IN THE
INDIANA COURT OF APPEALS

CAUSE NO. 21A-EX-02702

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR, and DUKE INDUSTRIAL GROUP Appellants (Statutory Representative and Intervenor Below), v. DUKE ENERGY INDIANA, LLC and INDIANA UTILITY REGULATORY COMMISSION Appellees (Petitioner and Administrative Agency Below).	)	Appeal from the Indiana Utility Regulatory Commission IURC Cause No: 45253 S1 The Honorable James F. Huston, Chairman The Honorable Sarah E. Freeman, Stefanie Krevda, David Ober and David E. Ziegner, Commissioners The Honorable David E. Veleta, Senior Administrative Law Judge.

RESPONSE OF DUKE INDUSTRIAL GROUP IN OPPOSITION TO REHEARING

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TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

I. INTRODUCTION 4

II. ARGUMENT 4

A. The Amendment at Issue Substantively Altered the Material Terms of the Federal Mandate Statute 4

B. The Change in Law Here Has Prospective Application and Does Not Impact the Result in This Case 6

III. CONCLUSION 9

WORD COUNT CERTIFICATE 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Cases

N.G. v. State,
148 N.E.3d 971 (Ind. 2020) 6

Chadwick v. City of Crawfordsville,
216 Ind. 399, 24 N.E.2d 937 (1940) 7

Durham ex rel. Estate of Wade v. U-Haul International,
745 N.E.2d 755 (Ind. 2001) 6

Indiana Dept. of Environmental Mgmt. v. Medical Disposal Services, Inc.,
729 N.E.2d 577 (Ind. 2000) 7, 8

Office of Utility Consumer Counselor v. Duke Energy Indiana, LLC,
183 N.E.3d 266 (Ind. 2022) 5

Office of Utility Consumer Counselor v. Duke Energy LLC,
--- N.E.3d ---, 2023 WL 2127358 (Ind. App. 2023) 5

State v. Pelley,
828 N.E. 2d 915 (Ind. 2005) 6

United National Insurance Co. v. DePrizio,
705 N.E.2d 455 (Ind. 1999) 6

I. INTRODUCTION

Duke Industrial Group, by counsel, submits this opposition to the Petition for Rehearing ("Petition") filed on March 23, 2023 by appellee Duke Energy Indiana, LLC ("Duke"). Duke's petition is premised on a statutory amendment subsequent to this Court's decision, which does not indicate any error in this Court's February 21, 2023 decision. What Duke alleges is a change of law, but its petition does not include any analysis of when such a change of law applies retroactively. The general rule, applicable here, is that a statutory amendment is prospective only, absent a clear and unmistakable expression of intent to the contrary. There is no language in the amendment at issue suggesting retroactive applicability. The statutory amendment may have an effect on future cases, but it does not alter the Court's statutory analysis and conclusion in this case.

II. ARGUMENT

A. The Amendment at Issue Substantively Altered the Material Terms of the Federal Mandate Statute

Duke claims the statutory amendment merely served to "clarify" the Federal Mandate Statute and "make clear" the Court's interpretation was "incorrect," "erroneous" or "wrong." See Petition at 5, 6, 8. That is not an accurate characterization. What actually happened is that the General Assembly made substantive *revisions* to the terms of the statute, materially *changing* its operation and effect. Nothing in that

amendment impacts the merits of the Court's analysis of the statutory language in effect throughout the pendency of this case.

The Court properly found, consistent with the Supreme Court's *dicta* in Office of Utility Consumer Counselor v. Duke Energy Indiana. LLC, 183 N.E.3d 266, 270 (Ind. 2022), that the Federal Mandate Statute was framed in the future tense and spoke in terms of "projected" costs for "proposed" projects, and hence clearly authorized only recovery of costs incurred subsequent to issuance of the necessary certificate of public convenience and necessity ("CPCN"). See Office of Utility Consumer Counselor v. Duke Energy LLC, --- N.E.3d ---, 2023 WL 2127358 (Ind. App. 2023) at *2-6.

The statutory language on which the Court based its construction is exactly what the legislature altered through the new amendment. The amendment deletes the future tense phrasing in favor of revised present and past tense terms, removing references to "projected" costs and "proposed" projects. See Rehearing Addendum at 4-6. Contrary to the prior terms of the statute, the amendment *adds* new language authorizing recovery of costs the utility "has incurred," including prior to the petition date and prior to the date of the Commission's order. Id. at 4.

Nothing in those revisions suggests the Court misread the statutory terms as they existed prior to the amendment. To the contrary, the Court properly construed the language and applied the statute on its express terms. Then, the General Assembly subsequently elected to revise that language, altering the operation of the statute. That

is not a mere clarification. It is a material change in substance. See United National Insurance Co. v. DePrizio, 705 N.E.2d 455, 460 (Ind. 1999) ("A fundamental rule of statutory construction is that an amendment changing a prior statute indicates a legislative intention that the meaning of the statute has changed.").

B. The Change in Law Here Has Prospective Application and Does Not Impact the Result in This Case

Even though the basis for Duke's rehearing petition is a post-decision statutory amendment, Duke fails to analyze the established standards governing a change of law. Instead, Duke simply contends the legislature acted in response to the Court's decision. See Petition at 5-9.[1] Even if so, that assertion does not address the relevant question: whether the change of law necessitates a different result in a pending appeal. The answer here is that it does not.

"The general rule of statutory construction is that unless there are strong and compelling reasons, statutes will not be applied retroactively. . . . Statutes are to be given prospective effect only, unless the legislature unequivocally and unambiguously intended retrospective effect as well." State v. Pelley, 828 N.E. 2d 915, 919 (Ind. 2005) (citation omitted). Accord N.G. v. State, 148 N.E.3d 971, 973 (Ind. 2020) ("Absent explicit language to the contrary, statutes generally do not apply retroactively."). The

[1] In particular, Duke relies on Durham ex rel. Estate of Wade v. U-Haul International, 745 N.E.2d 755 (Ind. 2001). But that case did not concern the retroactive application of a statutory revision in a pending case. The Supreme Court there discussed a statutory amendment from 1987 when deciding a case in 2001. Id. at 761.

exception is a "remedial" statute enacted to "cure a defect or mischief" in the prior law. Id. As explained supra, the amendment at issue was not a mere clarification and did not simply resolve a prior ambiguity. Rather, it materially altered the operation of the statute by removing the language prescribing prospective recovery only and adding language to authorize retrospective recovery as well. Because this is not a "remedial" amendment, the general rule applies and the statutory change cannot be applied retroactively in this case.

The situation here is very similar to the circumstances addressed by the Supreme Court in Indiana Dept. of Environmental Mgmt. v. Medical Disposal Services, Inc., 729 N.E.2d 577 (Ind. 2000). In that case, an entity operating a waste disposal facility sought a declaratory judgment against IDEM to establish it was not subject to solid waste regulations, but the trial court entered summary judgment for IDEM and the Court of Appeals affirmed. See 729 N.E.2d at 578. While the case was on remand, the General Assembly amended the applicable statute to expressly exclude that particular type of facility. Id. at 581. The Court held that amendment was inapposite:

> The legislature's subsequent legalization of MDSI's activities, however, did not relieve MDSI of the obligation it faced at the time. As a general rule, the law in place at the time an action is commenced governs. "Unless a contrary intention is expressed, statutes are treated as intended to operate prospectively, and not retrospectively." *Chadwick v. City of Crawfordsville,* 216 Ind. 399, 413–14, 24 N.E.2d 937, 944 (1940).

Id. Here, by the same token, the law that was in effect from the commencement of the Commission proceeding until after this Court's decision on appeal is the controlling state of the law for this case.

There is no language in the amendment expressing an intent to apply the change in the law retroactively. See Rehearing Addendum at 3-6. The legislature could have easily called explicitly for retroactive application or stated that the revised statutory terms should govern pending cases, but it did not do so. This is not a procedural amendment, relating to the form of filing or the conduct of the proceeding. Rather, it alters the rights of the utility and the financial responsibilities of ratepayers, impacting the recovery of costs in regulated rates. A change in law with such material consequences for the economic interests of the public served by Duke should not be applied retroactively.

III. CONCLUSION

Duke's Petition for Rehearing does not demonstrate any error in this Court's decision and should be denied.

Respectfully submitted,

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WORD COUNT CERTIFICATE

The undersigned counsel hereby verifies, in accordance with Ind. Appellate Rules 44 and 46, that except for those portions of the brief excluded from the word count, the foregoing *Response of Duke Industrial Group in Opposition to Rehearing* contains 1,174 words, as calculated by the word count function of the word processing software used to prepare the Brief.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on April 10, 2023, the foregoing *Response of Duke Industrial Group in Opposition to Rehearing* was filed with the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court.

The undersigned counsel hereby certifies that on April 10, 2023, copies of the foregoing *Response of Duke Industrial Group in Opposition to Rehearing* were served on the following Public Service Contacts through E-Service using the IEFS:

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The undersigned counsel certifies that the following, not designated as Public Service Contacts, were served the foregoing *Response of Duke Industrial Group in Opposition to Rehearing* by first class, United States mail, postage prepaid, and by electronic mail, this 10th day of April, 2023:

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