STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

SUBDOCKET FOR REVIEW OF NORTHERN INDIANA PUBLIC SERVICE COMPANY LLC'S R.M. SCHAHFER GENERATING STATION FIRE AND RELATED IMPACT ON FUEL PROCUREMENT AND FUEL COSTS.	**)**	**CAUSE NO. 38706 FAC 130-S1**

REPLY TO JOINT EXCEPTIONS TO NIPSCO'S PROPOSED ORDER AND JOINT POST-HEARING BRIEF

Northern Indiana Public Service Company LLC ("NIPSCO"), by counsel, respectfully replies to the Joint Proposed Order filed by the NIPSCO Industrial Group ("Industrial Group") and the Indiana Office of Utility Consumer Counselor ("OUCC") (collectively "Consumer Parties") and the Joint Post-Hearing Brief in Support of Proposed Order ("Joint Brief") filed on March 21, 2022, as set out below.[1]

NIPSCO's Proposed Order filed in this Cause on February 21, 2022 accurately reflects the record evidence, presents appropriate findings of fact based

[1] All cites herein are to the clean version of the Joint Proposed Order.

on that evidence, and provides appropriate resolutions of all issues of law and fact before the Commission in this proceeding and should be adopted in its entirety.[2]

I. Introduction.

The Consumer Parties have put forth a request in this proceeding that is extraordinary. They seek for the Commission to mandate NIPSCO to pay refunds of more than $40 million for alleged harm that occurred in 2021. But they do not stop there. They also petition the Commission to impose an ongoing refund liability on NIPSCO that, according to their estimates, would amount to $167 million between January 1, 2021 and May 31, 2023.[3] Despite this extraordinary request, the case the Consumer Parties have put on before the Commission and the record they developed is insufficient to support their enormous refund request.

The Consumer Parties' refund request is premised on alleged imprudence by NIPSCO that led to a fire-related outage of its Schahfer Units 14 and 15 on July 16, 2020. The Consumer Parties' refund case has two distinct parts: (1) their attempt to interpret NIPSCO's root cause evidence without the benefit of an expert

[2] Abbreviations used herein are those previously defined and used in NIPSCO's Proposed Order filed in this Cause.

[3] IG Exh. 1 at Table 2. NIPSCO acknowledges that this amount would be slightly reduced based upon agreement by the Consumer Parties that "delta LMP" charges should serve as reductions to any potential refunds. However, to the best of NIPSCO's knowledge, the Consumer Parties have not put forward a total refund amount for 2021-2023 that reflects this reduction.

versed in coal-fired generation unit operations and maintenance, and (2) their presentation of a calculation of a proposed 2021 refund amount.[4] With respect to the fire itself, they have resorted to misconstruing (and in some instances outright misrepresenting) the evidence offered by NIPSCO through its expert witnesses. In several instances, they attempt to assign to NIPSCO arguments and positions that NIPSCO did not put forth. And even more tellingly, they repeatedly make assertions *without citation to the record* that are not supported by the record and, in multiple instances, are actually contradicted by the record.

NIPSCO does not take its characterization of the approach employed by the Consumer Parties lightly. As set forth below, instead of adhering to record evidence *as it was presented in context*, they repeatedly take improper liberties which, if uncorrected, would create significant and substantial confusion—and also put NIPSCO at risk of paying more than $167 million in refunds. This must be confronted directly and corrected, as NIPSCO does below.

Regardless, the Consumer Parties' request is not only undermined by a fair review of the record, but even more by the evidence they chose not to provide in this case. The Consumer Parties' position is that NIPSCO was responsible for the July 2020 fire and, thus, when market prices rose in 2021—mostly a year later in

[4] *See* NIPSCO Proposed Order at p. 55.

the summer of 2021 and continuing to year end—NIPSCO's fuel cost recovery must be based on the hypothetical that the units were on-line and available every day in 2021. They make this argument improperly relying upon hindsight review of how the energy market actually performed in 2021 and have not offered any evidence to question the prudence of NIPSCO's retirement decision at the time it was made. Additionally, a large amount of the proposed refund relates to the period of October-December 2021 (*i.e.*, after the units retired).

Reading only the Consumer Parties' case, it might be overlooked that post-fire, from late December of 2020 through September 2021, Unit 15 was in-service and that availability only ended when NIPSCO intentionally retired Unit 15 (together with Unit 14) on October 1, 2021. This highlights the Consumer Parties' decision to essentially ignore how NIPSCO evaluated its generation portfolio after the fire. By January 2021, NIPSCO had the opportunity to bring both Units 14 and 15 back on-line, and those units could be operating today. Given this undisputed fact, NIPSCO presented evidence on how it evaluated its generation fleet post-fire and the basis for its decisions to not bring Unit 14 back on-line; to bring Unit 15 back for 2021 through the peak season and until additional generation came online; and to retire both units on October 1, 2021. Whenever an unplanned outage occurs, a utility must respond. The prudence of that response is as important as the outage event itself, especially here where, after the fire, it has been

demonstrated that customer costs did not increase throughout the remainder of 2020 and, by January 1, 2021, Unit 15 was already back in service. By essentially failing to rebut NIPSCO's evidence related to its resource evaluation and decision-making in early 2021, which is entirely consistent with the uncontroverted evidence that its 2018 IRP had already demonstrated that the continued operation of these units was no longer economic, the Consumer Parties have failed to support their extraordinary request that the Commission find NIPSCO imprudent and thereby disallow the recovery of incurred fuel costs of $40 million for 2021 and, on a forward-looking basis, subject NIPSCO to refunds of up to $167 million.

II. NIPSCO Response.

A. There are important, uncontested facts in this proceeding.

On pages 52-54 of NIPSCO's Proposed Order, NIPSCO outlined many key, uncontested facts. Before NIPSCO substantively responds to the Consumer Parties' arguments, it is helpful to recite some of the record evidence that is not disputed, as it provides context and background for the discussion below. With respect to the overall context of this case, the uncontested facts include, but are not limited to, the following:

- In NIPSCO's 2018 IRP, Units 14 and 15 were identified as uneconomic and as a result were scheduled for retirement no later than May 2023.[5]

[5] Pet. Exh. 1 at p. 4.

- By July of 2020, these two units were less than 3 years from retirement, were dispatching at a far lesser rate than in the past (in particular Unit 14),[6] and NIPSCO was engaged in bringing new renewable projects on line to replace them.[7]

- All record evidence points to the failure of the cooling system associated with the main transformer for Unit 14 as the primary root cause of the fire.

- An alarm indicating an elevated transformer temperature activated and was issued to the CRO responsible for Unit 14 operations at approximately 7:56 a.m. CST—several hours before the fire actually occurred.[8]

- Despite receiving the alarm in a timely manner, the CRO was actively addressing other issues and numerous alarms and failed to address the high temperature alarm.[9]

- Because Unit 14 continued to operate and discharge energy into the transformer, the temperature continued to gradually rise for several hours.[10]

- The transformer's oil eventually reached its boiling point and set off a separate "sudden pressure alarm," which led to Unit 14 tripping off-line at approximately 1:25 p.m. CST.[11]

- Energy continued to be discharged into the transformer as the unit wound down, and an "arc flash" ignited the gaseous oil that was escaping the transformer, which caused the fire in question.[12]

- The fire led to substantial damage to Unit 14, as well as damage to common equipment shared by Units 14 and 15, ultimately leading to unplanned forced outages at both Units 14 and 15.[13]

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6 As reflected in Table in Pet. Exh. 2, Unit 14's EFOR had been increasing and EAF had been decreasing year-over-year since 2017.

7 Pet. Exh. 3 at pp. 7-8.

8 Pet. Exh. 2 at p. 9, lines 11-12.

9 *Id*. at p. 9, line 16 through p. 10, line 2; *see also id*. at Questions / Answers 14-16.

10 *Id*. at Question / Answer 17.

11 *Id*. at Question / Answer 18.

12 *Id*.

13 *Id*. at Question / Answer 19.

- Unit 15 was returned to service in December of 2020 and was utilized to serve customers until it was retired in October of 2021.

There are additional uncontested facts that relate directly to the equipment in question—the Unit 14 main transformer, and the piece of equipment that was identified as the root cause of the fire, its cooling system.[14]

- Maintenance records demonstrate there was no history of problems or concerns with the cooling system for Unit 14's main transformer.[15]

- Records of the temperature for the Unit 14 main transformer in the weeks leading up to the fire indicate no temperature concerns until the morning of July 16, 2020.[16]

- On July 14 *and* 15, 2020—the two days immediately preceding the fire—the transformer's cooling system was visually inspected, found to be operational, and no concerns were identified.[17]

- The Unit 14 CRO on shift on July 16, 2020 was extremely experienced, with more than 37 years working in generation-related roles and more than 17 years as a CRO.[18]

- The high temperate alarm operated properly and timely, notifying the CRO of the elevated transformer temperature.[19]

- In addition to the high temperature alarm, due to weather conditions, Unit 14 was experiencing several additional operational issues that were being

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[14] As further discussed below, the Consumer Parties attempt to conflate the transformer itself and its cooling system. While the transformer itself ultimately overheated, the fire was not caused by a failure *of the transformer*. Instead, *the cooling system failed*, which led to a sequence of events that resulted in the transformer overheating, then resulting in the fire at issue.

[15] Pet. Exh. 2 at Question / Answer 25; *see also* Pet. Exh. 2-R at Question / Answer 24.

[16] Pet. Exh. 2 at Question / Answer 25, including Att. 2-B.

[17] Inspection rounds sheets for these days included a review of the "14 Main Power Transformer" and indicated "All Cooling Fans [and Oil Pumps] in Service." Pet. Exh. 2-R, Att. 2-R-C at pp. 39, 61.

[18] Pet. Exh. 2 at Question / Answer 13.

[19] *Id*. at Questions / Answers 14-15; *see also* Pet. Exh. 2-R at p. 20, lines 9-11, where Mr. Sangster explained "in interviews with the Unit 14 CRO, he clearly stated that, at 07:56 on July 16, 2020, he was aware of the high temperature alarm on the Unit 14 Main Transformer."

actively managed by the CRO and other plant personnel, which resulted in hundreds of alarms being issued to the CRO.[20]

- The CRO had been trained to address situations such as this by either dispatching a Station Operator to inspect the transformer and its cooling system or by informing a supervisor of the alarm and potential issue.[21]
- The CRO was the only person aware of the alarm until after the fire occurred.[22]
- The sudden pressure alarm also operated properly and timely.[23]
- NIPSCO's root cause analysis (and all evidence in the record) indicates a failure of *the cooling system* for Unit 14's main transformer was the root cause of the fire.[24]

With this background, NIPSCO addresses the substantive arguments raised by the Consumer Parties.

B. The Consumer Parties' argument that the fire caused Units 14 and 15 to retire in October of 2021 is illogical and based upon application of irrelevant case law.

Before addressing some of the issues regarding the Consumer Parties' characterization of record evidence, NIPSCO first discusses a key portion of this case—the Consumer Parties' attempt to evade the post-fire CRA analysis and NIPSCO decision-making and argue the fire directly caused Units 14 and 15 to

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20 Pet. Exh. 2 at Question / Answer 12. This is a key fact that is ignored by the Consumer Parties, as further discussed below.

21 *Id*. at Question / Answer 15.

22 *Id*. at Question / Answer 16.

23 *Id*. at Question / Answer 18.

24 *Id*. at Question / Answer 24. This was the conclusion of NIPSCO's official RCA, included at MPG-4 (*see* p. 6) and the earlier analysis that looked at the Unit 14 main transformer, included as Confidential Att. MPG-7 (*see* p. 4).

retire on October 1, 2021.[25] In multiple instances,[26] the Consumer Parties repeat their allegation that the fire at Unit 14 caused (a) Units 14 and 15 retiring in October of 2021 *and* (b) the alleged harm that occurred after the retirement decision was made in early 2021. That is, despite the retirements occurring more than a year after the fire, Unit 15 returning to service in 2020, and CRA's analysis and NIPSCO's generation planning decision, they argue "the fire [] caused the forced outages *and premature retirements*" (Brief at p. 37, emphasis added). They continue their line of argument saying that NIPSCO's post-fire decisions do not supersede the causal connection between the *unplanned* outage (fire) and the harm to customers.[27]

If you remove their unsupported and illogical argument, then their entire case falls apart. The only way they can successfully get to the point of potential refunds (of any amount whatsoever) is by wholly ignoring the CRA analysis and NIPSCO decision-making process that relied on that analysis. This is because they do not allege any harm or FAC impact in the months immediately following the

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[25] NIPSCO substantively discusses the prudence of its retirement decision in Section II.C.1.a below.

[26] In addition to page 37 of their Brief, the same argument is made on page 58 of the Proposed Order and page 2 of the Brief.

[27] Consumer Parties' Brief at pp. 17-23.

fire in July of 2020; instead, all refund amounts they seek are for periods following NIPSCO's portfolio decision and after Unit 15 had returned to service in late 2020.

This argument is a stretch even with respect to Unit 14, and it is not logically or legally correct. But it is hard to explain the leap in logic it takes to make this argument for Unit 15, because it had returned to service for more than 9 months. The key language that supports NIPSCO on this issue is included on page 52 of NIPSCO's Proposed Order. Therein, NIPSCO explained that the only period where the outages can be defined as "unplanned" would be before NIPSCO engaged in independent decision-making about the future disposition of the units in late 2020 and/or early 2021. Any "unplanned" outage for Unit 15 unquestionably ended in December of 2020, when that unit was brought back online. And the outage for Unit 14 ceased to continue to be "unplanned" around the same time, when NIPSCO made the decision to allow it to remain in forced outage and ultimately retire that unit rather than bring it back on line.[28]

Beyond the fact that NIPSCO was undeniably engaged in evaluation of the most appropriate retirement date *before the fire occurred*,[29] it was not the fire that

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[28] It continued to be a *forced* outage, but it ceased to be an *unplanned* outage.

[29] Pet. Exh. 1-R at Question / Answer 11. This point is conceded, but given short shrift by, the Consumer Parties because "[a]t no point prior to the fire did NIPSCO indicate in any regulatory filing or other public announcement any change to the planned retirement of Units 14 and 15 at the end of May of 2023"; *see* Consumer Parties' Brief at p. 18.

inevitably caused these units to retire approximately 15 months later, nor did the fire cause NIPSCO to incur excessive FAC charges. Instead, it was NIPSCO's reasonable and prudent resource planning decision that led to the conclusion that retirement was in the best interests of its customers, and as this decision played out over late and through 2021, there were some unrelated changes in the MISO energy market. The attempts by the Consumer Parties to claim otherwise by relying on negligence case law and the "doctrine of superseding cause" are unavailing.[30] The decision not to offer any evidence challenging the reasonableness of the retirement decision and to simply bypass it (as if it did not occur) and then argue the retirements in October of 2021 were "caused by the fire" and that the fire "result[ed] in . . . the unavailability of Unit 15 from the October 2021 retirement date through the planned May 2023 retirement"[31] requires a leap in logic and ignores intervening, prudent, independent action by NIPSCO following the fire.

The case law cited to by the Consumer Parties[32] provides no support for their position either. First, they interject a legal doctrine that relies on *two negligent actors*—the original negligent act by a party that is then followed by a subsequent

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30 *Id*. at pp. 18-20.

31 *Id*. at p. 2.

32 *Paragon Family Restaurant v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003); *Cook v. Ford Motor Co.*, 913 N.E.2d 311, 329 (Ind. App. 2009), *transfer denied*, 929 N.E.2d 785 (Ind. 2010). These cases were cited and discussed in their Brief at pp. 18-20 and Proposed Order at pp. 57-59.

negligent act of another party leading to the incurrence of damages. According to this tort doctrine, the original actor is not the proximate cause if the intervening or superseding act breaks the chain of causation. The original actor is only excused of proximate cause if it could not have reasonably foreseen the ultimate harm. The distinction of such precedent and the instant case is obvious. Assuming arguendo that NIPSCO was found negligent and to be the cause of the fire, NIPSCO is not arguing that a subsequent negligent act by a third party should relieve it of responsibility for economic harm to customers. The doctrine is completely inapposite here.

Moreover, the doctrine only applies when both negligent acts occur before the "event" occurs—in this case, it would be before the fire. The intervening nature is that *before the injury to the person* (here Units 14 and 15) another, separate negligent act occurs that breaks the causal chain. For example, if the CRO failed to act on the cooling alarm and the transformer was about to overheat, but then a contractor drove a truck into the transformer and the already-overheated transformer caught on fire, NIPSCO would argue that NIPSCO was not the proximate cause of the fire due to the trucker's intervening negligent act, and opposing parties would argue the fire was going to occur whether or not the contractor was negligent. Clearly this doctrine has no bearing on how a party

intentionally and reasonably acted *after* the occurrence of a fire to address the risk of the incident at issue months after it occurred.

As to whether NIPSCO could reasonably foresee the alleged harm that units on unplanned outage might mean for customer fuel costs, the point is, NIPSCO did consider that risk and *took affirmative action to determine whether and how to protect customers from that risk*. NIPSCO hired its IRP expert that had modeled the economics of these units in 2018 to come back in 2020 post-fire and update the modeling to consider the most appropriate course of action at this point in time. The Consumer Parties may have been able to argue that, *before* Unit 15 was brought back into service and Unit 14 could have been brought back, any harm to customers in terms of FAC costs was caused by the unplanned outages from the fire—for the period of July 16 through late 2020. However, the fact that no harm occurred during this period has been proven in the record, and is further demonstrated by the fact the Consumer Parties did not argue refunds were due for this period.

The period during which the Consumer Parties argue refunds should be due begins in 2021, more than six months after the fire, and after NIPSCO intentionally undertook analysis designed to address the cost and risk of having the units available versus other alternatives. The point is, as shown by the CRA

analysis and the decision to bring back Unit 15, the availability of the units in 2021 was no longer driven by the fire, but, instead, was based on an intentional IRP-type analysis conducted by NIPSCO. This is not (as the Consumer Parties seem to assert) some negligent intervening act; rather, it is an analytical response to the fire and the exercise of reasoned judgement about how to operate a utility based on all circumstances related to the units in question—such as operating history, costs, other resource options, hedging strategy, expectations for the MISO market, etc. Any potential causal chain was broken because NIPSCO used the time after the fire to analyze possible consequences, assess resources from a reliability and cost perspective, and arrive at a well-planned decision on the future of each unit.

In light of their deliberate decision to not even attempt to overcome the weight of the evidence associated with the CRA analysis and NIPSCO's retirement decision, the Consumer Parties ineffectively resorted to twisting negligence theories to try to overcome this failure. Given they were aging units already determined to be uneconomic in the 2018 IRP, it was not only natural, but necessary, that NIPSCO assess their future following the fire. Furthermore, NIPSCO had already begun re-evaluation of the units in the summer of 2020, because its expeditious execution of the 2018 IRP's Short-Term Action Plan put NIPSCO in a position to do so.

The Consumer Parties could have argued that NIPSCO caused the fire and then proceeded to make the wrong decision about the duration of operating Unit 15 and the decision to not restore Unit 14 by relying on flawed analysis. But they refused to take on that analysis by CRA, likely understanding it was consistent with the 2018 IRP's earlier conclusion on economics, it was thorough, and it led to NIPSCO bringing Unit 15 back in service through the peak season of 2021. Instead, Consumer Parties jump from the July 2020 fire, to a rise in market prices essentially in mid-2021 (and for Unit 15, after October 1—over a year after the fire), and now ask the Commission to just ignore what NIPSCO did after the fire. And what is the support they offer? A misapplied tort law theory set forth in cases regarding bar fights and vehicular accidents.

To justify a finding of utility imprudence related to fuel costs incurred in 2021, the Consumer Parties must be required to do more than point to an unplanned outage in July of 2020. They must fully address NIPSCO's actions that encompass its resource planning and decision-making that drove whether to operate these units in 2021, and for how long. The record shows the Consumer Parties refused to challenge that analysis. Their failure is particularly compelling given much of their calculated refund occurs from October-December 2021 (and thereafter), representing the period after NIPSCO intentionally retired both units. The fire cannot be the basis for arguing for a refund for the period after Unit 15

actually operated for 9 months (and Unit 14 could have been operated). Having made that decision to only focus on the events leading to the fire, they cannot hide behind some inapplicable tort doctrine in an effort to ignore key facts that are at the heart of the necessary review of prudence in this case.

C. The Consumer Parties attempt to distract from their lackluster case by ignoring important record evidence and repeatedly misconstruing and misrepresenting record evidence.

1. Important record evidence was ignored by the Consumer Parties.

a. The prudence of NIPSCO's assessment of the future operation of the units has been ignored.[33]

The most important record evidence that was almost wholly ignored by the Consumer Parties is the resource planning analysis that was undertaken by CRA following the fire and NIPSCO's decision-making process based upon that analysis. NIPSCO offered direct and rebuttal testimony from Mr. Augustine—the CRA Vice President who oversaw the resource planning analysis for NIPSCO under its 2018 IRP and the additional analysis following the fire at Unit 14—fully explaining the analysis and its results.[34] Likewise, Mr. Talbot—a NIPSCO executive with direct oversight for NIPSCO's electric generation operations—

[33] The importance of this evidence is discussed in the section immediately above.

[34] While Mr. Gorman did briefly address the 2018 IRP and offer a criticism of the market pricing assumptions in the CRA analysis performed in 2020, there was no substantive discussion or criticism of CRA's analysis in Mr. Gorman's or Mr. Eckert's testimony.

offered both direct and rebuttal testimony supporting NIPSCO's reasoned and prudent decision to return Unit 15 to service in late 2020, allow Unit 14 to remain in outage, and retire both units in October of 2021. It is hard to fathom that this would not be discussed by the Consumer Parties, but that is what happened.[35]

Although they have the right to prosecute their case as they see fit, their decision to disregard this important evidence speaks to the strength of CRA's analysis and NIPSCO's retirement decisions in reliance thereon. Notably, it also means that the record on which the Commission must base its decision contains only evidence supporting the prudency of CRA analysis *and* NIPSCO's generation resource decision—including returning only Unit 15 to service, allowing Unit 14 to remain in outage, and ultimately retiring both units on October 1, 2021. As further discussed above, this is crucial, as the Consumer Parties attempt to bypass this evidence by arguing that the fire caused these units to retire—and do so by ignoring the intervening and reasoned analysis NIPSCO undertook following the fire and upon which the retirement decision was based.

[35] The only references to Mr. Talbot's testimony (Pet. Exh. 1) included in Mr. Eckert's or Mr. Gorman's testimony occur on page 2 and pages 3-4, respectively, and only relate to the expected retirement date for the Schahfer Station. From review of both pieces of testimony, there does not appear to be any substantive discussion or criticism of NIPSCO's decision-making process that led to the retirement decision.

b. NIPSCO executed its 2018 IRP Short-Term Action Plan which enabled it to maintain reliability and retire the units in October of 2021.

NIPSCO's 2018 IRP had identified six transmission upgrades that were necessary to ensure reliable operations following the retirement of *the entire Schafer Generating Station*, but the four transmission upgrades necessary for reliable operations *when Units 14 and 15 were set to retire* had already been completed well before Units 14 and 15 retired. Based upon a reading of the Consumer Parties' Brief and Proposed Order, the Commission would not be aware of this crucial distinction and would be left to wonder if NIPSCO proceeded with the retirements despite reliability concerns, because it is not mentioned. Quite to the contrary of reality, their discussion of necessary transmission upgrades would actually lead the Commission to believe that NIPSCO plowed ahead with retiring Units 14 and 15 when required transmission upgrades had not been completed and reliability concerns had not been addressed.[36] The Consumer Parties' Brief (at p. 19) says, "Moreover, as of NIPSCO's August 2021 testimonial filing in this case, more than a year after the fire, only four of the six identified transmission upgrades had been completed." This may be *technically* true, but the intentional failure to distinguish between the upgrades needed for the entire Schahfer Station to retire and those

[36] NIPSCO does not repeat a discussion of this issue in the section below addressing misleading statements or arguments by the Consumer Parties, but it is yet another example of the prevalence of this problem.

needed for Units 14 and 15 to retire is, at best, deceptive. NIPSCO was crystal clear in its direct testimony (filed in August of 2021—the date cited by the Consumer Parties) that "*all upgrades required to retire only Units 14 and 15 have been completed*, and this provided NIPSCO with greater flexibility when deciding whether and to what extent it should return Units 14 and 15 to service."[37] And no party alleged there were any reliability concerns at the time of or subsequent to the October 2021 retirements—another fact left out by the Consumer Parties.

c. NIPSCO's retirement decision was made only after assuring its energy requirements would be met, consistent with an appropriate level of market purchases, and it had an appropriate Hedging Plan in place.

Although the Consumer Parties spent some time discussing the potential value of Units 14 and 15 as "physical [energy] hedges" (Proposed Order at pp. 59 and 61), they generally disregard two facts that have direct relevance to the proposed "hedging value" of the units in the energy market following retirement. First, the level of energy purchases in late 2020 and through 2021 was not higher than usual. In fact, as discussed in Mr. Campbell's rebuttal testimony, the volumes of MISO purchases *during each month between January and November of 2021* were actually well below historical levels—even below purchases in 2020 when COVID

[37] Pet. Exh. 3 at p. 10, lines 5-8 (emphasis added).

and the broader pandemic drove down energy needs.[38] In fairness, there is a passing reference to this fact on page 21 of the Consumer Parties' Brief.[39] But, the request for more than $40 million in refunds in 2021 and the general tenor of the Consumer Parties' pleadings would leave the impression that NIPSCO was extremely exposed to the MISO market and incurred inordinate volumes of high-priced purchases. Clearly, this was not and is not the case.

Secondly, NIPSCO sought and received approval from the Commission for an updated Hedging Plan, which was implemented on July 1, 2021 to protect customers from market volatility.[40] This was more than a year following the fire and several months after NIPSCO's retirement decision was made in early 2021. At the risk of redundancy, the revised Hedging Plan—which was presented to the Consumer Parties before filing, filed with the Commission, not objected to in any way by the Consumer Parties, and approved by the Commission–was also ignored. This evidence bears directly on the reasonableness of NIPSCO's post-fire actions and demonstrates that NIPSCO was not overly-exposed to market volatility in 2021, as Unit 15 was back in service, renewable generation had been

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38 Pet. Exh. 3-R at pp. 10-11 and Figure 1.

39 "NIPSCO defends its practice of relying on MISO market energy purchases as an element of its resource mix (see NIPSCO Ex. 3-R at 9-12)[.]"

40 NIPSCO also made appropriate adjustments to its hedging practices from July 16, 2020 through June 30, 2021 to account for its current resource mix. However, based on predetermined FAC filing cycles, the updated Hedging Plan was not approved until FAC-130.

brought online, and as of July 1, 2021 (*i.e.*, prior to the most significant MISO energy market price spikes)[41] NIPSCO was operating under a revised Hedging Plan that was based upon the generation that would be available—including planned retirements in October of 2021.

Additionally, as Mr. Campbell pointed out in rebuttal, some level of reliance on the MISO market to serve customers' energy needs is part of an appropriate, balanced portfolio.[42] NIPSCO is unaware of any indication from the Commission that it is inappropriate to utilize the competitive wholesale markets to serve customers, as evidenced by the fact that all vertically integrated electric utilities in Indiana are members of either MISO or PJM Interconnection LLC. The consistent practice of using available wholesale market energy as part of a balanced portfolio has served NIPSCO's customers well over time,[43] and when

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41 *See also* IG Exh. 1 at Confidential Attachment MPG-12, which contains a column for MISO "Market Price" showing a price spike in February of 2021, and then consistent increases beginning in June or July of 2021.

42 Pet. Exh. 3-R at pp. 9-12.

43 *Id*., where Mr. Campbell testified:

> Market purchases have a place within NIPSCO's diversified resource portfolio. RTOs were created to provide more efficient transmission investment and improved reliability, as well as access to a broader market to support economic energy purchases. Purchases from the market have also served as an economic benefit to customers since MISO's inception as a means of allowing customers to access lower-cost energy. For years, NIPSCO has benefited from this broader market access through MISO, and, while any market will experience periodic volatility, leveraging the ability to purchase some portion of NIPSCO's energy requirements from the wholesale market remains a viable, useful resource alternative. *Id*. at p. 12, lines 1-10.

planned to be a relatively small part of energy requirements, as here, doing so is reasonable. Again, the Consumer Parties do not come out and challenge the prudence of NIPSCO's Hedging Plan or NIPSCO's planned level of limited market purchases. Instead, they simply say that FAC costs went up when market prices increased, which was after the fire at Unit 14. Then, without proving causation, they imply this correlation is sufficient to demonstrate the FAC costs are attributable to the fire.

Furthermore, the Consumer Parties' refund request is founded upon after-the-fact review and second-guessing of NIPSCO's retirement decision. As explained in NIPSCO's Proposed Order (at pp. 51-52, 59-60), the Commission has repeatedly held that the prudence of an electric utility's actions and decisions is not judged with twenty-twenty hindsight; instead, review of such decisions focuses on the time it was made and information available at that time.[44] Without offering any evidence that NIPSCO's early 2021 retirement decision was unreasonable or imprudent, the Consumer Parties attempt to use this subdocket as a means to hold NIPSCO responsible for rising energy market costs and/or FAC

[44] *Northern Ind. Pub. Serv. Co.,* Cause No. 44340 FMCA 12 (IURC 1/29/2020), p. 12, 2020 WL 529286; *see also Northern Ind. Pub. Serv. Co.,* Cause No. 43849 (IURC 7/13/2011), p. 11; *Indiana Gas Co.,* Cause No. 37394 GCA 54 (IURC 5/28/1997); *Duke Energy Indiana, Inc.,* 38707 FAC 123 S1 (IURC March 17, 2021).

factors. This is classic hindsight review, which the Commission has repeatedly and consistently held is improper.

d. The failure of the cooling system caused the transformer fire, and all record evidence demonstrates NIPSCO properly maintained and operated that cooling system.

Another key subject that is ignored by the Consumer Parties is that all record evidence demonstrates that the cooling system that failed and was the root cause of the fire was operating properly until the morning of July 16, 2020. As noted in the list of uncontested facts above, (1) NIPSCO's maintenance records demonstrate there was no history of problems with the cooling system for Unit 14's main transformer;[45] (2) temperature records for the transformer in the weeks leading up to the fire show no temperature concerns until the morning of July 16, 2020;[46] and (3) on each of the two days immediately preceding the fire, the cooling system was visually inspected, found to be operational, and no concerns were identified.[47]

Not only were these facts about the cooling system disregarded by the Consumer Parties, but they also attempted to create the exact opposite impression

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45 Pet. Exh. 2 at Question / Answer 25; *see also* Pet. Exh. 2-R at Question / Answer 24.

46 Pet. Exh. 2 at Question / Answer 25, including Att. 2-B.

47 Inspection rounds sheets for these days included a review of the "14 Main Power Transformer" and indicated "All Cooling Fans [and Oil Pumps] in Service." Pet. Exh. 2-R, Att. 2-R-C at pp. 39, 61.

by conflating discussions of and facts related to the transformer versus the transformer's cooling system. This is best evidenced on pages 56-57 of the Consumer Parties' Proposed Order. For example, on page 56, they state: "NIPSCO describes the transformer failure as an 'unexpected' event. *See* NIPSCO Proposed Order at 56, 57. NIPSCO admittedly knew, however, that the transformer was operating in a condition indicating 'extreme fault gas production' with a 'High hazard factor,' and knew that 'Continued operation could result in transformer failure.' *See* IG Ex. 1, Att. MPG-7."[48]

This is not only incorrect; it also a misrepresentation of what "NIPSCO admitted[]" and what is reflected in the record. On page 57 of NIPSCO's Proposed Order (the portion cited to above), NIPSCO said, "The *cooling fans* for the transformer in question had been operating properly and *unexpectedly failed*, as older equipment sometimes does." (Emphasis added.) Likewise, on page 56 of NIPSCO's Proposed Order, NIPSCO was again speaking about the cooling system when it stated: "That is to say, no evidence was offered to question the prudence of NIPSCO's operations and maintenance *of the cooling system*. Rather, it appears that *this piece of equipment unexpectedly failed to operate* on July 16." In contrast, in

[48] The context of this discussion in the Consumer Parties' Proposed Order is taking the dissolved gas (or DGA) issue that had existed for many years and NIPSCO was monitoring and trying to obscure the fact that the cooling system for the transformer was what failed and was the fire's root cause—not the transformer itself, and not any dissolved gas issue.

other places, NIPSCO did discuss historical dissolved gas issues related to *the Unit 14 main transformer* and actions it had taken in response. This is not a benign error. It is an attribution to NIPSCO of something NIPSCO did not say, and it relates *directly* to one of the essential issues in this case—NIPSCO's prudency with respect to operating and maintaining the equipment in question.

This gives a flavor for what is consistently done in the Consumer Parties' post-hearing filings, and this instance is indicative of broader concerns NIPSCO has, as discussed throughout this Reply Brief.

2. NIPSCO offered ample record evidence about the fire's root cause, and the Consumer Parties' attempt to reinterpret and misconstrue this evidence is unavailing.

NIPSCO offered extensive evidence about the cause of the fire and its root cause investigation. The Consumer Parties offered no investigation or analysis of their own and, instead, attempt to re-interpret NIPSCO's evidence to fit their version of the case. Importantly, however, neither the OUCC nor the Industrial Group offered testimony from any witness with particular expertise in generation facilities or their related transmission equipment. This sub-docket was created by Commission order on April 28, 2021, and their testimony was filed on November 12, 2021—meaning the parties had ample time to find and retain a qualified expert. But they chose not to.

NIPSCO, on the other hand, offered testimony from not just "an" expert but "the" expert on this issue—Mr. Sangster, who has decades of experience with NIPSCO's generation systems and related equipment and who oversaw the root cause investigation for the fire. As discussed more fully in NIPSCO's Proposed Order (at p. 55), when the Commission is tasked with weighing evidence that is offered and the implications of such evidence, it is essential that the Commission consider the expertise of the witness sponsoring evidence and advancing arguments, and weigh evidence accordingly.[49]

The best example of this concern is the discussion of the dissolved gas analysis (or "DGA") related to the Unit 14 main transformer, which occurs at pages 55-56 of the Consumer Parties' Proposed Order and pages 8-12 and 16 of their Brief. The Consumer Parties discuss the DGA related to the transformer and leave the (mis)impression that (a) this transformer developed a new and troubling problem in April of 2020, (b) NIPSCO did nothing in response to an exigent problem, and (c) the dissolved gas issue caused or contributed to the fire. Each of these impressions is incorrect.

[49] *See Ind. Mich. Power Co.*, Final Order in Cause No. 39314 at p. 105 (Nov. 12, 1993), where the Commission stated that "[i]n weighing the evidence, we will consider the credibility, knowledge and expertise of the respective witnesses[.]"

Through Mr. Sangster, NIPSCO offered testimony the dissolved gas levels in the Unit 14 main transformer had been elevated for many years. Record evidence also demonstrates NIPSCO included this transformer on its "transformer watch list" and was sampling its oil on a more-frequent-than-usual basis.[50] Most importantly, Mr. Sangster satisfactorily explained that the dissolved gas levels were not a contributing factor to the fire given that such gas levels had no impact on the failure of the cooling system or even the ultimate overheating of the oil.[51] Furthermore, while there were passing references to and/or discussions of dissolved gas and oil quality, NIPSCO's root cause analysis[52] determined that the failure of the cooling system was the root cause of the fire. Therefore, to claim that "NIPSCO's internal fire investigation clearly treated [the dissolved gas issue] as a significant factor" and that "NIPSCO's internal assessment of the fire concluded that the excessive levels of dissolved gases in the cooling oil had a material bearing on the fire"[53] are flatly wrong and belied by the record in this proceeding.

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50 Pet. Exh. 2-R, Att. 2-R-D.

51 *See id*.; *see also* Pet. Exh. 2-R at Question / Answer 19, where Mr. Sangster explains why this is the case and concludes that "the dissolved gas levels of the oil within the Transformer had nothing to do with the Transformer fire."

52 This was the conclusion of NIPSCO's official RCA, included at Att. MPG-4 (*see* p. 6) and the earlier analysis that looked at the Unit 14 main transformer, included as Confidential Att. MPG-7 (*see* p. 4).

53 Consumer Parties' Proposed Order at p. 56.

Considering the expertise of the witnesses offering testimony and relevant Commission precedent, NIPSCO's discussion and interpretation of key pieces of evidence should be accorded much more weight than that of Mr. Gorman—a witness with no identified expertise in this area.

3. Several discussions and descriptions of record evidence offered by the Consumer Parties are misleading and/or contrary to the record.

In addition to the issues identified above, there are many more instances where the claims about or interpretations of record evidence offered by the Consumer Parties would confuse or mislead the Commission if not corrected. Below, NIPSCO provides examples of significant "liberties" that have been taken with the record.

Page 56 of the Consumer Parties' Proposed Order includes a finding that "the fact the CRO was working the second half of back-to-back 12-hour shifts at the time the high temperature alarm was disregarded was a contributing factor in the events leading to the fire." The surrounding discussion in their Proposed Order leaves a false impression as there is no evidence that the CRO working back-to-back shifts was a contributing factor to the fire. Quite the opposite. There is evidence that the CRO was extremely experienced and that CROs regularly

worked back-to-back shifts like this one,[54] demonstrating this was someone who was fully capable of working the schedule that he did. And there is evidence that the CRO saw the alarm, acknowledged the alarm, was monitoring the alarm, and prioritized and was actively mitigating other ongoing operational issues.[55] It is one thing to fault the CRO for making the wrong judgment call about what was the priority or failing to follow procedure. It is quite another to lead the Commission to believe that the CRO was not doing anything with the unit or addressing any issues/concerns for more than 5 hours and was (quite literally) falling asleep at the control board.

Later, on page 57 of the Proposed Order, the Consumer Parties discuss the transformer and its cooling system and conclude that "[t]he Commission will not assume that routine checks and walk-downs were actually being completed in the absence of proper records." They make this claim in the face of evidence that the precise system that failed (the cooling system) was inspected in the days before and found to be functioning properly.

Additionally, on page 33 of their Brief, the Consumer Parties state "NIPSCO's massive accumulated capital investment in Units 14 and 15 and the

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54 Pet. Exh. 2-R at pp. 19-20.

55 *See* NIPSCO's discussion of uncontested fact above.

related operating expenses are still embedded in NIPSCO's base rates and continue to be paid for by ratepayers, even though those units are unexpectedly no longer providing service and NIPSCO is no longer operating them." On the one hand, this is *technically* true, but it is undeniably misleading. For the period after October 1, 2021 when the units retired, there is a "revenue credit" under the terms of a settlement agreement in Cause No. 45159 under which NIPSCO is required to provide a credit to customers associated with the retirement of Units 14 and 15. The revenue credit to customers has been filed by NIPSCO to addresses *the exact thing* the Consumer Parties complain about. So new, lower rates reflecting the removal of Units 14 and 15 are not yet in effect, but NIPSCO has taken steps to address this. Of course, from the Consumer Parties' post-hearing filings, this would not be known.[56]

These, however, are not the most troubling of the examples. Beyond what is cited immediately above, there are several examples of incorrect statements made by the Consumer Parties. First, they claim on page 28 of their Brief that "during the five-year historical period before the fire, Units 14 and 15 were utilized *solely for system support and reliability purposes and were not economically dispatched* to

[56] There is a similar issue related to the Consumer Parties incorrect claim that NIPSCO cited to certain facts and claims they should be "offsets" to potential refund amounts. This is addressed in a separate section below on the appropriate refund amount.

achieve energy savings."[57] (Emphasis added.) This is contradicted by the Industrial Group's own evidence, as Mr. Gorman (IG Exh. 1 at p. 23, line 19) testified under oath that "these units [Units 14 and 15] were seldom dispatched for economic purposes" during the period of 2015-2019—showing that he knew and acknowledged there were some periods in the last several years before the fire that these units were, in fact, dispatched for economic purposes. Mr. Sangster similarly offered testimony that, while it was the exception and not the norm, Units 14 and 15 were sometimes economically dispatched by MISO,[58] and Mr. Campbell explained NIPSCO's dispatch and offer strategy, which historically included both a must-run and economic offer component.[59] This has a significant implication on the case, as the Consumer Parties use this repeated and incorrect assertion to support utilizing the "high end" range of Mr. Gorman's refund proposal, *which would double the amount of refunds* NIPSCO would be required to pay.[60]

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[57] A materially similar (incorrect) statement is also made on page 31, where they claim "hence the status in the latter half of 2020 was that NIPSCO was running its coal units *solely for system reliability purposes*." (Emphasis added.)

[58] Pet. Exh. 2 at p. 5.

[59] *See* Pet. Exh. 3 at pp. 11-14, which is confidential testimony from Mr. Campbell explaining NIPSCO's offer strategy.

[60] For sake of clarity, NIPSCO's position is that the historical dispatch hours are much more representative of how the units may have operated in 2021, because the units were historically dispatched for both reliability and, when market pricing was high enough, for economic purposes as well. Therefore, the "low end" assumption of generation output is much more representative of potential 2021 operations than the "high end," especially since NIPSCO incurred significantly lower volumes of MISO market purchases in each month in 2021.

Similarly, on page 24 of their Brief, they discuss implications of the fire and allege as follows: "That lost ability, due to the fire, to utilize Units 14 and 15 as physical hedges – their unavailability for economic dispatch – *has resulted in incrementally greater purchases in the more expensive MISO market*, thereby increasing NIPSCO's fuel costs." (Emphasis added.) As discussed in more detail above, the allegation that NIPSCO has incurred "incrementally greater purchases" in the MISO market is demonstrably false. Record evidence unequivocally shows NIPSCO purchased a lower (not greater) volume of energy from MISO in 2021 than in recent years.[61]

Further, on page 26 of their Brief, the Consumer Parties state: "According to NIPSCO, the energy market is too complicated to compute the economic repercussions with precision, therefore the financial burden caused by utility imprudence must be borne by ratepayers instead of itself."[62] Tellingly, there is no cite to the record to support the allegation that this was said by NIPSCO. This is a straw man of their own creation, as NIPSCO made no such claim. NIPSCO stated an uncontroverted fact—it is impossible to recreate the market and attempting to do so is definitively speculative. But NIPSCO never said or implied "and for this

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61 Pet. Exh. 3-R at pp. 10-11 and Figure 1.

62 Similar, although less egregious, language appears in the first full paragraph of page 60 of their Proposed Order.

reason, no refund is due—it would just be too hard to calculate." Instead, NIPSCO utilized the facts and record in this case to *demonstrate and prove* any refund here is actually inappropriate.[63]

The final such instance that NIPSCO will discuss is an allegation that "[t]he fire left NIPSCO with 900 MW of Schahfer capacity unavailable *when that market risk became manifest with a sharp increase in MISO prices in 2021*."[64] When reviewing the record, however, it is undisputed that Unit 15 was available from late 2020 through October 1, 2021. This begs the question: when was there a "sharp increase in MISO prices"? Mr. Gorman answers this himself in his direct testimony (at p. 25, lines 18-9), when he testified that "particularly *since early 2021*, MISO market energy prices have increased dramatically." (Emphasis added.)[65] Thus, despite offering testimony that MISO market prices spiked in "early 2021," and with full knowledge that Unit 15 was available beginning in December of 2020 and did not retire until October 1, 2021, the Consumer Parties claim that "900 MW of Schahfer capacity was unavailable" to mitigate potential market volatility "when that market risk became manifest with a sharp increase in MISO prices in 2021."[66] This

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63 *See*, *e.g.*, Alternative Section at p. 2 (last full paragraph); *see also*, NIPSCO's summary of Mr. Campbell's direct testimony contained on page 15 of NIPSCO's Proposed Order.

64 Consumer Parties' Brief at p. 26 (emphasis added).

65 NIPSCO notes that price spikes in the MISO market were seen in February of 2021 and in the hottest summer months of 2021.

66 Consumer Parties' Brief at p. 26 (emphasis added).

is an attempt to over-state NIPSCO's market exposure during 2021—which is consistent with the other facts they ignore, including the lower level of MISO market purchases in 2021 and the availability of a revised Hedging Plan after July 1, 2021.

Were any one of these statements or allegations made in isolation, one may excuse it as accidental. That, clearly, is not the case. While the Consumer Parties assert a negative inference should be drawn based upon allegations NIPSCO's root cause report in FAC-129 was "deficient,"[67] the foregoing discussions demonstrate that it is not NIPSCO, but the Consumer Parties, who are "obscur[ing] material factors"[68] and facts before the Commission.

D. NIPSCO's proposed adjustments and offsets to potential refunds are appropriate.

In Section 6 of NIPSCO's Proposed Order, NIPSCO fully explained and justified why refunds should not be required based on the record of this proceeding. However, in the event the Commission were to find otherwise and require refunds, NIPSCO also submitted an "Alternative Section Regarding Amount of Refunds" ("Alternative Section") that explains NIPSCO's position

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[67] "NIPSCO's lack of candor warrants negative inferences concerning NIPSCO's degree of fault in the circumstances and events leading to the fire." Consumer Parties' Proposed Order at p. 57. NIPSCO responded to this issue in in Mr. Sangster's rebuttal (Pet. Exh. 2-R at pp. 21-22), and this was summarized in NIPSCO's Proposed Order at p. 38.

[68] Consumer Parties' Proposed Order at p. 57.

regarding the amount of any such refunds. While this section fully outlines NIPSCO's position and justification for its proposed refund amounts, NIPSCO also takes an opportunity to directly respond to the Consumer Parties' arguments about the appropriate amount of refunds.

NIPSCO begins by noting, consistent with the theme emphasized above, that the Consumer Parties have not correctly or fairly described NIPSCO's position on refunds. Specifically, on pages 61-62 of their Proposed Order and pages 32-36 of the Brief, the Consumer Parties say four different factors were proposed by NIPSCO as "potential offsets or credits" when NIPSCO only proposed the first of the four as an offset.[69] However, the second, third, and fourth—avoided capital investment in the retired units, NIPSCO covering the cost of replacement capacity, and the revenue credit reducing base rates—were clearly only referred to generally as factors to consider when calculating refunds and to support the "low end" assumption.[70] NIPSCO *did* propose amounts associated with periods in late 2020

[69] There are three places on pages 61-62 of the Proposed Order where they say "the projected capital investment suggested by NIPSCO is not a reasonable or appropriate **offset** to the FAC refunds at issue here"; "NIPSCO's voluntary commitment is not a valid **offset**"; and "the revenue credit is not a reasonable or appropriate **offset**" (emphasis added).

[70] Alternative Section at p. 1 ("NIPSCO also pointed out that, to the extent refunds are considered by the Commission, it should take into the account the multi-million-dollar capacity coverage NIPSCO is providing for the loss of Units 14 and 15"); p. 5 ("Furthermore, and especially in light of the additional capacity and avoided capital costs that are not accounted for in the refunds amounts discussed above, we further find that using the 'low end' capacity factor assumptions and offsetting any potential customer gains in 2021 with potential customer losses in 2020 are both appropriate as well.")

where MISO market prices exceeded the cost to operate Units 14 and 15 as "offsets" to any potential refunds. However, NIPSCO clearly did not propose the other items listed here as dollar-for-dollar "refund offsets." In its Proposed Order, NIPSCO likewise discussed these items as factors bearing relevance on the ultimate refund amount.[71] Tellingly, the Consumer Parties do not argue that these are not relevant to the Commission's consideration of appropriate refunds—because these factors are all clearly relevant to whether and to what extent NIPSCO's customers were negatively impacted by the fire at Unit 14. And that is all NIPSCO is asking for—for the Commission to give these financial factors and commitments by NIPSCO consideration and appropriate weight when determining the ultimate amount of any refund, if the Commission is inclined to require one.

Regarding the corrections and adjustments NIPSCO proposed to Mr. Gorman's refund calculations, NIPSCO will not repeat the positions and support included in the Alternative Section. NIPSCO will, however, briefly reiterate a few key points. First, NIPSCO emphasizes that there are multiple reasons why the "high end" assumption—which assumed Units 14 and 15 would have dispatched

[71] NIPSCO Proposed Order at p. 62 ("In fact, when considering the avoided incremental capital expenditures, multi-million-dollar capacity costs wholly covered by NIPSCO, and the additional revenue credit to customers from an earlier retirement, we cannot conclude that NIPSCO's customers were negatively impacted by the fire and related forced outages between the time of the fire and both units being retired (July 16, 2020 through October 1, 2021)").

at significantly higher levels than they have historically—is not appropriate. This includes the recent operational history, the EAF and EFOR for the units, additional generation that had come online and displaced higher cost coal-fired generation, and, importantly, the much lower level of MISO market purchases NIPSCO actually incurred in 2021. Second, the corrections NIPSCO proposed are required to (as accurately as feasible) reflect the reality of the units' physical capabilities[72] and the reality of the MISO market and coal and transport pricing, in order to allow a relatively fair comparison. Finally, because the Consumer Parties did not challenge the CRA analysis or NIPSCO's retirement decision-making relying thereon, all record evidence supports the reasonableness or prudency of the decision to retire the units in October of 2021, which should (a) limit all potential refunds to only July 16, 2020 through September 30, 2021 and (b) foreclose any-and-all refund liability on or after October 1, 2021, as further discussed immediately below.

E. NIPSCO's actions were prudent, despite the Consumer Parties' presumption to the contrary and reliance on inapplicable legal principles.

[72] NIPSCO continues to question how the Industrial Group (and apparently the OUCC, as they joined the Proposed Order and Brief) continue to argue it is reasonable to utilize a maximum MW output for the units that is not only above their Economic Maximum, but also above their nameplate capacity.

The Commission established this sub-docket, in part, to "examine the *prudency* of the actions leading to the fire at Schahfer and the actions associated with that fire that led to the unplanned forced outage of Units 14 and 15[.]"[73] Importantly, the Commission identified the applicable standard under which to review the cause of the fire—prudency, which is a standard the Commission has utilized historically and which it has described in prior orders. With respect to whether NIPSCO's imprudence was the cause of the fire, the Consumer Parties argue the record establishes that:

> NIPSCO is responsible for the failure to address the high temperature alarm on the day of the fire, that NIPSCO was fully aware for an extended period of time that the transformer was in very poor condition and had elevated levels of combustible gases in the cooling oil yet did nothing to correct those known problems, and [that] in other respects that NIPSCO failed to take adequate measures to ensure the safe and reliable operation of its generating equipment.

Consumer Parties' Brief at p. 3. NIPSCO has addressed the condition of the transformer and the adequacy of its operating and maintenance practices in its Proposed Order, as well as above. However, NIPSCO also herein addresses whether, based on the record of this case, NIPSCO should be found imprudent as to the cause of the fire. This issue has two parts: (1) whether there was actually imprudence that occurred leading to the fire at Unit 14 and the unplanned forced

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73 FAC-130 Order at p. 21 (emphasis added).

outage of Units 14 and 15, and, if so, (2) whether NIPSCO should be held responsible for that imprudence.

It is indisputable that regulated public utilities, like NIPSCO, are situated differently than ordinary businesses—including having practically all aspects of its operations regulated by the Commission. It also does not appear to be in dispute that the Commission has set forth a standard for prudency review, such as its discussion in *Duke Energy Indiana, Inc.,* Cause No. 43114 IGCC-S1 (IURC 12/27/2012), p. 111 2012 WL 6759528 ("Duke Order"). Rather than discussing the facts of this case under the appropriate prudence standard, the Consumer Parties focus on the doctrine of *respondeat superior* and the law of negligence.[74] But, to the best of NIPSCO's knowledge, neither of these legal doctrines have been applied by the Commission. For example, a search for the term "*respondeat superior*" reveals that this term has never appeared, let alone been discussed or applied, in a Commission order *or* appellate decision reviewing a Commission order.[75] Further, NIPSCO's review of relevant Commission orders revealed that negligence law is almost never mentioned. And the one time it was discussed

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[74] *See generally* Consumer Parties' Brief at pp. 4-8.

[75] Counsel for NIPSCO performed a search for the term "*respondeat superior*" in any Commission order using a commercial legal research program, and this research revealed no such orders. Further, a search for the use of the term "*respondeat superior*" in combination with "Indiana Utility Regulatory Commission" in all Indiana Court of Appeals and Supreme Court cases likewise revealed no such appellate orders.

substantively was in an order determining whether Duke had acted prudently with respect to incurrence of costs associated with construction and operations of a generation facility.[76] Unsurprisingly, the controlling standard the Commission relied upon in that case was prudence—the same standard NIPSCO argues should apply here.

Instead of engaging in a discussion as to whether NIPSCO was imprudent under the standard set forth in the Duke Order, the Consumer Parties attempt to bypass it completely, arguing that in essence it is no longer good law because it "predate[s] NIPSCO Industrial Group v. Northern Indiana Public Service Co., 31 N.E.3d 1, 8-9 (Ind. App. 2015), in which the Court of Appeals noted: 'the Commission may not create legal presumptions.'"[77] Even a cursory review of that decision, however, reveals it is distinguishable from this proceeding. Unlike that decision cited by the Consumer Parties, this is not a case where the Commission is attempting to shift a *statutory burden* to a non-utility party.[78] Instead, the Duke Order involved review of the appropriateness of recovering certain costs from utility customers in the face of arguments by the opponents that the utility had

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[76] Duke Order at p. 111.

[77] Consumer Parties' Brief at pp. 16-17.

[78] NIPSCO's discussion in this section is focused on the presumption of prudence with respect to utility operations as discussed in the Duke Order, *not* any presumption that FAC costs have been at the lowest reasonable cost.

acted improperly, or imprudently. The Duke Order and the prudence standard are clearly more applicable here.

Under this Duke Order standard of prudence, and as more fully discussed in NIPSCO's Proposed Order, "[t]he Commission must determine whether decisions were made in a reasonable manner in light of the conditions or circumstances that were known or reasonably should have been known when the decision was made. [] As we explained in Cause No. 43114, a utility's 'conduct is presumed to be prudent unless the [opposing] Parties present evidence that raises a question about [the utility's] actions.'"[79]

NIPSCO explained "the prudency of the actions leading to the fire at Schahfer" (FAC-130 Order at p. 21) in some detail in pages 52-57 of its Proposed Order. The uncontested facts included in this Reply Brief also address this issue.[80] Concisely, there is no record of issues with the cooling system; the cooling system was operating properly in the days before the fire, as confirmed by maintenance records; the high temperature alarming operated timely and properly; and the very-experienced CRO had been trained on how to address the high temperature alarm but prioritized responding to other operational issues. The Consumer

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[79] Duke Order at p. 111 2012 WL 6759528 (citing *Indiana Michigan Power Co.,* Cause No. 39314 (IURC 11/12/1993), pp. 5-6) (internal citations omitted); *see also Duke Energy Indiana, Inc.,* Cause No. 38707 FAC 76 S1 (IURC 10/21/2009), pp. 15-16, 2009 WL 3455937.

[80] *See* the second list of bullet points on pages 9-11 above.

Parties did not provide any evidence *or even raise an allegation* that NIPSCO's training, processes, procedures, and/or staffing for CROs were in any way deficient.[81] Even without any presumption of prudence, a review of the record in this case demonstrates NIPSCO acted prudently, and NIPSCO's evidence was not adequately rebutted by the OUCC or Industrial Group.

However, there is one fact on which the Consumer Parties focus—the actions (or inactions) of the CRO in response to the high temperature alarm. Leaning heavily upon *respondeat superior* and the law of negligence, the Consumer Parties argue NIPSCO should be held responsible for what they claim amounts to negligence by the CRO, saying repeatedly that "NIPSCO caused the fire by failing to take action in response to the high temperature alarm."[82] In doing so, they generally ignore the actual circumstances faced by the CRO and the actions undertaken by the CRO in response, presuming that his actions were negligent. NIPSCO was clear that the CRO did not follow identified procedures, as he should have dispatched a Station Operator to inspect the cooling system and transformer or made a supervisor aware of the alarm. Had such action been taken promptly, it potentially could have prevented the fire.

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81 *See*, *e.g.*, Pet. Exh. 2-R, Attachment 2-R-B.

82 Consumer Parties' Brief at p. 4 (heading II.A.1).

But this CRO was actively monitoring all aspects of Unit 14 operations on July 16, 2020, and was occupied with addressing other concerns that he believed to be more exigent. This is clear from the record. As summarized on pages 6-7 of NIPSCO's Proposed Order,

> [i]t was a particularly busy day at Schahfer, with all four units operating. Throughout the entire morning, Unit 14 was experiencing multiple fuel supply issues. The coal coming into the plant was wet from rain and was plugging up coal chutes and feeders. This in turn was tripping, or shutting off, the cyclone burners. The CRO and Station Operators were continuously working to put these systems back into service and keep the unit operating. During this time, *hundreds of alarms were coming into the control room*. Early in the morning, a general "trouble alarm" from the unit main transformer also came into the Unit 14 control room. At 7:56 a.m. CST, an alarm was activated associated with the main transformer at Unit 14, which is an oil-cooled transformer. This alarm indicated that there was a higher than usual temperature in Unit 14's main transformer (the "Transformer"). This alarm, like many other alarms, "popped up" on the CRO's "alarm screen." [T]he *CRO for Unit 14 continued working with station personnel, including Station Operators, to address Unit 14's fuel supply issues from wet coal, as well as several ongoing issues with the cyclone burners that feed the coal into the Unit 14 boiler*. (Emphasis added.)

Mr. Sangster further explained that CROs are actively monitoring the operations of all aspects of a particular generating unit and that the action that will be taken with respect to any particular alarm is dependent on numerous factors, including,

but not limited to, the type of alarm, the criticality of the alarm, prioritization of other alarms, and unit-specific conditions.[83]

Thus, it cannot be presumed that the CRO's decision to prioritize other active operational issues and to acknowledge and monitor (but not take definitive action regarding) the high temperature alarm was *de facto* negligent. This decision was a deviation from NIPSCO's procedures, but it was based upon the reasoned judgment of the CRO as he was in real-time evaluating numerous operational issues. While the Consumer Parties emphasize repeatedly that the time between the alarm issuance and fire was more than five hours,[84] this underscores the fact that this alarm initially only showed a slight elevation in temperature, which gradually rose throughout the day[85] as Unit 14 continued to operate—because the CRO was successfully managing all other issues. This very-seasoned CRO made a judgment call to prioritize other issues and alarms—a decision which an after-the-fact investigation revealed was incorrect. The prudence of his decision should be judged based upon what was known by the CRO at the time the decision was made–not hindsight review with the benefit of a full root cause analysis having been performed.[86] The CRO did not blatantly ignore the alarm or fail to perform

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83 Pet. Exh. 2 at p. 11, lines 3-7.

84 *See* Consumer Parties' Brief at pp. 1, 3, 4, 6, 7, 11, 15.

85 Pet. Exh. 2 at Attachment 2-B.

86 *See* Commission's final order in Cause No. 44340-FMCA-12 at p. 12, citing *N. Ind. Pub. Serv. Co.*, Cause No. 43849 at 11 (IURC July 13, 2011) and *Indiana Gas Co., Inc.*, Cause No. 37394 GCA 54

job duties—he prioritized other issues, intended to get back to the cooling system issue, and, in the end, with full after-the-fact knowledge of the outcome, he can be viewed as having made a mistake.

NIPSCO's position is that (a) it is entitled to a presumption of prudence and (b) even without that presumption, the evidence NIPSCO submitted demonstrates NIPSCO acted prudently in terms of what it could control. NIPSCO has also explained why the evidence the Consumer Parties submitted (or, actually, the interpretation of evidence *NIPSCO submitted*) is not sufficient to demonstrate imprudence. Ultimately, human error is something that can take place, regardless of experience and training. Penalizing NIPSCO under these circumstances will not improve future safety or operations given these facts.

Moreover, the diligent manner in which NIPSCO used CRA to study how to respond to the fire, and its execution of its 2018 IRP Short-Term Action Plan, should not be ignored in assessing its overall prudence in this case. In the end, however, the Commission must review the record and determine whether the CRO acted imprudently or unreasonably. As presented by the Consumer Parties,

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at 4 (IURC May 28, 1997) (where the Commission reviewed $600,000 in damages to various equipment at Unit 12 at the Michigan City Generating Station related to the "polar vortex" and ultimately found that such costs were recoverable from NIPSCO's customers when reviewing the decision based upon the facts and circumstances as they existed at the time a decision was made about the unit's operations, instead of based upon hindsight review).

to make a determination of utility imprudence, the Commission must —for the first time—apply the principle of *respondeat superior* to hold NIPSCO strictly liable for the actions of its employee. The facts in this case do not justify this type of determination, nor do they justify tens of millions of dollars in refunds.

III. Conclusion.

WHEREFORE, for the reasons set forth in NIPSCO's testimony, attachments, post-hearing filings, and to comply with Indiana law and to further the public interest, NIPSCO respectfully requests that the Commission adopt the findings in NIPSCO's Proposed Order.

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The undersigned hereby certifies that the foregoing was served by email transmission upon the following:

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Dated this 4th day of April, 2022.

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