

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF NORTHERN INDIANA PUBLIC)
SERVICE COMPANY LLC PURSUANT TO IND.)
CODE §§ 8-1-2-42.7, 8-1-2-61, AND, 8-1-2.5-6 FOR (1))
AUTHORITY TO MODIFY ITS RETAIL RATES AND)
CHARGES FOR ELECTRIC UTILITY SERVICE)
THROUGH A PHASE IN OF RATES; (2) APPROVAL)
OF NEW SCHEDULES OF RATES AND CHARGES,)
GENERAL RULES AND REGULATIONS, AND)
RIDERS (BOTH EXISTING AND NEW); (3))
APPROVAL OF A NEW RIDER FOR VARIABLE NON-)
LABOR O&M EXPENSES ASSOCIATED WITH COAL-)
FIRED GENERATION; (4) MODIFICATION OF THE)
FUEL COST ADJUSTMENT TO PASS BACK 100% OF)
OFF-SYSTEM SALES REVENUES NET OF EXPENSES;)
(5) APPROVAL OF REVISED COMMON AND)
ELECTRIC DEPRECIATION RATES APPLICABLE TO)
ITS ELECTRIC PLANT IN SERVICE; (6) APPROVAL)
OF NECESSARY AND APPROPRIATE ACCOUNTING)
RELIEF, INCLUDING BUT NOT LIMITED TO)
APPROVAL OF (A) CERTAIN DEFERRAL)
MECHANISMS FOR PENSION AND OTHER POST-)
RETIREMENT BENEFITS EXPENSES; (B) APPROVAL)
OF REGULATORY ACCOUNTING FOR ACTUAL)
COSTS OF REMOVAL ASSOCIATED WITH COAL)
UNITS FOLLOWING THE RETIREMENT OF)
MICHIGAN CITY UNIT 12, AND (C) A)
MODIFICATION OF JOINT VENTURE)
ACCOUNTING AUTHORITY TO COMBINE)
RESERVE ACCOUNTS FOR PURPOSES OF PASSING)
BACK JOINT VENTURE CASH, (7) APPROVAL OF)
ALTERNATIVE REGULATORY PLANS FOR THE (A))
MODIFICATION OF ITS INDUSTRIAL SERVICE)
STRUCTURE, AND (B) IMPLEMENTATION OF A)
LOW INCOME PROGRAM; AND (8) REVIEW AND)
DETERMINATION OF NIPSCO'S EARNINGS BANK)
FOR PURPOSES OF IND. CODE § 8-1-2-42.3.)

CAUSE NO. 45772

**JOINT OBJECTION AND MOTION TO STRIKE
MIDWEST INDUSTRIAL USER’S GROUP
WITNESS MICHAEL R. O’CONNELL’S OPPOSITION TESTIMONIES**

Northern Indiana Public Service Company LLC (“NIPSCO”), NIPSCO Industrial Group, and NLMK Indiana, by counsel, and pursuant to 170 IAC 1-1.1-12, hereby object to and move to strike the March 31, 2023 testimonies of Michael R. O’Connell filed on behalf of Midwest Industrial User’s Group (“MIUG”) in opposition to the March 10, 2023 Stipulation and Settlement Agreement (“Settlement Agreement”) filed by NIPSCO, NIPSCO Industrial Group, NLMK Indiana, United States Steel Corporation, Walmart, Inc., RV Industry User’s Group, and the Indiana Office of Utility Consumer Counselor (collectively, the “Settling Parties”).

As further explained below, Mr. O’Connell’s testimony should be stricken as improper because it does not tend to disprove, explain, or otherwise contradict the Settlement Agreement or any specific term therein. Instead, Mr. O’Connell’s testimony amounts to mislabeled surrebuttal testimony, which either restates issues already addressed in his prior testimony in this Cause or raises, for the first time and not in response to a particular settlement term, arguments that should and could, have been included in Mr. O’Connell’s prior testimony. Mr.

O’Connell’s Rate 531 opposition testimony also seeks an end-run around the Commission’s March 7, 2023 docket entry in this Cause and ignores prior Commission precedent rejecting assertions that it possesses authority to decide matters of state anti-trust law. NIPSCO and the Settling Parties are prejudiced by Mr. O’Connell’s testimony and his impermissible filing serves only to frustrate the Indiana Utility Regulatory Commission’s (“Commission”) administrative process.

Background

On September 19, 2022, NIPSCO filed its Verified Petition and case-in-chief with the Commission pursuant to Ind. Code §§ 8-1-2-42, 8-1-2-42.7, 8-1-2-61, and 8-1-2.5-6 requesting authority to modify its retail rates and charges for electric utility service through a phase-in of rates and other related regulatory and ratemaking relief.

On March 6, 2023, NIPSCO filed a Notice of Agreement in Principle with Less than All the Parties, Request to Vacate Evidentiary Dates, and Motion for Approval of Agreed Procedural Schedule. On March 7, 2023, the Commission issued a docket entry establishing a settlement procedural schedule. Among the dates set by the Commission’s docket entry, each party who did not execute the Settlement Agreement were due to prefile with the Commission its testimony, if any, in opposition to the Settlement Agreement or any of its terms on or before

March 31, 2023, or a notice confirming that party's position with respect to the Settlement Agreement, e.g., not a signatory but not opposing or other position. On March 31, 2023, Mr. O'Connell, on behalf of MIUG, filed two pieces of testimony: one in opposition to the Settlement Agreement as it relates to Rates 526, 532, 533 ("Rate 526/532/533 Testimony") and a second piece of testimony in opposition to the Settlement Agreement as it relates to Rate 831/531 ("Rate 831/531 Testimony").

MIUG's Testimony is Improper and Prejudicial

Rather than addressing the Settling Parties' settlement testimony or the terms of the Settlement Agreement, Mr. O'Connell's Rate 831/531 Testimony is a broad-based attack on the established framework for this rate class, which was not modified by the Settlement Agreement. This framework was made plain in NIPSCO's direct and rebuttal filings, and addressed by other parties, including those who raised opposition, and supported, the Rate 831/531 structure. MIUG failed to file any cross-answering testimony responding to the non-NIPSCO parties' positions on Rate 831/531. Now, Mr. O'Connell's Rate 831/531 Testimony in opposition to the Settlement is replete with references to NIPSCO's rebuttal testimony (*See e.g.*, Rate 831/531 Testimony, Questions / Answers 15 and 27).

What Mr. O'Connell's Rate 831/531 Testimony does not do is challenge a term in the Settlement Agreement itself. Instead, MIUG has sought to seize an

opportunity to supplement the arguments in its prior testimony and adds new analysis to support its claims. (*See* Rate 531 Settlement Opposition Testimony, pp. 26 - 28.) Proper opposition testimony should counter facts presented in an adverse party's settlement testimony or challenge an aspect of the Settlement Agreement — not present factual evidence, arguments, and theories which could and should have been part of initial testimony. The Indiana Supreme Court has likewise recognized that proper rebuttal testimony is to be limited to evidence which explains, contradicts, or disproves an adversary's evidence, and if testimony offered in rebuttal should have been presented in the party's case in chief, it may be excluded. (*McCullough v. Archbold Ladder Co.*, 605 N.E.2d 175, 180 (Ind. 1993).) *cf* ("[t]he proper function of rebuttal evidence is to contradict, impeach or defuse the impact of evidence offered by an adverse party." *Bowman v. Int'l Bus. Mach. Corp.*, No. 1:11-CV-0593, 2013 WL 1857192, at *7 (S.D. Ind. May 2, 2013) (quoting *Peals v. Terre Haute Police Dep't*, 535 F.3d 621, 630 (7th Cir. 2008)). The Commission has imposed similar requirements in its proceedings. *See e.g., Re Indiana Cities Water Corp.*, 1990 WL 488768, (I.U.R.C. Cause No. 38851, July 5, 1990). Mr. O'Connell not only duplicates his prior testimony, which does not respond to the Settlement Agreement or any term therein, but he also expands on his prior arguments to inappropriately bolster his previous claims. (*See* Rate 831/531 Testimony, pp. 26-28.)

Portions of MIUG's Rate 831/531 Testimony should also be struck on the basis of relevance consistent with IND. R. EVID. 402. In its March 3, 2023 docket entry, the Commission struck portions of MIUG's direct testimony from the record because the Commission "does not have jurisdiction over *federal* anti-trust violations, and such matters are not at issue in this proceeding." (Docket Entry, p. 2.) MIUG's Rate 831/531 Testimony seeks to exploit a technicality in the Commission's docket entry, and Mr. O'Connell again offers testimony on matters beyond the reach of the Commission's jurisdiction – arguing this time on matters related to *state* anti-trust laws. (See Rate 831/531 Testimony, p. 9, lines 10 – 20; p. 27, lines 16 – 17; pp. 29 - 31, lines 16 – 7.) MIUG fails to recognize the Commission precedent, cited in NIPSCO's February 16, 2023 Objection and Motion to Strike MIUG Witness Michael R. O'Connell's Testimony, which rejected arguments that the Commission has authority to consider anti-trust issues *under both state and federal law*. (In *Re NIPSCO*, Cause No. 40125, May 3, 1995, Final Order at p. 32, quoting *In the Matter of Blough Insurance Agency*, Cause No. 35890, 1980 Ind. PUC Lexis 178 at *12 (August 27, 1980), "the Commission ... has no jurisdiction over antitrust laws of *this state* or the Federal antitrust laws." (emphasis added)) MIUG has not only attempted to use its "opposition" testimony to supplement its direct case, it has again raised arguments beyond the Commission's jurisdiction and on which the Commission has previously decided.

Mr. O’Connell’s Rates 526/532/533 Testimony purports to “address specific aspects” of Rates 526, 532, and 533 “in opposition of the recent Rate Case Settlement” and yet, he does not address any relevant term of the Settlement Agreement itself. Instead, his testimony challenges “arbitrary barriers” in Rates 532 and 533, namely the rate eligibility requirements in those tariffs related to minimum demand and equipment ownership. Notably, these exact tariff requirements were presented in NIPSCO’s case-in-chief and, except as to the minimum demand contract requirement for Rate 532 to which NIPSCO responded on rebuttal, no modifications to these existing tariff provisions were proposed by other parties in this case. Most importantly, the Settlement Agreement does not itself modify these provisions. While the Settlement Agreement contains several terms that impact these rate classes and otherwise modifies NIPSCO’s initial request in this Cause (Settlement Agreement, Paragraphs 5, 7(b), 7(h), 7(k)), Mr. O’Connell never addresses any of the Settlement Agreement terms actually impacting these tariffs. This omission speaks volumes about the true intent of his testimony – to raise untimely concerns related to the eligibility provisions of these tariffs. Even MIUG’s testimony addressing distribution charges in Rate 526 addresses the level of those charges as presented in NIPSCO’s direct testimony, and only represents a complaint that a customer that cannot qualify for Rates 532 or 533 would pay such costs due to being a Rate 526 customer.

MIUG's testimony should be limited to that which contradicts the opposing parties' settlement testimony *without new analyses and arguments*. See *Welch v. Eli Lilly & Co.*, No. 1:06-CV-0641, 2009 WL 700199, at *5 (S.D. Ind. Mar. 16, 2009). Under 170 IAC 1-1.1-11(e), as an intervenor, MIUG is "bound by all rulings and other matters of record prior to the time the intervenor is made a party and takes the case as the intervenor finds it as of the date of intervention." Settlement opposition testimony is not an opportunity to plug gaps in a party's case – indeed, a party cannot "offer testimony under the guise of 'rebuttal' only to provide additional support for his case in chief." *Cage v. City of Chicago*, No. 09-C-3078, 2012 WL 5557410, at *2 (N.D. Ill. Nov. 14, 2012).¹ Here, MIUG's Rates 526/532/533 Testimony does not even constitute "additional support for its case in chief" because MIUG did not even file testimony regarding the eligibility requirements in Rates 532 and 533 when it filed its testimony directed solely at Rate 531 on January 20, 2023. MIUG should not be permitted to ignore the purpose of settlement opposition testimony and the Commission's rules and the established settlement schedule by filing improper testimony that does not respond to or

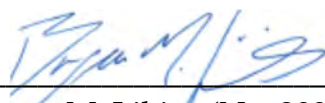
¹ See also *Schmucker v. Johnson Controls, Inc.*, 3:14-CV-1593, 2019 WL 718553, at *7 (N.D. Ind. Feb. 19, 2019) (quoting *Peals*, 535 F.3d at 630 (internal quotation marks omitted)). "Testimony offered only as additional support to an argument made in a case in chief, if not offered to contradict, impeach or defuse the impact of the evidence offered by an adverse party, is improper on rebuttal."

contradict the Settlement Agreement or any specific term therein, or the Settling Parties' supporting testimony.

Conclusion

For these reasons, NIPSCO objects to Mr. O'Connell's settlement opposition testimony in its entirety and moves for the Commission to strike it from the record evidence that may be submitted in this proceeding.

Respectfully submitted,



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Dated this 7th day of April 2023.



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