Settlement's increased fixed charge on conservation and energy efficiency is arbitrary and capricious. By definition, the Commission ignoring this issue provides less than substantial evidence to support their order approving the Settlement Agreement's increase in residential fixed charges.

> *4. The Commission erred in failing to make any specific findings of fact or make an ultimate finding of reasonableness as to the material issue raised regarding whether the increase of the fixed customer charge disproportionately harms low income consumers, elderly consumers and African American consumers, who use 27.7%, 48.4% and 24.6% less respectively than their counterparts.*

NIPSCO's own data supports the conclusion that the increase in the residential fixed-charge disproportionately affects low-use ratepayers. (Tr. Vol. 17, pp. 25–26). CAC provided more than substantial evidence that low-income customers, elderly customers, and African American customers in NIPSCO's electric monopoly service territory will be disproportionately affected by the increase in the fixed customer charge. *Id.*, pp. 25–28. NIPSCO failed to rebut this assertion by CAC as it relates to elderly customers and African American customers.

Although NIPSCO argued that its data shows that low income customers use more energy than others, its presentation of data was very misleading, incomplete, and was effectively rebutted by CAC. (*Cf*. Tr. Vol. 25, pp. 96, 146, to Tr. Vol. 17, p. 26, lines 13-14; Hr. Tr. Vol. 1, p. 48, line 3-p.49, line 8, p. 51, lines 19-25, p. 52, line 8, p. 53, line 13; Tr. Vol. 26, p. 93). Regardless, the Commission failed to make a basic finding of fact or conclusion of law on the material issue raised of how an increased fixed charge affects low volume users of electricity, who in NIPSCO's service territory are low income customers, elderly customers, and African American customers.

The Commission has a duty to see that the rates charged are fair and reasonable, both to consumers and to the utility. *Pub. Service Comm'n. of Ind. v. Ind. Bell Telephone Co.,* 235 Ind. 1, 130 N.E.2d 467 (1955); *OUCC v. Ind. Cities Water Corp*., 440 N.E.2d 14 (Ind. Ct. App. 3d Dist. 1982); *L. S. Ayres & Co.,* 169 Ind. App. 652, 351 N.E.2d 814 (2d Dist. 1976). If the Commission finds any rates or charges to be unjust, unreasonable, insufficient, discriminatory, or otherwise in violation of statute, the Commission may determine, and by order fix, just and reasonable rates or charges, to be imposed in the future in lieu of those found to be improper. Ind. Code § 8-1-2-68. In approving the increase to the fixed customer charge, the Commission merely said that the increased fixed customer charge is based on cost evidence provided by NIPSCO and does not violate principles of gradualism and that the increase aligns with cost causation principles. Order at 87–88. The Commission's analysis was incomplete, ignoring the actual evidence in the record and the material issues before it.

The increase to the fixed customer charge disproportionately harms low-income consumers, elderly consumers, and African American consumes, since they, on average, use less than other residential ratepayers. Households headed by an individual of African-American

descent, on average, use 24.6% less electricity than households headed by a Caucasian; elderly households use, on average, 48.4% less electricity than non-elder households; and, low-income consumers use on average 27.7% less than their higher-income counterparts. (Tr. Vol. 17, pp. 158-59). The Commission was completely silent on the matter of low income customers using less energy on average than their respective counterparts. And, the Commission failed to reach an ultimate conclusion or finding of fact on the unrebutted evidence presented by CAC regarding the impact on elderly and African American households that is consistent with the evidence of record and with the law.

The Commission failed to reach an ultimate conclusion or finding of fact on the unrebutted evidence presented by CAC regarding the impact on elderly consumers and African American households, or on the evidence presented by CAC regarding the impact on low income consumers, that is consistent with the evidence of record and with the law. *CAC*, 485 N.E.2d at 612-13. The Court should remand the Order for the Commission to determine whether the increased fixed customer charge structure disproportionately harms low income customers, elderly customers, and African American customers since they, on average, use less than other residential ratepayers.

5. The Commission approved the increase in the fixed customer charge despite its deleterious effect on conservation and utility-sponsored energy efficiency programs, which is contrary to federal law and state rule.

The Commission's approval of the increase in the fixed customer charge despite its deleterious effect on conservation and energy-efficiency is contrary to federal law and state rule. The Commission is bound to follow applicable federal law and state rule. This includes the federal law named the National Energy Policy Act of 1992 codified at 16 U.S.C. 2621–2622, which encourages state regulators of utilities, like the Commission, to consider setting rates to

"promote energy efficient investments," and encourages authorities similar to the Commission to both consider including energy efficiency as one of the goals of ratemaking, and to consider "adopting rate designs that encourage energy efficiency." In order to comply with the National Energy Policy Act and Indiana's Utility Powerplant Construction Act (Ind. Code 8-1-8.5 *et al*.), the Commission passed rules which state in part:

> The regulatory framework attempts to eliminate or offset regulatory or financial bias against DSM [Demand Side Management], or in favor of a supply-side resource, a utility might encounter in procuring least-cost resources. The commission, where appropriate, will review and evaluate the existence and extent of regulatory or financial bias.

170 Ind. Admin. Code 4-8-3(a). Instead, by approving the increase in the fixed customer charge, the Commission establishes a subsidy for high energy users regardless of their income without analyzing or making findings and conclusions of law as to whether that preference discourages DSM. This, in turn, creates a financial bias against demand side management and energy efficiency that is contrary to the regulatory framework adopted by the Commission. The Court should remand this issue back to the Commission to make a ruling that is consistent with the law.

D. <u>The Commission Erred in Denying Either of the Low-Income Payment Assistance Program Proposals.</u>

1. The Commission's denial of CAC's comprehensive low-income payment assistance program proposal lacks a reasonably sound basis of evidentiary support.

The basis for the Commission's denial of CAC's request to implement a comprehensive low-income payment assistance program in NIPSCO's service territory was based on the IPL 2016 Order in Cause No. 44576. Order at 90. The Commission referenced the similar proposal by CAC in the recent IPL rate case and stated, "that there are numerous implementation and policy related concerns and declined to adopt the CAC's program design in that case. The CAC provided with no better record or rationale in this case as to why we should adopt such a

program." *Id.* As noted above, the IPL 2016 Order in Cause No. 44576 is currently on appeal. That IPL 2016 Order in regards to the low-income proposal was inconsistent because it referenced a need for "greater demographic and billing information," at the same time the Commission denied CAC's request for the utility to report such data. *Indianapolis Power & Light Co.*, Cause No. 44576, 2016 WL 1118795, at *72 (IURC Mar. 16, 2016) (currently being appealed by CAC and other parties). The situation, as it relates to CAC's program design proposal and data collecting proposal, is identical here with NIPSCO.

Substantial evidence in the record supports the implementation of a low-income program and a distinction between low-income residential customers and other customers sufficient to justify the difference in rate. (Tr. Vol. 17, pp. 132–38, 170-183). The Commission even makes a finding "recognizing the importance of the issues." Order at 90. Yet, the Commission goes on to avoid those important issues by citing the IPL 2016 Order that the "timing of the introduction of the proposal . . . has not provided an opportunity for sufficient consideration of the complexities involved." Order at 90. The Commission, however, fails to mention when a party should introduce such a proposal and to state why it would stray from the most recent Commission precedent that squarely addresses this issue. In Commission Cause No. 43669, the Commission explicitly noted its preference for determining this type of proposal in the context of a base rate case such as this proceeding ("we find that these programs offer complexities with respect to ratemaking that should ultimately be addressed in the context of a utility base rate case rather than as a single issue under the AUR Act.") *In re Universal Service Fund*, Cause No. 43669, 2009 WL 4091979 (I.U.R.C. Nov. 19, 2009); (App. Vol. 26, pp. 85–86, 90-91). The case at issue here on appeal was a NIPSCO base rate case proceeding, and it provided CAC a unique opportunity to make such a proposal to the Commission. Instead, the Commission acted contrary

to Commission precedent as to timing and the appropriate venue in which to address such an issue, and CAC relied on this precedent to its detriment.

The Commission, instead, went onto continue to deny a low income rate because it did not have what it thought was necessary information and at the same time denied to require NIPSCO to report that very same data. As in the IPL 2016 Order, a summary of the Commission's rationale for denying the proposed low income rate are that the proposal was not made in the right venue, at the right time, or with adequate data to properly analyze the proposal. However, as demonstrated above, CAC made its proposal in a base rate case in accordance with the Commission's preference as stated in Commission Cause No. 43669. 2009 WL 4091979 (I.U.R.C. Nov. 19, 2009). In addition, since Indiana's monopoly electric utilities have no general requirement as to the frequency of base rate cases and NIPSCO admitted that it does not have a date in mind by which it would file its next base rate case, it is difficult to determine when the right time to make the proposal might be. (Hr. Tr. Vol. 1, 55, lines 3-8). And finally, given that all the data that the Commission requires to evaluate the proposal is in the sole control of NIPSCO, and that the Commission has the authority[12] to require the release of that data by NIPSCO, it is CAC's position that the Commission's denial of the proposed low income rate lacks a reasonably sound basis of evidentiary support as required by *PSI Energy, Inc. v. Ind. Office of Util. Consumer Counsel*, 764 N.E.2d 769, 774 (Ind. Ct. App. 2002), and should accordingly be remanded to the Commission for the collection of data and further proceedings to properly evaluate CAC's low income payment assistance proposal.

[12] Ind. Code § 8-1-2-26 (allowing the Commission to require the making of reports, including "other items, whether of a nature similar to those hereinbefore enumerated or otherwise, as the commission may prescribe, in order to show completely and in detail the entire operation of the public utility in furnishing the unit of its product or service for the public").

2. Because the Settlement did not expressly or implicitly eliminate NIPSCO's low-income payment assistance program, the Commission erred in denying it.

The Settlement does not expressly eliminate NIPSCO's low-income proposal, an issue which CAC raised and the Commission did not squarely address in its Order. *Id.* The Settlement after listing a number of negotiated items where the low-income payment assistance program is not expressly mentioned, the Settlement at paragraph 19 states, "[a]ll other components of NIPSCO's filed cost allocation and rate design shall be as NIPSCO filed in its case-in-chief with the following exceptions or adjustments." Order at 107. There are then a few items listed after that statement where again the low-income payment assistance program is not mentioned. *Id*. This would imply that the settling parties left the proposal by NIPSCO to implement a low income payment assistance program intact, and that it was not part of their purported "benefit of the bargain." However, NIPSCO did file testimony in support of the Settlement on March 4th, 2016, stating NIPSCO is no longer proposing a low-income program. (Tr. Vol. 25, p. 208).

The Commission acknowledged NIPSCO's withdrawal of NIPSCO's proposed low-income payment assistance program in the Commission's final Order, Order at 71; however, the Settlement itself adopts NIPSCO's case-in-chief except for changes made in the Settlement. Order at 107, 112. All of NIPSCO's case-in-chief was entered into the record, even the evidence originally presented by NIPSCO supporting its lowim-income payment assistance program proposal. Yet, the Settlement is absolute in silence on the original low-income payment assistance program, thusly falling into the "[a]ll other components of NIPSCO's filed cost allocation and rate design." *Id*.; (Tr. Vol. 26, pp. 23–48). The Commission's Order approves the Settlement without altering the Settlement's language in regards to NIPSCO's case-in-chief. Order at 90–91. CAC pointed this out in its response testimony to the Settlement Agreement, an argument which is even summarized by the Commission but never ruled upon in the section

entitled "Commission Discussion and Findings." Order at 79, 82. But that response has been ignored by the settling parties and by the Commission. The Commission has approved NIPSCO's low-income program without realizing it.

Some reasons an Indiana appellate court can set aside an administrative agency order is if the order is arbitrary, capricious, an abuse of discretion, or if the order is not support by substantial evidence. Ind. Code § 4-21.5-5-14(d); *Jay Classroom Teachers Ass'n v. Jay School Corp.*, 55 N.E. 3d 814, 816 (Ind. 2016). An arbitrary and capricious administrative action has been defined as a "willful and unreasonable action, without consideration and in disregard of the facts or circumstances of the case; action taken without some basis which would lead a reasonable and honest man to such action." *State Bd. of Tax Com'rs v. Chicago, M., St. P. & P.R. Co.*, 96 N.E. 279, 282 (Ind. App. 1951). A definition of abuse of discretion is when the "trial court's decision is clearly against the logic and effect of the facts and circumstances before the court." *In re Unsupervised Estate of Harris*, 876 N.E.2d 1132, 1135 (Ind. App. 2007). The Commission's acceptance of NIPSCO's withdrawal of its low-income program is contradictory to the Settlement the Commission approved, and as such is arbitrary, capricious, an abuse of discretion, and is not supported by substantial evidence.

CAC asks this Court in the alternative of remanding the Commission's Order regarding CAC's comprehensive low-income payment assistance proposal to remand the Commission's Order and direct the Commission to adopt NIPSCO's low-income payment assistance program explicitly since that is what the Settlement required.

E. The Commission Erred in Failing to Require the Reporting of Basic Customer Data.

The Commission refused to order the collection of disconnection notices, disconnects, arrearages, and similar data. Order at 90. The Commission's refusal to create a low-income program for qualified customers is premised on the IPL 2016 Order. *Id.* In that case, the Commission refused to create a similar low-income program without additional data to justify and support such a program. *Indianapolis Power & Light Co.*, Cause No. 44576, 2016 WL 1118795, at *72 (IURC Mar. 16, 2016) (currently being appealed by CAC and other parties). But after finding that this data-deficit exists, the Commission also denied CAC's request for regular reporting of customer's data that would fill the noted deficit. *Id.*

Again, some reasons an Indiana appellate court can set aside an administrative agency order is if the order is arbitrary, capricious, an abuse of discretion, or if the order is not supported by substantial evidence. Ind. Code § 4-21.5-5-14(d); *Jay Classroom Teachers Ass'n v. Jay School Corp.*, 55 N.E. 3d 814, 816 (Ind. 2016). An arbitrary and capricious administrative action has been defined as a "willful and unreasonable action, without consideration and in disregard of the facts or circumstances of the case; action taken without some basis which would lead a reasonable and honest man to such action." *State Bd. of Tax Com'rs v. Chicago, M., St. P. & P.R. Co.*, 96 N.E. 279, 282 (Ind. App. 1951). A definition of abuse of discretion is when the "trial court's decision is clearly against the logic and effect of the facts and circumstances before the court." *In re Unsupervised Estate of Harris*, 876 N.E.2d 1132, 1135 (Ind. App. 2007). "Substantial evidence is more than a scintilla." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 * (1938). The Commission's denial of any requirement on NIPSCO to routinely collect and publicly report key billing information is arbitrary, capricious, an abuse of discretion, and is not supported by substantial evidence.

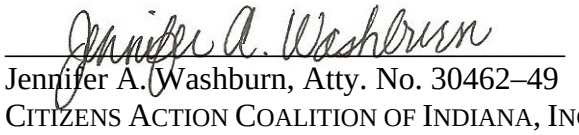
Without timely trend data, it is not possible to appropriately respond to the payment troubles increasingly being experienced within the low-income population, including compiling data which the Commission said was needed in order to approve a low income payment assistance program. Order at 90-91. The evidence of record shows that NIPSCO is the only entity that has the data on general residential and low income customer accounts, billing, receipts, arrearages, notices of disconnections, bill payment agreements, disconnections of service for non-payment, reconnections of service after disconnection for non-payment, accounts written off as uncollectible and accounts sent to collection agencies. It would be difficult for outside entities to understand the effectiveness of credit and collection practices and policies of NIPSCO without this data. It would be difficult for outsiders to understand the state of home energy security among NIPSCO's residential customers without this data, or the appropriate amount of expenditures required to help low income customers with energy efficiency programs and payment assistance without this data.

The Commission gave little consideration to CAC's request for regular reporting of customers' data that would eliminate the data-deficit hampering development of a potential low-income program. The denial is incompatible and unreasonable with the Commission's denial of the low-income program for the lack of such data. The Commission's denial is clearly against the logic and effects of the facts before the Commission. The Commission in denying CAC's request for regular reporting of customers' data disregarded the substantial evidence in favor of this request with no evidence in support of the denial other than a desire for the data request to be settled by the parties and not by a Commission order.

VI. CONCLUSION

For the foregoing reasons, Appellant CAC requests that the Court reverse and remand the Commission's July 18, 2016 Order in Cause No. 44688 approving a partial settlement of some parties as it relates to its decision to approve the Settlement's increase in the fixed customer charge, its denial of CAC's request for data reporting, its denial of CAC's low-income program, and its implicit approval but not explicit approval of NIPSCO's low-income payment assistance program with instructions that the Commission make specific findings of fact material to ultimate conclusions, have substantial evidence within the record as a whole to support any findings of fact that it makes, and issue a decision that is not contrary to law and in accordance with the well-defined and long-established requirements of the applicable standard of judicial review for Commission final orders.

Respectfully submitted,



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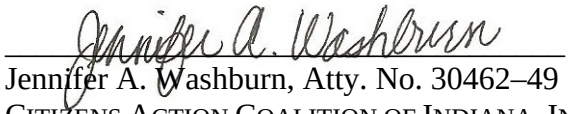
WORD COUNT CERTIFICATE

The undersigned hereby verified, in accordance with Ind. Appellate Rule 44, that the foregoing Appellant's Brief contains no more than 14,000 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.

Respectfully submitted,



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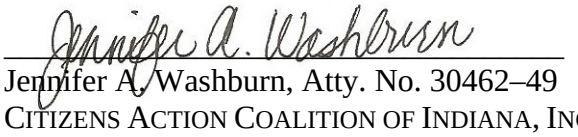

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that copies of the foregoing Amended Appellant's Brief have been served on Public Service Contacts through E-Service using the IEFS this 17th day of January, 2017, on the following:

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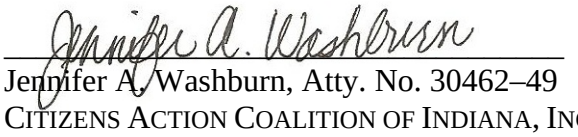

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