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INDIANA UTILITY REGULATORY COMMISSION

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

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| VERIFIED JOINT PETITION OF INDIANA GAS COMPANY, INC., SOUTHERN INDIANA GAS AND ELECTRIC COMPANY AND THE BOARD OF DIRECTORS FOR UTILITIES OF THE DEPARTMENT OF PUBLIC UTILITIES OF THE CITY OF INDIANAPOLIS, AS SUCCESSOR TRUSTEE OF A PUBLIC CHARITABLE TRUST, d/b/a CITIZENS GAS & COKE UTILITY, PURSUANT TO IND. CODE § 8-1-2-2.5 et. seq. FOR APPROVAL OF AN ALTERNATIVE REGULATORY PLAN WHICH WOULD ESTABLISH A PILOT UNIVERSAL SERVICE PROGRAM | ) | CAUSE NO. 42590 |

**MOTION TO DISMISS JOINT PETITION**

Come now certain intervenors designated collectively as the Manufacturing and Health Providing Customers (referred to herein as "MHPC"), by counsel, and file their Motion to Dismiss Joint Petition ("Motion") pursuant to the Rules of this Commission including 170 IAC 1-1.1-12, and in support thereof, state the following:

**Procedural Background**

1. On March 4, 2004 Indiana Gas Company, Inc., Southern Indiana Gas and Electric Company and the Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis, as successor trustee of a public charitable trust, d/b/a Citizens Gas & Coke Utility (collectively the "Petitioners"), filed their Joint Verified Petition (the "Petition") seeking to implement a "Universal Service Program" by means of an Alternative Utility Regulatory Act Ind. Code § 8-1-2.5 et. seq.

2. On March 5, 2004 there was filed in this Cause (a) a Stipulation and Settlement Agreement between Citizens Gas & Coke Utility and the Indiana Office of

Utility Consumer Counselor ("OUCC") and (b) a Stipulation and Settlement Agreement Among Indiana Gas Company, Inc., Southern Indiana Gas & Electric Company and the Indiana Office of Utility Consumer Counselor (amended and refilled on April 30, 2004)(collectively the "Stipulations").

**Motion to Dismiss**

**A. The Joint Petitioners' Proposed Alternative Regulatory Plan Is Illegal**

3. The Joint Petitioners have offered a plan that is illegal under Indiana law.

4. First, Indiana's Alternative Utility Regulation Act, IC 8-1-2.5 (the "AUR") is not intended to provide for an income transfer program.

5. The Indiana legislature made the following findings in IC 8-1-2.5-1:

> Sec.1. The Indiana general assembly hereby declares the following:
>
> (1) That the provision of safe, adequate, efficient, and economical retail energy services is a continuing goal of the commission in the exercise of its jurisdiction.
>
> (2) That competition is increasing in the provision of energy services in Indiana and the United States.
>
> (3) That traditional commission regulatory policies and practices, and certain existing statutes are not adequately designed to deal with an increasingly competitive environment for energy services and that alternatives to traditional regulatory policies and practices may be less costly.
>
> (4) That an environment in which Indiana consumers will have available state-of-the-art energy services at economical and reasonable costs will be furthered by flexibility in the regulation of energy services.
>
> (5) That flexibility in the regulation of energy services providers is essential to the well-being of the state, its economy, and its citizens.
>
> (6) That the public interest requires the commission to be authorized to issue orders and to formulate and adopt rules and policies that will permit

> the commission in the exercise of its expertise to flexibly regulate and control the provision of energy services to the public in an increasingly competitive environment, giving due regard to the interests of consumers and the public, and to the continued availability of safe, adequate, efficient, and economical energy service

6. Nothing in the proposal by the Joint Petitioners relates to an increase in competition in the energy market or the legislative findings cited in the AUR.

7. Even if the Joint Petitioners attempt to tie their proposal to increased competition, something they fail to do in their evidence, the AUR still requires any plan that impacts rates to produce "just and reasonable rates and charges." IC 8-1-2.5-6.

8. As discussed in more detail in the next sections, the Indiana courts and this commission have found that rates that charge some customers less than others for he like service under the same circumstances are discriminatory. Discriminatory and preferential rates are not just and reasonable.

9. Not only does our statutory law impose limits on the implementation of discriminatory rates, but Indiana common law place limits on the rates the Joint Petitioners may charge. It is a long standing rule that utility rates must be cost based. See City of Logansport v. Public Service Commission, 177 N.E. 249, 255 (1938). Because utilities are essentially monopolies, there must be some standard imposed to assure that the rates are reasonable, just, non-discriminatory and not excessive. See L.S. Ayres & Co. v. Indianapolis Power & Light Co., 351 N.E.2d 814, 821 (Ind. Ct. App. 1976) (quoting Bluefield Waterworks & Improvement Co. v. Public Serv. Comm'n, 262 U.S. 679, 692-93 (1923)); Indiana Gas v. Utility Consumer Counselor, 575 N.E.2d 1044, 1046 (Ind. Ct. App. 1991).

10. All customers of the Joint Petitioners have a "basic" common law right "to be served in all particulars, without discrimination, and at a reasonable price... ." Foltz v. City of Indianapolis, 234 Ind. 656, 130 N.E.2d 650, 656 (1955). This right exists "regardless of any statute, charter or franchise" providing for service on reasonable terms. Id. at 657, 671.

11. Charging one subgroup of customers less for the same service charged to similarly situated customers is discrimination and violates both Indiana ratepayers common law rights as well as their statutory rights, including their right to just and reasonable rates under the AUR.

12. Further, as discussed in detail in the next section, the Court of Appeals observed that, if the Commission could approve discriminatory rates, the effect would be to empower the Commission, an appointed, non-elected body, to create a special rate for any group it determined to be deserving.

13. This Commission should not allow itself to be put in the position of approving discriminatory and preferential rates under the guise of an AUR.

14. Instead, the Commission should recognize that both the AUR and the common law require rates to be just and reasonable.

15. Rates that charge similarly situated customers differently are not just and reasonable.

16. The Commission should dismiss the Joint Petitioners' unlawful and discriminatory AUR proposal.

**B. The Court of Appeals Has Found Discriminatory Rates -- Charging Customers Receiving the Same Service Under the Same Circumstances Different Rates – to be Unlawful**

17. Indiana Court of Appeals ruled that 'targeted' rates for low-income customers are unlawful. Citizens Action Coalition v. Public Serv. Co., 450 N.E.2d 98, 101 (Ind. App. 1983).

18. The Court of Appeals found CAC's reading of IC 8-1-2-103 and IC 8-1-2-68 "untenable." Id. The latter "permits reasonable differences in rates; that is, it allows different rates to be charged 'for service rendered under different conditions and under different circumstances'." Id. quoting Capital Improvement Board v. Public Service Commission, 375 N.E.2d 616, 133 (Ind. App. 1978). Still, "when read together, the statutes prohibit charging different rates for 'like and contemporaneous service'." Id.

19. Our court of appeals found that targeted lifeline rates are unlawful under Indiana law.

> A targeted lifeline rate structure does precisely that. It charges customers receiving the same service under the same circumstances different rates. **This violates Ind.Code 8-1-2-103.** It does not matter that the group receiving the preferential rates is deserving. **The statute prohibits such discrimination.**

450 N.E.2d at 101 (emphasis added).

20. Our court of appeals agreed with the appellees that the observations of the Colorado Supreme Court in Mountain States Legal Foundation v. Public Utilities Commission, 590 P.2d 495, 498, were applicable here:

> To find otherwise would empower the PUC, an appointed, nonelected body, to create a special rate for any group it determined to be deserving. The legislature clearly provided against such discretionary power when it prohibited utilities from granting "any preference." .... Establishing a discount gas rate plan which differentiates between economically needy individuals who receive the same service is unjustly discriminatory.

Id.

21. Thus, the court of appeals found that charging customers receiving the same service under the same circumstances different rates is illegal. The proposal of the Joint Petitioners charges customers receiving the same service under the same circumstances different rates. The Joint Petitioners' proposal is illegal.

22. This Commission cannot approve the proposal of the Joint Petitioners because the rates Joint Petitioners propose are contrary to law.

23. Because the Commission cannot approve the proposal of the Joint Petitioners, it should dismiss the Cause in its entirety.

24. Dismissing this Cause will save the participants and this Commission the needless and wasteful expenditure of further proceedings that must necessarily result in a denial of the relief requested which is illegal under Indiana law.

## C. This Commission has Consistently Found that Charging Customers Receiving the Same Service Under the Same Circumstances Different Rates is Unlawful

25. This Commission considered the issue of discriminatory rates in its March 24, 1982 Order in Cause No. 35780-S8 ("Commission's March Order") and found targeted lifeline rates to be unlawful. This was the underlying case that lead to the decision in Citizens Action Coalition v. Public Serv. Co., 450 N.E.2d 98 (Ind. App. 1983).

26. In the Commission's March Order, it found that there were two types of lifeline rates.

5. That the two basic forms of lifeline rates are 'general' and 'targeted.'

> A general lifeline rate is a lower than cost, uniform charge per kilowatt-hour for a basic amount of electricity which is applicable to all residential customers. The subsequent blocks of energy usage are priced at a rate above the cost of service thereby permitting the utility to recoup the revenue shortfall resulting form the lower than cost rate applicable to the initial (lifeline) block of energy.
>
> A targeted lifeline rate is a lower than cost uniform charge per kilowatt-hour for a basic amount of electricity which is only available to specific income and/or demographic groups within the residential class. The subsequent blocks of energy usage by the targeted group and all blocks of energy usage by consumers other than the targeted group are priced at a rate above the cost of service thereby permitting the utility to recoup the revenue shortfall resulting from the lower than cost rate applicable to the initial (lifeline) block of energy usage by the targeted group.

27. The Joint Petition proposes today for gas customers what this Commission described as "targeted lifeline rates" for electric customers in the Commission's March Order. "Specific income groups and/or demographic groups within the residential class" are targeted for a lower than cost charge available only for them. The subsidy for this "targeted" group is to be paid by other customers – a result this Commission found unlawful in its March Order.

28. The Commission looked to IC 8-1-2-103 which provides in part as follows:

> (a) No public utility, ..., may charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered, or for any service in connection therewith, than that prescribed in the published schedules or tariffs then in force or established as provided herein, or than it charges, demands, collects, or receives from any other person for like and contemporaneous service ....

Again, this is exactly what the Joint Petition and related Settlement Agreements would do. The utilities will "charge, demand, collect or receive" from a targeted group of

residential customers less than the utilities "charge, demand, collect or receive" from "other person[s] for like and contemporaneous service."

29. The Commission quoted Bassett v Merchants Heat & Light Co., PUR 1919C 475, 483, as follows:

> A rate cannot be made for those whose incomes are small or unfavorably affected by current conditions, and other rates for the same service for those whose incomes are larger or swollen by changing conditions....

This is exactly what Joint Petitioners propose: to make a special reduced rate for a targeted group – a portion of LIHEAP eligible customers – and to charge other rates for the same service for others similarly situated. See, e.g., Petitt Deposition attached to direct testimony of Mr. Phillips, p. 5 (agrees plan is to reduce the bills of certain eligible customers); p. 41 (agrees there is a "targeted audience,"); p. 53-54 (no transportation customer is LIHEAP eligible); p. 78 (96% to 97% of Vectren's residential customers will not be eligible for assistance under the proposal.)

30. This Commission agreed and stated as follows:

> We therefore, find that a lifeline rate 'targeted' to provide rate relief to specific income and/or demographic groups for a basic level of electricity which is less than the rate charged all others for a like and contemporaneous service is prohibited by law.

Commission's March Order page 9. The proposal of the Joint Petitioners to provide 'targeted' relief to specific income group which is less than the rate charged all others for a like and contemporaneous service **is prohibited by law**.

31. This Commission did find that a general lifeline rate applicable to all residential customers "which recoups the resultant revenue shortfall within the residential class" may be permissible under Indiana law. However, that is not what is proposed in this case by the Joint Petitioners. Instead, the proposal in this Cause presented by the

Joint Petitioners fails to meet this potentially permissible plan in two ways: first, it will charge, demand, collect and receive less from only a very small percentage of residential customers, and second, those required to allow the utilities to recoup the revenue shortfall is not limited to the residential class.

32. The basis promoted for the plan rejected as unlawful in the Commission's March Order related to the "unprecedented increase in the cost of electricity during the past decade and the resultant economic burden on consumers, especially the poor, elderly, and handicapped, and this commission is compelled to examine any and all possible means to alleviate such a burden." At 6.

33. The same type of reasoning has been promoted by the Joint Petitioners in this Cause – that the spikes in gas cost have a greater impact on low income residential customers. However, just as in the earlier cause, the Commission in this Cause should find that attempting to address this issue through a 'targeted' lifeline rate type proposal is unlawful under Indiana law.

34. Interestingly, and relevant, is the position taken by one of the Joint Petitioners, SIGECO, in the Lifeline Rates case decided in the Commission's March Order.

> That it is the position of the respondents and all intervenors except [CAC], and city of Fort Wayne (city) that the primary purpose of lifeline rates is to provide assistance to the needy (low income and elderly on fixed income) residential electric consumers. They [CAC and City] also argue that and lifeline rate, general or targeted, results in the provision of service below cost which must be subsidized and as such are unjustly discriminatory and/or preferential which is impermissible under Indiana law. It is also their position that the establishment of such rates constitute ratemaking for the sole purpose of carrying out public policy which invades the prerogative of the legislature which has the power to determine public policy and the programs to implement such policy.

The position taken by one of the Joint Petitioners in the earlier case supports the position taken by the MHPC in this case and the decision that such a plan is unlawful reached in the Commission's March Order. Targeting one group with lower rates at the expense of similarly situated customers is unjustly discriminatory and impermissible under Indiana law.

35. This Commission has consistently held through the years that charging similarly situated customers different rates for like service is unlawful. See, e.g., In the Matter of the Joint Petition of Hoosier Energy Rural Electric Cooperative, Inc., Cause No. 37866 (October 1, 1986) (charging different rates for the same service under the same conditions is clearly prohibited); In Re Northern Indiana Public Service Company, Cause No. 39623 (August 11, 1993)("In Citizens Action Coalition, the court held that rates are discriminatory, and therefore prohibited by Section 68, if the difference in rates violates Section 68 or any other provision of the Act, including Section 103. Id. When read together, Sections 68 and 103 prohibit "charging different rates for 'like and contemporaneous' service."" At 20.) See also, this Commission's orders in Cause No. 38964/39063 (July 17, 1991); Cause No. 40010 (October 5, 1995); and Cause No. 40125 (May 3, 1995).

36. The plan put forward by the Joint Petitioners, which would provide 'targeted' relief to a specific income group which is less than the rate charged all others for a like and contemporaneous service, is prohibited by law. This Commission so found in the past and should again in this Cause.

WHEREFORE, the Manufacturing and Health Providing Customers move this Commission to dismiss the Joint Petition in its entirety for want of jurisdiction and for all other relief appropriate in the premises.

DATED: June 11, 2004

Respectfully submitted,

LEWIS & KAPPES, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing document has been served upon the following by **email**, and by **first class**, United States mail, postage prepaid, this 11th day of June, 2004:

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