FILED
February 27, 2023
INDIANA UTILITY
REGULATORY COMMISSION

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

VERIFIED PETITION OF NORTHERN INDIANA PUBLIC SERVICE COMPANY LLC FOR (1) APPROVAL OF AND A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR A FEDERALLY MANDATED SCHAHFER ASH POND COMPLIANCE PROJECT; (2) AUTHORITY TO RECOVER FEDERALLY MANDATED COSTS INCURRED IN CONNECTION WITH THE SCHAHFER ASH POND COMPLIANCE PROJECT; (3) APPROVAL OF THE ESTIMATED FEDERALLY MANDATED COSTS ASSOCIATED WITH THE SCHAHFER ASH POND COMPLIANCE PROJECT; (4) AUTHORITY FOR THE TIMELY RECOVERY OF 80% OF THE FEDERALLY MANDATED COSTS THROUGH RIDER 887 – ADJUSTMENT OF FEDERALLY MANDATED COSTS AND APPENDIX I – FEDERALLY MANDATED COST ADJUSTMENT FACTOR ("FMCA MECHANISM"); (5) AUTHORITY TO DEFER 20% OF THE FEDERALLY MANDATED COSTS FOR RECOVERY IN NIPSCO'S NEXT GENERAL RATE CASE; (6) APPROVAL OF SPECIFIC RATEMAKING AND ACCOUNTING TREATMENT; (7) APPROVAL TO AMORTIZE THE SCHAHFER ASH POND COMPLIANCE PROJECT COSTS THROUGH 2032; (8) APPROVAL OF ONGOING REVIEW OF THE SCHAHFER ASH POND COMPLIANCE PROJECT; ALL PURSUANT TO IND. CODE § 8-1-8.4-1 *ET SEQ.*, § 8-1-2-19, § 8-1-2-23, AND § 8-1-2-42; AND, TO THE EXTENT NECESSARY, APPROVAL OF AN ALTERNATIVE REGULATORY PLAN PURSUANT TO IND. CODE § 8-1-2.5-6.	)	**CAUSE NO. 45797**

SUBMISSION OF PROPOSED ORDER AND ALTERNATIVE FINDING

Northern Indiana Public Service Company LLC ("NIPSCO"), by counsel, respectfully submits its form of proposed order.

To the extent the Commission does not approve NIPSCO's Schahfer Ash Pond Compliance Project and issue a Certificate of Public Convenience under the Federal Mandate Statute, or to the extent the Commission believes relief under Ind. Code § 8-1-2.5-6 is appropriate generally, NIPSCO is including Attachment A, where the same result is reached under Ind. Code § 8-1-2.5-6.

For purposes of convenience, a Word version of both documents will be provided to the Administrative Law Judge via email transmission.

Respectfully submitted,

Bryan M. Likins (No. 29996-49)
Tiffany Murray (No. 28916-49)
NiSource Corporate Services - Legal
150 West Market Street, Suite 600
Indianapolis, Indiana 46204
Likins Phone: (317) 684-4922
Murray Phone: (317) 649-6424
Fax: (317) 684-4918
Emails: blikins@nisource.com
tiffanymurray@nisource.com

Attorneys for Petitioner
Northern Indiana Public Service Company LLC

CERTIFICATE OF SERVICE

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

Randall C. Helmen
Lorraine Hitz
Office of Utility Consumer Counselor
115 W. Washington Street, Suite 1500 South
Indianapolis, Indiana 46204
rhelmen@oucc.in.gov
lhitz@oucc.in.gov
infomgt@oucc.in.gov

Jennifer A. Washburn
Citizen Action Coalition
1915 West 18th Street, Suite C
Indianapolis, Indiana 46202
jwashburn@citact.org
rkurtz@citact.org

Aaron A. Schmoll
Joseph P. Rompala
Lewis & Kappes, P.C.
One American Square, Suite 2500
Indianapolis, Indiana 46282
aschmoll@lewis-kappes.com
jrompala@lewis-kappes.com

Dated this 27th day of February, 2023.

Tiffany Murray

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<u>ORDER OF THE COMMISSION</u>

Presiding Officers:
David E. Veleta, Commissioner
Loraine L. Seyfried, Chief Administrative Law Judge

On November 2, 2022, Northern Indiana Public Service Company LLC ("Petitioner" or "NIPSCO") filed its Verified Petition initiating this Cause and its direct testimony and attachments.[1] NIPSCO filed corrections to its direct testimony on January 17, 2023.

Petitions to intervene were filed by Citizens Action Coalition of Indiana, Inc. ("CAC") on November 11, 2022, and NIPSCO Industrial Group[2] ("Industrial Group") on January 30, 2023.

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[1] NIPSCO filed Attachment 1-B (Certificate of Publication of Legal Notices) on February 22, 2023.

The Presiding Officers granted the petitions to intervene by docket entry on November 22, 2022 and February 7, 2023, respectively.

On February 3, 2023, the Indiana Office of Utility Consumer Counselor ("OUCC") and CAC filed their respective direct testimony and attachments. Industrial Group filed cross-answering testimony on February 10, 2023. On February 10, 2023, NIPSCO filed its rebuttal testimony and attachments.

The Presiding Officers issued docket entry questions to NIPSCO on February 17, 2023 to which NIPSCO responded on February 22, 2023.

A public evidentiary hearing was initially convened on February 23, 2023, at which time the prefiled evidence of NIPSCO, the OUCC, CAC, and Industrial Group, was admitted into the record without objection.

Based upon the applicable law and evidence presented, the Commission finds:

1. Notice and Jurisdiction. Due, legal and timely notice of the hearing in this Cause was given and published as required by law. Petitioner is a "public utility" as defined in Ind. Code § 8-1-2-1(a) and an "energy utility" as defined in Ind. Code §§ 8-1-2.5-2 and 8-1-8.4-3. Under Ind. Code § 8-1-8.4-6 and -7, the Commission has authority to issue a certificate of public convenience and necessity ("CPCN") and to approve cost recovery for projects necessary to comply with federally mandated requirements. Accordingly, the Commission has jurisdiction over Petitioner and the subject matter of this proceeding.

2. Petitioner's Characteristics. NIPSCO is a public utility limited liability company organized and existing under the laws of the State of Indiana with its principal office and place of business at 801 East 86th Avenue, Merrillville, Indiana. Petitioner is engaged in rendering electric utility service in the State of Indiana. NIPSCO renders retail electric utility service to more than 483,000 retail customers located in all or part of Benton, Carroll, DeKalb, Elkhart, Fulton, Jasper, Kosciusko, LaGrange, Lake, LaPorte, Marshall, Newton, Noble, Porter, Pulaski, Saint Joseph, Starke, Steuben, Warren and White Counties in northern Indiana. NIPSCO owns, operates, manages and controls plant and equipment within the State of Indiana that is in service and used and useful in the generation, transmission, distribution and furnishing of such service to the public.

3. Requested Relief. NIPSCO requested (1) approval of and a CPCN for a federally mandated Schahfer Ash Pond Compliance Plan (referred to herein as the "Compliance Project"); (2) authority to recover federally mandated costs incurred in connection with the Compliance Project; (3) approval of the estimated federally mandated costs associated with the Compliance Project; (4) authority for the timely recovery of 80% of the federally mandated costs through Rider 887 – Federally Mandated Cost Adjustment Rider and Appendix I – FMCA Factors (the "FMCA Mechanism"); (5) authority to defer 20% of the federally mandated costs incurred in connection with the Compliance Project for recovery in NIPSCO's next general rate case; (6) approval of the specific ratemaking and accounting treatment described herein; and (7) approval

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[2] The companies that comprise the NIPSCO Industrial Group in this Cause are Cleveland-Cliffs Steel LLC, Linde, Inc., NLMK Indiana, United States Steel Corporation, and USG Corporation.

of ongoing review of the Compliance Project; all pursuant to Ind. Code § 8-1-8.4-1 *et seq.*, § 8-1-2-19, § 8-1-2-23 and § 8-1-2-42.

The Compliance Project will close three ponds at NIPSCO's R.M. Schahfer Generating Station ("Schahfer"), which is generally referred to as the multi-cell unit ("MCU") that includes the material storage runoff basin ("MSRB"), the metal cleaning waste basin ("MCWB"), and the waste runoff area ("WRA") which includes dewatering and excavation of coal combustion residual ("CCR") material, and once removed, backfilled with clean fill and a cover system. The federal mandate driving the Schahfer Ash Pond Compliance Project is the CCR rule (40 C.F.R. Parts 257 and 261) promulgated by the Environmental Protection Agency ("EPA") under Subtitle D of the Resource Conservation & Recovery Act ("RCRA") (42 U.S.C. §6901) (the "CCR Rule").

4. Summary of Evidence of the Parties. NIPSCO, the OUCC, and Intervenors each submitted evidence in this Cause, which is summarized below.

A. NIPSCO's Case-in-Chief.

(1) Overview and Costs of Compliance Projects. Alison M. Becker, Manager of Regulatory Policy for NIPSCO, described NIPSCO's request for a CPCN for federally mandated projects associated with NIPSCO's proposed Compliance Project to comply with federally mandated requirements under Ind. Code 8-1-8.4-5 for recovery through NIPSCO's FMCA Mechanism. Ms. Becker explained the statutory authority supporting NIPSCO's requested relief, explained why NIPSCO's requested relief is appropriate and will serve the public interest, and supported, to the extent necessary, NIPSCO's alternative regulatory plan. Ms. Becker testified the public convenience and necessity will be served by NIPSCO's compliance with the RCRA and CCR Rule. She stated the Compliance Project is in the public interest because it will enable the Company to comply with the RCRA and CCR Rule and do so in an appropriate manner. She explained stated Indiana Code ch. 8-1-8.4 defines eligible projects as those that are federally mandated, including those mandated by the EPA. She explained that NIPSCO seeks relief within the bounds provided by the Indiana General Assembly in the enabling statute consistent with public policy and serves the public interest. She testified NIPSCO's approach to compliance with the RCRA and CCR Rule is sound and reasonable, and the requested Compliance Project is appropriate.

Ms. Becker testified that to the extent additional relief is necessary from the requirements of the Federal Mandate Statute or traditional accounting and ratemaking rules to allow for the requested accounting and ratemaking treatment and to support recovery of all federally mandated costs incurred in connection with the Compliance Project, NIPSCO seeks approval of an alternative regulatory plan and elects to become subject to Ind. Code § 8-1-2.5-6. She stated that on March 10, 2022, the Indiana Supreme Court issued a decision related to Duke Energy Indiana which reversed the Commission and found that Duke should have obtained pre-approval from the Commission before recording certain environmental remediation costs as a regulatory asset on its books ("Supreme Court Decision"). She explained that in that case, it appears that the Order approving recovery of such costs was issued in 2019, approximately ten (10) years after Duke created that entry on its books. She explained that in Cause No. 45253 S1, Duke received approval for a CPCN under the Federal Mandate Statute to recover coal ash remediation costs it incurred post-2019. She testified the OUCC appealed the Commission's Order, arguing that based on the Supreme Court Decision, Duke's coal ash remediation costs incurred before the Commission issued the S1 order should be denied. She stated the OUCC and Industrial Group filed briefs in that appeal on October 12, 2022. Additionally, she stated that, in NIPSCO's Cause No. 45700, a Motion for Judgment on the Evidence was filed arguing that because of the Supreme Court Decision, NIPSCO's request in that Cause was prohibited as a matter of law. The Cause No. 45700 Presiding Officers denied the Motion via docket entry.[3] Therefore, as a result of the uncertainty created by the position that compliance costs incurred before an Order is issued are not recoverable through the FMCA and how, if at all, Indiana appellate courts will interpret the Supreme Court Decision and whether its rationale applies to requests brought under the Federal Mandate Statute, NIPSCO has included a request for approval of an alternative regulatory plan to confirm that its federally mandated costs, which include costs that must be incurred throughout most of 2024 related to compliance requirements, are authorized to be recovered. She testified that recovery of the federally mandated costs as proposed by NIPSCO is in the public interest and consistent with the considerations the Commission is required to evaluate pursuant to Ind. Code § 8-1-2.5-5, The Schahfer Ash Pond Compliance Project enhances and maintains the value of NIPSCO's utility service and it is beneficial to NIPSCO, its customers, and the State of Indiana for NIPSCO to recover the federally mandated costs associated with the Compliance Project.

Mr. Robert Ridge, Manager of Project Engineering for NIPSCO, explained NIPSCO's commercial and project execution activities related to the Compliance Project, and the alternatives NIPSCO considered, NIPSCO's cost estimate for the Compliance Project, and its execution timing to achieve compliance. He described the Compliance Project is closing three ponds at Schahfer, which includes dewatering and excavation of CCR material. He explained that removed CCR material will be transported to the CCR-permitted landfill at Schahfer and that after CCR material is removed, the ponds will be backfilled with clean fill and a cover system will be installed to allow vegetation to grow and future storm water to shed off the closed ponds. He explained the scope of this work is similar to that currently underway at Michigan City, which is pending before the Commission in Cause No. 45700. He testified the compliance date for closure of these ash ponds is November 29, 2025. He explained that the Compliance Project involves several scopes of work. One of the first steps of the project includes installation of a dewatering system to lower water elevations to facilitate safe excavation of CCR at deeper elevations. Excavation activities will be completed utilizing equipment such as excavators, dozers, and front end loaders. CCR will be loaded into off-road dump trucks for offsite disposal in NIPSCO's existing, permitted landfill at Schahfer. It is estimated that approximately 256,200 cubic yards of material will be removed from the ponds. After CCR removal is complete for each pond, the pond will be backfilled with clean fill obtained from an onsite borrow location. It is estimated that approximately 493,700 cubic yards of onsite material will be utilized to backfill the ponds to create a base for the cover system. As the ponds are backfilled a cover system, stormwater features, and a stormwater pond will be installed, and vegetation will be established to allow future stormwater to shed off of the closed ponds.

[3] At page 2, the Cause No. 45700 Presiding Officers noted "Joint Movants' reliance upon the Indiana Supreme Court's opinion in *Ind. Ofc. of Util. Consumer Couns. v. Duke Energy Ind., LLC*, 183 N.E.3d 266 (Ind. 2022) is questionable because that decision addressed cost recovery under traditional ratemaking authority, not under the federal mandate statute, Ind. Code ch. 8-1-8.4, or the Alternative Utility Regulatory statute, Ind. Code ch. 8-1-2.5."

Mr. Ridge explained that NIPSCO began engineering work in 2017 to start developing the Closure/Post-Closure Plan which was submitted to IDEM in 2019 for review. Engineering continued to progress as NIPSCO received feedback from IDEM during the review and approval process. After receiving a completeness of review letter from IDEM, NIPSCO prepared and issued an RFP on October 3, 2022, which allows NIPSCO to award the construction contract by early in the second quarter of 2023 and begin excavating CCR material after receiving an Order issuing a CPCN for the Compliance Project in this proceeding. He explained that undertaking this kind of work was necessary because waiting to perform any engineering, planning, or procurement activities until after the petition in this proceeding would have put NIPSCO at increased risk of missing the compliance deadline. He explained that there is also similarly scoped CCR pond work required at Schahfer for the WDA and the Bailly Generating Station ("Bailly"). He testified that completing the Compliance Project in 2024 reduces potential impacts to the schedule and associated compliance dates for the work that will be performed at Schahfer's WDA and Bailly, as attempting to complete work at multiple locations simultaneously places constraints on subcontracted resources available in the area, as well as logistics concerns when offloading material into the landfill at Schahfer.

Mr. Ridge explained problems that could occur if construction were pushed beyond the December 31, 2024 targeted completion date, most of which stem from the northern Indiana winter weather. He described that extending the construction schedule past December 31, 2024 would require the project to suspend work or continue working through an additional winter season, which would increase costs for the project because frozen ground makes work difficult and snow, ice, and wind can prohibit workers from traveling to the work site and limit the hours available for safe work to occur. He stated that because the Compliance Project involves extensive earthwork activities, icy conditions can slow or halt progress and winter storms can affect the work site and work equipment, increasing costs and slowing progress. He also explained that freezing conditions can also lead to increased cost and complications for the dewatering system that will be used to support the project.

Mr. Ridge testified that to ensure all aspects of the Compliance Project are executed in compliance with all requirements, NIPSCO submitted a Construction Quality Assurance ("CQA") Plan to IDEM with the Closure/Post-Closure Plan. He said an updated CQA Plan will also be submitted to IDEM after award of the construction contract. He explained NIPSCO will employ a full time, third party CQA contractor to ensure work is being performed in accordance with the CQA Plan and Closure/Post-Closure Plan.

Mr. Ridge testified that the current estimated total cost of the Compliance Project is $53,025,000 ($46,920,000 in direct costs and $6,105,000 in indirect costs). Mr. Ridge discussed how the cost estimate was developed and testified that the estimated cost for the Compliance Project is reasonable. He testified the cost estimate is the result of updates to previous estimates to encompass the final design of the closure and requirements in the Closure/Post-Closure Plan. He said the current cost estimate includes owner's costs, contingency, escalation, and estimated construction contract amounts. This estimate is a Class 3 estimate, which NIPSCO anticipates updating after reviewing the responses to the RFP. He explained that, similar to the contract structure NIPSCO used in Cause No. 45700 and to which there was no objection from the parties in that Cause, the contract for the Compliance Project is planned to be awarded primarily utilizing firm unit prices for the work to be performed and that the contract is also planned to include liquidated damages to help ensure the project is completed within the defined project schedule and provisions to account for fluctuations in unit quantities, as well as fuel costs. Mr. Ridge testified the Compliance Project is not intended to "extend" the useful life of Schahfer or other NIPSCO facilities but is instead intended to allow NIPSCO to comply with the requirements of the RCRA and CCR Rule, which was promulgated under RCRA, by closing three ponds at Schahfer.[4] He did note that achieving compliance with these requirements preserves NIPSCO's ability to use the site for generation.

(2) Federal Mandates. Maureen Turman, Director of Environmental Policy & Sustainability for NiSource Corporate Services Company ("NCSC"), explained the federally mandated requirements and associated compliance deadline related to the Compliance Project. Ms. Turman discussed the federally mandated requirements, how these federally mandated requirements are driving the pond closure activities related to the Compliance Project, and the closure alternatives considered and ultimately rejected.

Ms. Turman testified three ash ponds at Schahfer City are regulated by RCRA under the CCR Rule. Although not part of the Compliance Project here, there is a fourth pond, the WDA, that will continue to operate until all the boilers at Schahfer are retired at the end of 2025 and a landfill that is subject to the CCR Rule.

Ms. Turman testified that as of the date of this filing, NIPSCO does not have an approved closure permit from IDEM for the MCU. She explained that NIPSCO submitted its closure permit to IDEM on June 27, 2019 and that on August 3, 2022, NIPSCO received a notice of closure plan completeness from IDEM, indicating that NIPSCO's permit application contained all required information. She stated NIPSCO's current expectation is that IDEM will approve the application in early 2023 based on its consultation with IDEM about the proposed closure method.[5] Ms. Turman explained that NIPSCO made its filing because, in Cause No. 45700, certain parties took the position that expenditures that occur before the Commission issues an order approving a CPCN request should not be recoverable under the Federal Mandate Statute, and NIPSCO needs to begin closure work in mid-2023 to ensure it completes the required compliance work by November of 2025, a deadline imposed by the CCR Rule. She noted that if NIPSCO were to wait until January or February of 2023 (when it expects to receive IDEM approval) and then make a filing with the Commission, and if NIPSCO were also to wait to begin pond closure work until an order were received from the Commission in this Cause, it would jeopardize NIPSCO's ability to comply with the CCR Rule requirement to close the MCU by November of 2025.

Ms. Turman testified that in 2020, NIPSCO made operational changes that caused receipt of CCR materials to three Schahfer CCR ash ponds to cease. The requirements of the CCR Rule mandate closure within 5 years of closure being initiated, which is understood to be the date the unit ceases receiving waste. The Schahfer CCR ash ponds ceased receipt of waste on October 30, 2020, resulting in a closure compliance date of November 29, 2025.

Ms. Turman explained the allowable closure methods – closure by removal and closure in place. She stated the closure by removal entails dewatering the ash, followed by excavation of all ash within the pond limits, including the liner (if one is present) and decontamination of the CCR

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[4] The federally mandated requirements contained in RCRA and the CCR Rule and NIPSCO's compliance therewith is further discussed by NIPSCO witness Turman.

[5] Although NIPSCO expects approval, IDEM could approve, approve with modifications, or reject it.

unit and areas affected by releases from the CCR unit, which is then properly managed, and the pond can then be backfilled and graded. CCR removal and decontamination are complete when constituent concentrations throughout the CCR unit and any areas affected by releases from the CCR unit have been removed and groundwater concentrations do not exceed the groundwater protection standards. The closure in place entails the removal of the free liquids and the control, minimization, or elimination, to the maximum extent possible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters or the atmosphers. Once the pond is dewatered, the remaining CCRs must be graded, and, in most circumstances, have additional fill materials brought in to provide a suitable base for the cap. The CCRs are then capped with soil, clay, and/or an engineered barrier, then mulched and seeded with a vegetative cover.

She testified NIPSCO evaluated closing the MCU via both the CIP and CBR methods and that challenges were identified relating to full conformance with the decontamination criteria to meet the CBR method for the MCU. In particular, IDEM expressed the opinion that the CBR performance standards could not be met at the MCU if the slurry wall and adjacent material which provides necessary geotechnical support and stability to the slurry wall were left in place because IDEM's belief was that the slurry wall contained some amount of CCR. Removing the slurry wall would dramatically increase the cost of closure. The slurry wall surrounding the MCU was installed within man-made native sand berms constructed of a fluid material which solidifies over time to create a low permeability core within the berms. The slurry wall extends from near the top of the berms into the underlying bedrock, serving as a barrier to fluid and material flow. However, it is not a free-standing structure, so removal of substantial amounts of supporting sand materials on either inside or outside of the slurry wall would compromise its structural integrity, potentially resulting in full collapse or failure of the wall. Leaving the slurry wall in place also provides additional cost benefits when closing the MCU. Hydraulic pump tests, which were performed to predict the impacts of full-scale dewatering within the MCU during closure construction activities, indicated that the slurry wall was effective in preventing groundwater migration into the MCU, the net effect being a reduction in the time required for dewatering (and construction), and lesser amounts of dewatering fluids during closure activities. Each of these reductions is anticipated to have a net positive effect on total closure construction costs. The slurry wall also separates the MCU from an adjacent non-CCR Rule regulated ash impoundment, serving to prevent potential lateral migration of ash into the MCU during excavation activities and subsurface water into the clean fill and capped unit following closure. Once it was determined that the slurry wall should remain, it was concluded that the units would be closed in conformance with the CIP performance standards. NIPSCO then determined that removing as much of the ash as is technically feasible from the MCU would be the most effective way to meet the CIP requirements in the CCR Rule, which include "to control, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters or the atmosphere" and also result in the lowest cost long term option. Thus, NIPSCO was able to avoid the costs to install active hydraulic controls, which wase expected to be required by IDEM should the ash be left in place.

She stated that in addition to the potential cost savings removal of the ash also provided more long-term cost certainty; that is, removing as much of the ash as is technically feasible also removes the potential source of impact to groundwater, thereby potentially reducing the cost of groundwater corrective measures and post-closure care. Therefore, NIPSCO determined that CIP with ash removal was the most appropriate, lowest cost method for closure.

(3) Estimated Federally Mandated Costs. Mr. Ridge testified that the estimated total cost of the Compliance Project is $53 million ($47 million in direct costs and $6 in indirect costs). Mr. Ridge discussed how the cost estimate was developed and testified that the estimated cost for the Compliance Project is reasonable.

(4) Accounting and Ratemaking. Kevin J. Blissmer, Manager of Regulatory for NCSC, explained NIPSCO's proposed recovery of the Compliance Project through the FMCA Mechanism. Mr. Blissmer provided (1) a description of the cost recovery provided for under the Federal Mandate Statute; (2) an overview of the FMCA Mechanism and its related ratemaking treatment; (3) an explanation of how the deferred federally mandated costs will be reflected in NIPSCO's FMCA Mechanism tracker filings; and (4) a description of NIPSCO's proposed allocators to allocate the various components of the FMCA Mechanism. He explained NIPSCO's requests to (1) recover 80% of the approved federally mandated costs[6] incurred in connection with the Compliance Project through NIPSCO's FMCA Mechanism pursuant to Ind. Code § 8-1-8.4-7, and (2) defer 20% of the federally mandated costs and ongoing expenses incurred in connection with the Compliance Project for recovery in NIPSCO's next general rate case, where the deferred balance will be subject to a carrying charge based on the effective weighted average cost of capital ("WACC") on an interim basis until such costs are recognized for ratemaking purposes in its next general rate case; (3) recover any federally mandated costs, including but not limited to federally mandated costs incurred prior to and after approval of a Final Order in this proceeding to the extent such costs are reasonable and consistent with the scope of the Compliance Project, and (4) utilize the proposed factors to allocate between rate classes.

Mr. Blissmer described that NIPSCO seeks authorization for recovery of a return on and of the Compliance Project. He explained that because the Compliance Project relates to the federally mandated closure of a capital asset, the federally mandated costs associated with the project will be captured on a retirement work order and recorded as a reduction to accumulated depreciation. He testified that NIPSCO therefore proposes recovery based upon the incremental effect of the Compliance Project costs on NIPSCO's net original cost rate base, with 80% of that total amount timely recovered through the FMCA Mechanism, with the other 20% being deferred to a future electric base rate case. He stated that rather than amortizing the federally mandated costs associated with the Compliance Project over the period during which they are projected to be incurred, which would be over a period of less than 12 months, upon project completion NIPSCO proposes to amortize the costs associated with the Compliance Project through 2032. Mr. Blissmer testified that NIPSCO is proposing to recover carrying costs only on the 20% portion of federally mandated costs that is deferred for recovery in a future rate case. He explained that while authorized under the Federal Mandate Statute, NIPSCO is not seeking recovery of carrying costs on federally mandated costs for the period between when the Compliance Project is initiated and when such costs are included for recovery through the FMCA Mechanism. He testified there are no operations and maintenance ("O&M") expenses associated with the Compliance Project, and no property taxes to be incurred. The federally

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[6] This includes a return on the actual project retirement costs using NIPSCO's effective WACC plus amortization both for the 80% and the 20% deferral.

mandated costs associated with this Project include the actual costs incurred to complete the project (recovered through amortization of that investment), the financing costs associated with the investment in net original cost rate base (NIPSCO's WACC as applied to the costs of the project), associated federal and state income taxes and the public utility fee, which will be the annual calculation of federally mandated costs. He described that when NIPSCO has completed the Project, NIPSCO will file for recovery of 80% of this annual calculation and will defer 20%. Each ensuing year, NIPSCO's filing will reflect that one year of the total investment has been amortized.

Mr. Blissmer stated NIPSCO proposes that all federally mandated costs associated with the Compliance Project be allocated based on the demand allocators set forth in the Cost of Service Study from NIPSCO's most recent electric base rate case in Cause No. 45159 but noted that NIPSCO currently has an electric base rate case pending in Cause No. 45772 and that once approved, the demand allocators set forth in the Cost of Service Study in that case would be used to allocate the federally mandated costs. He stated the demand allocators would also reflect the significant migration of customers amongst the various rates to prevent any unintended consequences of the migration of customers between rates and to properly allocate their share of the revenue requirement in its FMCA semi-annual tracker filings. He explained that in accordance with Ind. Code § 8-1-8.4-7(c)(1), NIPSCO will include the operating income associated with the Compliance Project in the total electric Comparison of Electric Operating Income for purposes of the Ind. Code § 8-1-2-42(d) earnings test.

Gunnar J. Gode, Vice President and Chief Accounting Officer for NCSC, provided an explanation of how NIPSCO will account for the deferred federally mandated costs, which then leads to how the costs will be reflected in NIPSCO's FMCA Mechanism tracker filings, and a description of the amortization rate NIPSCO proposes for the federally mandated projects included in the Compliance Project. He testified that NIPSCO estimates it has collected $1.3 million associated with the MCU ash pond closure costs at Schahfer as of December 31, 2021. He stated this amount will not increase going forward as the collection of the MCU was omitted from Cause No. 45159. He testified NIPSCO will not include the recovery of this amount in the Compliance Project within the FCMA to ensure there is no double recovery in rates.

B. <u>OUCC's Case-in-Chief.</u> Brian A. Wright, Utility Analyst II in the OUCC's Electric Division, presented the OUCC's review of NIPSCO's proposed environmental compliance plan and discussed the CCR Rule driving NIPSCO's stated need for the Compliance Project. He testified the OUCC agrees the Compliance Project is necessary to comply with federal environmental rules. Mr. Wright explained that the OUCC has concerns with the Schahfer MCU groundwater remediation costs because they are potentially increased by the selection of closure in place over closure by removal, but were apparently not considered by NIPSCO when selecting the closure method. He stated the OUCC does not agree with NIPSCO's selected closure method because it did not provide an itemized cost estimated for the modified CIP that it selected. Mr. Wright testified that NIPSCO's cost comparison of alternative closure methods should not be considered accurate or complete because it omits removal of the slurry wall, closure of the adjacent impoundment, and increased groundwater remediation and post-closure care requirements for closure in place. While Mr. Wright recommended NIPSCO's petition be rejected as filed, he proposed an alternative in which the Commission grant NIPSCO cost recovery for construction, engineering, and owner's costs for period running from a Final Order in this Cause to the second quarter of 2024. Mr. Wright also recommended the

Commission grant NIPSCO up to $1,000,000 to cost costs for studying removal of the slurry wall and closure of the adjacent impoundment.

Mr. Wright testified that NIPSCO did not meet the requirements for cost recovery under the Federal Mandate Statute, as the Project's costs are being incurred under the same scenario as Duke Energy Indiana's closure costs that were deemed retroactive ratemaking by the Indiana Supreme Court. He stated NIPSCO removed CCR closure costs from its most recent rate case in Cause No. 45159 so seeking recovery of them now would constitute retroactive ratemaking. He testified that NIPSCO's Project costs are disqualified for recovery under the FMCA Statute because part of the costs will be incurred before the Commission can approve them. He stated the ARP statute does not and should be apply to CCR closure costs, and NIPSCO's request for an ARP and associated recovery should be denied.

Gregory L. Krieger, a Utility Analyst II, discussed his review to determine whether NIPSCO followed a reasonable process to define the necessary management of CCRs to comply with the CCR Rule and subsequently to develop a project cost estimate. He stated NIPSCO's proposed Project is incomplete because it does not include groundwater remediation measures, monitoring, and long-term compliance. Mr. Krieger recommended disallowing portions of NIPSCO's estimated Project costs related to quality assurance, engineering, and owner's costs. He also recommended eliminating NIPSCO's requested escalation and reducing its proposed contingency costs.

Brian R. Latham, a Utility Analyst in the OUCC's Electric Division, discussed NIPSCO's proposed ratemaking treatment and recovery of the Compliance Project's costs. He described his concern that NIPSCO's request creates a potential double recovery issue at the time of its next base rate because its accumulated depreciation account must be adjusted to remove ash pond removal costs from rate and the depreciation rate calculations. He testified that his concern could be avoided by rolling the Schahfer Compliance Project into NIPSCO's current rate case (Cause No. 45772). Mr. Latham testified that the OUCC's position is that indirect costs of removal are capital costs, but indirect costs already included in base rates should not be included in Petitioner's capital costs because it would be very easy for Petitioner to double recover indirect costs. He recommended reporting requirements to ensure no indirect costs be included in the Schahfer Compliance Project if they are also included in NIPSCO's Cause No. 45772 labor expense. Mr. Latham also recommended that, once the Compliance Project is complete, NIPSCO's carrying costs should be reduced to its weighted average cost of debt and that a carrying charge be applied to NIPSCO's $1.3 million prior collection of Schahfer ash pond closure costs.

C. CAC's Case-in-Chief. Benjamin Inskeep, Program Director at CAC, recommended that the Commission (1) encourage NIPSCO to fully clean up its Schahfer site of coal ash and constituents as is necessary for NIPSCO to provide safe electricity service to its customers and to best situate itself to meet federal requirements; (2) safeguard ratepayers from paying additional costs related to the MCU coal ash units beyond the Schahfer Ash Pond Compliance Project to the extent NIPSCO must incur future costs as a result of NIPSCO's selection of closure in place instead of adhering to a closure by removal; (3) find that customers should not bear the full cost of the Schahfer Ash Pond Compliance Project that was necessitated by NIPSCO's imprudent disposal of coal ash for decades and disallow recovery of all or a portion of these costs, and; (4) to the extent the Commission grants cost recovery of all or a portion of the Schahfer Ash Pond Compliance Project: (a) deny NIPSCO's request to earn a return "on" the Project costs, (b) remove all contingency costs included in NIPSCO's cost estimate, (c) ensure no double recovery of indirect costs, (d) remove all costs that are unrelated to the MCU, (e) deny NIPSCO's proposed cost allocation using adjusted demand allocators and instead approve cost allocation based on NIPSCO's adjusted energy allocators for any Schahfer Ash Pond Compliance Project costs approved in this proceeding (and future proceeding proposals for coal ash project cost recovery), and (f) deny cost recovery for all Schahfer Ash Pond Compliance Project costs incurred prior to a Final Order in this Cause that would contravene Indiana's statutory prohibition on retroactive ratemaking.

D. <u>Industrial Group's Cross-Answering Testimony.</u> Mr. Collins filed cross-answering testimony in support of NIPSCO's proposed 4 CP demand allocators, stating that coal ash pond costs are normally included in the production plant account, such as FERC Account 312, and that the costs of such fixed cost structures are appropriately allocated on a demand basis. He also explained that Rate 831 is a cost-based rate, and Rate 831 Tier 2 customers are not reliant upon NIPSCO's generation portfolio and do not receive the fuel cost benefits associated with that portfolio; therefore, there is no subsidy or "windfall" for Rate 831 Tier 2 under NIPSCO's demand allocation proposal.

E. <u>NIPSCO's Rebuttal.</u>

(1) <u>NIPSCO Witness Gode.</u> In rebuttal, Mr. Gode responded to Mr. Latham's concerns regarding potential double recovery of indirect costs and "return on" in NIPSCO's electric base rates and the FMCA. He explained that, pursuant to FERC guidance, NIPSCO is required to track any capital project individually, which also applies to cost of removal projects to support future depreciation studies. Mr. Gode testified that the Compliance Project is a discrete project that will be recorded and individually identified in NIPSCO's fixed assets subledger and that any labor and benefits associated with capitalized projects, including the Compliance Project, are not duplicative to costs being recovered through current or past rates. Mr. Gode also pointed out that NIPSCO does not include retirement work in progress in net original cost rate case; therefore, is no merit to Mr. Latham's concern about double recovery of return on rate base associated with the Compliance Project. He testified that as the Compliance Project costs enter the FMCA tracker, they will be moved from Account 108 (accumulated depreciation) to Account 182 (regulatory asset), further reducing the risk of inclusion in rate base. Given Mr. Gode's explanation of NIPSCO's standard practice to maintain unique project IDs within its books and records in order to separately track costs for the FMCA mechanism, he stated that Mr. Latham's recommended reporting requirements are duplicative, unnecessary, and burdensome.

In response to the Intervenors' retroactive ratemaking arguments, Mr. Gode reiterated why the FMCA mechanism is appropriate for recovery of costs for the Compliance Project, explaining that these costs were not included in NIPSCO's last rate case, where it was proposed and accepted that the costs would be presented to the Commission for approval in a future case. He explained that updating prior depreciation estimates is not "retroactive" as it serves to bring prior cost estimates into the present by updating for current market conditions and any changes to project scope.

Mr. Gode supported NIPSCO's proposed ratemaking treatment as reasonable and appropriate, refuting the Intervenors' assertion that incurred, actual Compliance Project costs recovered through the FMCA should not a return "on" component. He also refuted Mr. Latham's recommendation to apply a carrying charge to NIPSCO's estimated $1.3 million prior collections through depreciation related to the Compliance Project, pointing out that the adequacy of a cost of removal reserve is an ongoing component of ratemaking in the depreciation study and that Mr. Latham offers no support for his proposed recommendation.

Finally, Mr. Gode explained why, despite Mr. Latham's recommendation to address Schahfer Compliance costs in NIPSCO's pending electric rate case, the FMCA is an appropriate mechanism to recover costs of removal. He stated that, while recovery through depreciation expense as part of a base rate case proceeding is one appropriate method of recovery of costs of removal, it is not the only method and that NIPSCO's Compliance Project request meets every requirement of the Federal Mandate Statute.

(2) NIPSCO Witness Ridge. Mr. Ridge responded to the testimony of Mr. Krieger and Mr. Inskeep, who object to NIPSCO's inclusion of the upper end of the accuracy range in its proposed construction cost estimate, as well as NIPSCO's proposed allowances for contingency, escalation, and quality assurance. Mr. Ridge explained that the accuracy range of an estimate generally covers unknown or new scope items that have yet to be defined for the project, and that because work at the Schahfer MCU has yet to be initiated, it is appropriate to account for the unknowns of the Project. He also testified that contingency generally accounts for pricing and quantity variation in the specific scope estimated as well as for other project risk items or events and that NIPSCO's contingency allowance for the Schahfer Compliance Project accounts for pricing variations as the construction contract as yet to be awarded. Mr. Ridge testified that in NIPSCO's most recent TDSIC Plan case, Cause No. 45557, the Commission the inclusion of both contingency and cost estimate accuracy ranges.

In response to Mr. Krieger's proposal to reduce NIPSCO's cost estimate because contingency, escalation, and contractor mobilization costs are higher than those NIPSCO proposed in Cause No. 45700, Mr. Ridge stated that NIPSCO's cost estimate in this Cause is a Class 3 estimate developed prior to award of a construction contract unlike in Cause No. 45700, in which a construction contract had been awarded. He explained that NIPSCO's proposed mobilization costs in this Cause fall within the range of mobilization costs from the bids NIPSCO has received for the Schahfer Compliance Project. Mr. Ridge also testified that including escalation in NIPSCO's cost estimate in this Cause is appropriate because NIPSCO's estimate was drafted in 2022 and construction activities will be primarily completed in 2023 and 2024.

Mr. Krieger's testimony states NIPSCO's quality assurance budget is "excessive"; however, Mr. Ridge explained that the cost of quality assurance is primarily driven by the duration and scope of the project. As opposed to the Michigan City Compliance Project, the Schahfer Compliance Project is anticipated to be completed over multiple construction seasons and contains additional scope, including installation of a geomembrane liner system which requires oversight and testing.

(3) NIPSCO Witness Turman. In response to Mr. Inskeep's contention that NIPSCO has modified its closure in place with ash removal approach to closure by removal

and capping, Ms. Turman testified NIPSCO has made no modification to the ash removal approach set out in her direct testimony and reiterated its plans to use the closure in place method described in her direct testimony as provided in 257.102(d).

Responding to Mr. Inskeep's argument that the CCR Rule does not allow for utilities to blend two closure methods and uncertainty that NIPSCO will fully comply with the performance standard requirements for closure in place, Ms. Turman explained that NIPSCO's closure plan is consistent with the CCR Rule and meets the closure in place performance standards.

In response to Mr. Inskeep's concerns relating to groundwater remediation, Ms. Turman explained that first, NIPSCO is not seeking approval of its groundwater monitoring remedy or associated costs in this proceeding. Second, she stated that removing the majority of the coal ash at the MCU will minimize the ability for cash to act as a source of contamination to the groundwater. Third, Ms. Turman testified that NIPSCO's feasibility assessment of groundwater and solid materials at the MCU determined that monitored natural attenuation of the groundwater is expected to provide good long-term performance and be protective of human health and mitigate groundwater degradation.

Ms. Turman testified it would be inappropriate for the Commission to accept Mr. Wright's proposed limitation on NIPSCO requested recovery until NIPSCO submits a comprehensive cost analysis of the alternative closure methods, including cost estimates for removal of the slurry wall, closure of the adjacent impoundment, and groundwater remediation and post-closure costs for each method. She stated that this recommendation ignores the detail in her direct testimony describing that removal of the slurry wall is not required to comply with the CCR's CIP requirements and that it would dramatically increase the cost of closure due to a significant increase in excavation and disposal of solid waste material and increased volumes of waste liquid that would have to be managed. Ms. Turman testified that because no additional requirements have been established for the adjacent impoundment, any cost estimate to execute a compliant closure would be speculative and calculated based on significant assumptions, suppositions, presumptions that would preclude a valuable estimate.

(4) <u>NIPSCO Witness Blissmer.</u> Mr. Blissmer responded to Mr Latham's recommendation that NIPSCO include the costs of removal as part of its depreciation study in its current base rate case (Cause No. 45772) even though OUCC witness Mr. Wright and CAC witness Mr. Inskeep both concede that the Compliance Project is eligible for a CPCN and associated cost recovery under the FMCA Statute. He testified that rather than revising NIPSCO's base rate case filing, and given the relatively limited opposition in this case, it is more appropriate for the Commission to decide this case on the merits. He stated that if NIPSCO's requested Compliance Project is denied here, the actual and anticipated costs of removal will be included in the calculation of depreciation rates in a future general rate case in addition to the associated impact on net original cost rate base in NIPSCO's currently-pending base rate case.

In response to Mr. Inskeep's recommended denial of NIPSCO's proposed demand allocators and 4 coincident peak ("4 CP") methodology to allocate the costs of the proposed Compliance Project, he testified that NIPSCO's proposed allocation factors are the same as those that would have been used to allocate ash pond closure costs through base rates and are consistent with how costs were to be allocated under the FMCA Tracker pursuant to NIPSCO's last base rate case. He stated that it is appropriate to allocate the Compliance Project costs using demand allocators as opposed to energy allocators. He explained that prior FMCAs have delineated allocation of costs between fixed and variable costs, with fixed costs being allocated on a demand basis and variable costs on an energy basis. He explained that since only the first tier of Rate 831's service is firm service and backed by NIPSCO's production assets, Mr. Inskeep's recommendation to allocate the costs of NIPSCO's Compliance Project on an energy basis is inconsistent with how fixed FMCA costs have been allocated in the past and ignores the fact that the ash ponds are associated with NIPSCO's production facilities, which are designed to meet the demands of NIPSCO's customers.

Mr. Blissmer disagreed with Mr. Latham's recommendation to waive post-in-service carrying costs or allow the amount to be based on the weighted average cost of debt consistent with the FMCA Statute. He testified that Indiana Code § 8-1-8.4-7(c)(2) allows for 20% of the approved federally mandated costs, including depreciation, allowance for funds used during construction, and–importantly, for this issue–post in service carrying costs based on the overall cost of capital most recently approved by the Commission to be deferred and recovered in a future general rate case. He stated the statute specifically allows for this to compensate utilities for its cost of capital while it is waiting to collect the federally mandated costs it incurred. He explained that NIPSCO funds its capital projects through a combination of debt and equity and, as such, should recover its fully weighted average cost of capital when recovery expands over multiple years.

(5) <u>NIPSCO Witness Becker.</u> Ms. Becker responded to Intervenors' incorrect claims that the Federal Mandate Statute does not apply to costs that are incurred before an order is issued. She stated that the two critical findings the Commission must make are that the public convenience and necessity "will be served" by a compliance project and that the compliance project "will allow the energy utility to comply." She testified NIPSCO's project "will" serve the public convenience and necessity from the day that it is completed and for many years in the future and "will allow" NIPSCO to comply with the federal mandate. She stated that whether costs have already been incurred has no impact on these findings.

Ms. Becker also explained that the provision in Ind. Code § 8-1-8.4-6(b)(1)(B) concerning "projected federally mandated costs" is information the statute requires an energy utility "set forth in [its] application." She pointed out that it must therefore be a projection as of the date of the petition. She testified NIPSCO's cost estimate was a projection for the cost to complete the project when it filed its petition, and it continues to be a projection, since the work is not yet complete. She stated such a projection can include project costs incurred prior to and during the proceeding, especially when, as is often the case with compliance projects, there are mandated compliance deadlines that must be met and costs must be incurred prior to the petition date in order to meet those deadlines. She also pointed out the multiple orders of the Commission authorizing recovery of federally mandated costs incurred on a federally mandated compliance project before the issuance of the order.

Ms. Becker testified that Intervenors' recommendation for disqualification of costs incurred before the order issuance relies upon use of future tense in selective phrases in the statute. She noted there really is no need to parse verb tense because when the General Assembly intends for nothing to be done before an Order is issued, it knows how to say so.

4. Commission Discussion and Findings.

As we approach this case, we are mindful of the context in which this case has been filed. This is especially so in light of the 2022 Indiana Supreme Court decision on retroactive ratemaking in *Office of Util. Cons. Couns. v. Duke Energy Indiana, LLC,* 183 N.E.3d 266 (Ind. 2022) and the much more recent decision of the Indiana Court of Appeals interpreting the Federal Mandate Statute in *Office of Util. Cons. Couns. v. Duke Energy Indiana, LLC,* Cause No. 21 A EX 2702 (slip. op. 2/21/2023). Pursuant to the FERC USOA, coal ash closure costs are recorded by debiting (reducing) Accumulated Depreciation and thereby increasing net original cost rate base. Over time, through the course of setting depreciation accrual rates, this reduction in Account 108 would be reflected through new depreciation rates. We have required major electric utilities like NIPSCO to follow this practice by duly promulgating a regulation adopting the FERC USOA. 170 IAC 4-2-1.1(a). Accounting for retirements and costs of removal pursuant to the FERC USOA and the resulting ratemaking treatment is consistent with our statutory duty under Ind. Code §8-1-2-19:

> The commission, from time to time, shall ascertain and determine the proper and adequate rates of depreciation of the several classes of property of each public utility. The rates, tolls and charges shall be such as will provide the amounts required over and above the reasonable and necessary operating expenses to maintain such property in an operating state of efficiency corresponding to the progress of the industry. Each public utility shall conform its depreciation accounts to such rates, so ascertained and determined by the commission. The commission shall make changes in such rates of depreciation from time to time, as it may find necessary.

The Commission is directed by statute to "prescribe rules, regulations and forms of accounts regarding such depreciation," which we have done by adopting said FERC USOA. Ind. Code §8-1-2-20. Thus, so long as the compliance costs are reasonable and necessary to satisfy estimated retirement obligations, such costs are reflected in the calculation of future depreciation rates. Finally, "the commission shall provide for such depreciation in fixing the rates, tolls and charges to be paid by the public." Ind. Code §8-1-2-21. Such recovery is statutorily required and would not be foreclosed as "retroactive ratemaking" under the Supreme Court Decision.

The OUCC and CAC invite a sea change from this historic practice, a practice that is rooted in statutory language. They imply that costs incurred between base rate cases and before the issuance date of this order are non-recoverable under the Supreme Court Decision. Each of these statutes we have cited are mandatory and impose a duty on the Commission. Each of Ind. Code § 8-1-2-19 through 21 include the phrase"[t]he commission shall." All three sections were enacted as part of the original Spencer-Shively Act in 1913. (Acts 1913, ch. 76, §§22 through 24, p. 176.) These provisions are thus part of the bedrock of utility regulation as adopted by the General Assembly. But the OUCC and CAC argue that the Supreme Court Decision somehow casts them aside. They invite an alternative paradigm where cost of removal estimates are never reconciled with actual costs of removal. In this paradigm, we would be precluded from ascertaining and determining proper rates of depreciation so that property can be maintained in an operating state of efficiency corresponding to the progress of the industry. When the Supreme Court did not even mention Ind. Code §§ 8-1-2-19 through 21 in its opinion, we decline the OUCC's and CAC's invitation to read the Supreme Court Decision beyond its specific facts and holding.

Notably, in its last electric rate case, NIPSCO submitted testimony describing the preliminary scope of its compliance project and explaining its decision to not include costs in its depreciation rates at that time, and to instead, when the federal environmental regulations were better understood, seek recovery in a future base rate case or FMCA proceeding. These costs are therefore clearly not part of costs already recovered in rates.

In this case, NIPSCO has selected and presented an alternative method for approval of and recovery of these costs, one that the General Assembly has created through the Federal Mandate Statute. It is the eligibility for this alternative method of recovery that we are called to decide in this case. If we find the required elements set forth in Ind. Code §8-1-8.4-7(b) ("Section 7(b)") have been met, we are required to issue a CPCN and to provide for the *timely* recovery of the federally mandated costs pursuant to Ind. Code §8-1-8.4-7(c).

We pause to note that an issue arises as to whether the entirety of the costs of removal for this project are eligible for the alternative treatment proposed by NIPSCO under the Federal Mandate Statute. The parties have raised an issue that some of the costs included in NIPSCO's estimate may not be eligible for treatment under the Federal Mandate Statute because they were incurred before the date we have issued this Order. While we are aware of the recent Indiana Court of Appeals opinion in *Duke,* we note that opinion is not yet final because it has not yet been certified as such. Notably, if we approve NIPSCO's requested ARP, then this issue is eliminated because the costs would be recoverable through the alternative mechanism irrespective of the Court of Appeals decision. Absent approval of the requested ARP and if the final resolution of *Duke* is consistent with the holding in the non-certified Court of Appeals opinion, then costs incurred for this project before the date of this Order would not be recoverable as federally mandated costs pursuant to the mechanism set out in the Federal Mandate Statute. To the extent there are costs of the project that are ineligible for the Federal Mandate Statute, such costs should be addressed in the traditional manner by debiting Account 108 as we have described.

We now proceed to evaluate the Section 7(b) CPCN factors below and ultimately determine that each factor has been satisfied. Upon making this determination, Section 7(c) of the Federal Mandate Statute requires that timely recovery of 80% of an energy utility's federally mandated costs be recovered through its FMCA mechanism and the remaining 20% is deferred for recovery in its ensuing general rate case. We therefore turn to the elements of Section 7(b).

A. <u>Ind. Code ch. 8-1-8.4 ("Chapter 8.4") Certificate.</u> Pursuant to Ind. Code Section 7(b), "[t]he commission shall hold a properly noticed public hearing on each application and grant a certificate only if the commission has:

(1) made a finding that the public convenience and necessity will be served by the proposed compliance project;

(2) approved the projected federally mandated costs associated with the proposed compliance project; and

(3) made a finding on each of the factors set forth in section 6(b) of this chapter."

We begin our analysis by reviewing and making a finding on each of the factors set forth in Ind. Code §8-1-8.4-6(b) ("Section 6(b)"). These findings will then guide our analysis of the first two elements of Section 7(b).

(1) Federally Mandated Requirements. (Ind. Code §§ 8-1-8.4-5, 8-1-8.4-6(b)(1)(A), and 8-1-8.4-7(b)(3)). NIPSCO sought approval of the Schahfer Ash Pond Compliance Project to comply with the federal requirements and associated compliance deadline of RCRA and the CCR rule. Witness Turman thoroughly described the requirements of RCRA and the CCR rule and how they are requiring the closure of the three Schahfer ponds (sometimes referred to as the "MCU"). We find her testimony has persuasively set forth a description of the requirements at hand. Ind. Code § 8-1-8.4-5 defines a federally mandated requirement to include a "requirement that the commission determines is imposed on an energy utility by the federal government in connection with … [a]ny other law, order, or regulation administered or issued by the United States Environmental Protection Agency[.]" EPA promulgated the CCR Rule under RCRA, which is one of the federal mandates explicitly listed in Ind. Code § 8-1-8.4-5. Both the OUCC and CAC concluded that NIPSCO's Schahfer Compliance Project is necessary to comply with a federally mandated requirement. (Wright at p. 5 and Inskeep at p. 5.)

Consistent with Ind. Code § 8-1-8.4-5(3), we have regularly approved CPCN requests for recovery of environmental compliance costs generally and coal ash related compliance costs in particular. *See, e.g.*, our Orders in Cause Nos. 44765, 44794, 45052, and 44872. IDEM, the state agency with delegated authority to implement RCRA per 329 IAC 10 and to administer and enforce the RCRA hazardous waste program per Ind. Code 13-30 and 329 IAC 3.1 in the State of Indiana, has reviewed NIPSCO's combined closure application and deemed it complete in 2022. At the evidentiary hearing in this Cause, NIPSCO's counsel stated on the record that IDEM issued draft approval of NIPSCO's application in February 2023 and that the parties had reached agreement that NIPSCO may seek to file IDEM's final approval as a late-filed exhibit in this Cause. IDEM approved NIPSCO's Schahfer MCU CCR closure plan without any material modifications. As such, we find that RCRA and the CCR rule require that the Schahfer MCU be closed.

Accordingly, we find that NIPSCO's Schahfer Ash Pond Compliance Project allows it to comply with the federal requirements and associated compliance deadline in the RCRA and CCR rules, and each represent federally mandated requirements as that term is defined in Ind. Code § 8-1-8.4-5. Pursuant to Ind. Code§ 8-1-8.4-7(b)(3), we find NIPSCO's request satisfies Ind. Code§ 8-1-8.4-6(b)(l)(A).

(2) Federally Mandated Costs. (Ind. Code §§ 8-1-8.4-4, 8-1-8.4-6(b)(1)(B), 8-1-8.4-7(b)(2), and 8-1-8.4-7(b)(3)). Ind. Code § 8-1-8.4-4 defines federally mandated costs, in part, as "costs that an energy utility incurs in connection with a compliance project, including capital, operating, maintenance, depreciation, tax, or financing costs." It does not include fines or penalties for violations related to a federally mandated requirement. (*Id.*) While no party objected to whether NIPSCO's Project costs met the definition of "federally mandated costs," the parties raised several other related arguments, which we address in turn below. Intervenors' arguments concerning the applicability of the Federal Mandate Statute to costs incurred prior to the date of this Order are discussed in Section 4(B).

NIPSCO witness Ridge presented the Schahfer Ash Pond Compliance Project cost estimate of $53,025,000 ($32,467,000 in direct costs and $6,105,000 in indirect costs). (Ridge at p. 13 and Attachment 3-A.) NIPSCO witness Gode explained that the Project costs will be recorded as a retirement work order which reduces NIPSCO's Accumulated Depreciation (Account 108) balance and increases rate base, which has the same effect as NIPSCO making an investment in Utility Plant in Service. (Gode Direct at pp. 6-7.) NIPSCO witness Blissmer stated there are no O&M expenses associated with the Project, and therefore no need to defer any ongoing O&M. He testified that the federally mandated costs associated with the Project are the financing costs associated with the investment in net original cost rate base (NIPSCO's WACC as applied to the costs of the Project) plus the amortization of that investment, in addition to federal and state income taxes and the public utility fee. (Blissmer Direct at p. 9.)

Incremental Costs

OUCC witness Latham asserted that recovering the costs of NIPSCO's Schahfer Ash Pond Compliance Project through the FMCA creates risk of double recovery at the time of NIPSCO's next base rate case because its accumulated depreciation account must be adjusted to remove ash pond removal costs from rate base and depreciation rate calculations. (Latham at p. 4.) Mr. Latham also stated that any indirect costs and return "on" associated with the Schahfer Compliance Project included in NIPSCO's base rates should not be included in Petitioner's capital costs. (*Id.* at p. 5.) CAC witness Inskeep argued that NIPSCO had not demonstrated its indirect costs are new, additional costs that have not or will not be recovered from ratepayers through other rate mechanisms. (Inskeep Direct at p. 19.)

We start by acknowledging the unique nature of cost of removal ratemaking and distinguishing it from traditional capital cost recovery in that the FERC USOA does not precisely assign COR reserves for specific removal tasks, specific projects, or specific assets. Depreciation rates are set to collect estimated cost of removal for overall asset classes. NIPSCO took the step to estimate the amount it has collected through historical depreciation rates for general ash pond closure costs and reduced its proposed Project cost recovery through the FMCA mechanism by that amount. No party objected to the accuracy of this amount. Taking this step reasonably resolves any concern of double recovery of the federally mandated costs.

NIPSCO proposes to capitalize indirect labor costs, as these costs are allocated to all capital projects as part of standard plant accounting. We agree with Mr. Gode's rebuttal testimony (pp. 5-6), which explains that any internal resources related to the Schahfer Ash Pond Compliance Project will be recorded to the specific retirement work order and is not duplicative to costs being recovered through current or past rates and find that NIPSCO's proposal is consistent with FERC accounting guidance and our treatment of capitalized indirect costs in TDSIC Plan cases. Likewise, Mr. Gode's rebuttal testimony (p. 8) explained that NIPSCO will be able to omit remediation costs related to the Schahfer Compliance Project from any future demolition study and its rate base in any future rate case to ensure a return "on" is not earned twice.

Accordingly, we approve NIPSCO's requested CPCN and accept Petitioner's proposal to recover its compliance-related costs presented in this proceeding, less $1,300,000 already collected.

Schahfer Compliance Project Cost Estimate

CAC witness Inskeep testified that NIPSCO "inappropriately inflated the estimated cost" of the Schahfer Compliance Project by applying the upper end of the accuracy range for the contractor line item and that including contingency in the estimate has not been justified. (Inskeep at pp. 16 – 17.) OUCC witness Krieger (pp. 5-8) compared NIPSCO's proposed Schahfer Compliance Project cost estimate to the cost estimate it proposed in Cause No. 45700 for the Michigan City ash pond closure project and recommended eliminating "allowances, contingencies, and escalation" included in NIPSCO's proposed Project cost estimate. (Krieger at p. 12.)

We are not persuaded by Intervenors' testimony on these matters. As Mr. Ridge noted (Rebuttal, p. 6), NIPSCO's Schahfer Compliance Project cost estimate is a Class 3 estimate and was developed prior to award of a construction contract. NIPSCO's construction contract accuracy range of +/- 25% and contingency cost allowance are consistent with the Association for the Advancement of Cost Engineering ("AACE") system and industry practice and serve a similar purpose to that for contingency/accuracy ranges we approved in NIPSCO's most recent electric TDSIC Plan. Applying escalation to NIPSCO's proposed Project cost estimate is also reasonable because NIPSCO's estimate was drafted in 2022 and construction will be primarily completed in 2023 and 2024. NIPSCO explained (Ridge Rebuttal, p. 7) that the cost of quality assurance is primarily driven by the duration and scope of the project and that the Schahfer Compliance Project will be conducted over multiple construction seasons and contains a broader scope than the ash pond closure work at Michigan City in Cause No. 45700. We also note that through the FMCA tracker, NIPSCO will only recover the actual federally mandated costs it incurs; therefore, if it does not incur all of the contingency allowance or construction accuracy range included in its Project estimate, the total federally mandated cost will be less, and customers will only pay for what has been incurred.

Based on the evidence presented, we find NIPSCO's Schahfer Ash Pond Compliance Project cost estimate of $53,025,000 is reasonable and should be approved. Pursuant to Ind. Code § 8-1-8.4-7(b)(3), we further find that NIPSCO has satisfied Ind. Code§ 8-1-8.4-6(b)(l)(B).

(3) Compliance with Federally Mandated Requirements. (Ind. Code §§ 8-1-8.4-6(b)(1)(C) and 8-1-8.4-7(b)(3)). NIPSCO witness Turman explained the federally mandated requirements, namely RCRA and the CCR Rule, that are driving the pond closure activities related to the Schahfer Ash Pond Compliance Project. IDEM agreed to closing the Schahfer MCU and approved NIPSCO's closure application. (Late-Filed Exhibit 1.) The Schahfer MCU has a compliance date based on the date each pond ceased receipt of waste; therefore, the Schahfer Ash Pond Compliance Project must be complete by November 29, 2025.

CAC witness Inskeep (p. 5) agreed that the CCR Rule requires NIPSCO to close the Schahfer coal ash ponds and that NIPSCO's proposed project costs are necessary to comply with the CCR Rule. However, he asserted (p. 6) that NIPSCO's selected closure method "leaves questions unanswered" about whether NIPSCO will fully comply with all of the federal performance standard requirements for closure in place because the plain language of the CCR Rule does not allow utilities to blend the two CCR unit closure methods. (Inskeep Direct at p. 10.)

NIPSCO's rebuttal testimony (Turman Rebuttal at p. 9) explained that NIPSCO's proposal to remove as much ash as possible aligns with the closure in place method requirements and that a qualified professional engineer certified that NIPSCO's closure plan meets the federal closure performance standards. Per Late-Filed Exhibit 1, IDEM has reviewed and approved NIPSCO's proposed Closure Plan and determined the Plan is designed to meet closure-in-place performance standards set by federal regulations. We decline to second guess IDEM's judgment on matters within its jurisdiction, including those involving all coal ash closure, post-closure and compliance obligations in the State of Indiana.

Pursuant to Ind. Code§ 8-l-8.4-7(b)(3), we find that NIPSCO's request satisfies Ind. Code§ 8-l-8.4-6(b)(l)(C).

(4) Alternative Plans for Compliance. (Ind. Code §§ 8-1-8.4-6(b)(1)(D) and 8-1-8.4-7(b)(3)). A utility's application under Chapter 8.4 is required to include alternative plans that demonstrate that the proposed compliance project is reasonable and necessary. Ind. Code § 8-l-8.4-6(b)(1)(D).

NIPSCO witness Ridge presented the potential closure methods and related cost estimates prepared by an engineering contractor and explained there are key scope differences between the two approaches. (Ridge at p. 5.) For example, to use closure in place, NIPSCO would not remove CCR material prior to installing a cover system, and it expected that it would also need to make improvements to the existing slurry wall that surrounds the perimeter of the closed ponds to allow a pump and treatment system to be installed. Mr. Ridge further detailed (p. 7) that NIPSCO reviewed multiple options to beneficially reuse the CCRs being removed from the three Schahfer ponds, which indicated the three ponds being closed during the Schahfer Ash Pond Compliance Project did not have the quality or quantity of material needed to allow beneficial reuse to be a practical solution. (*Id.*) NIPSCO witness Turman (pp. 11-12) described NIPSCO's evaluation of closing the MCU via both the CIP and CBR methods, and she explained that challenges were identified relating to full conformance with the CBR's decontamination criteria based on IDEM's belief that the slurry wall contains some amount of CCR. She explained that removing the slurry wall would dramatically increase the cost of closure and removal of substantial amounts of supporting sand materials on either inside or outside of the slurry wall would compromise its structural integrity, potentially resulting in full collapse or failure of the wall. (*Id.* at p. 12.) Ms. Turman testified that leaving the slurry wall in place also provides additional cost benefits as it reduces the time required for dewatering, construction, and lesser amounts of dewatering fluids during closure activities. (*Id.* at pp. 12 – 13.) She stated that the slurry wall separates the MCU from an adjacent non-CCR Rule regulated ash impoundment, serving to prevent lateral migration of ash into the MCU during excavation. (*Id.* at p. 13.)

OUCC witness Wright (p. 9) recommended limiting NIPSCO's cost recovery until it submits a comprehensive cost analysis of alternative closure methods, including removal of the slurry wall, closure of the adjacent impoundment, and groundwater remediation and post-closure costs for each method. CAC witness Inskeep stated that NIPSCO has not demonstrated the long-term viability of its decision to leave the slurry wall and adjacent coal ash pond and that the MCU will continue to pose an environmental risk if it is not fully decontaminated. (Inskeep at p. 8.)

NIPSCO presented extensive testimony and attachments to support its conclusion that the Schahfer Ash Pond Compliance Project is reasonable and should be approved. NIPSCO's closure plan for the Schahfer MCU includes a cover system to limit infiltration of surface water into any residual ash in the impoundments. Record evidence demonstrates that eliminating the slurry wall will dramatically increase the cost of the Project and create compliance risk relative to NIPSCO's ability to meet the CBR performance standard requiring groundwater monitoring concentrations in the MCU groundwater monitoring well network to meet the groundwater protection standards within a 5-year timeline. Enforcing the OUCC's recommendation to require NIPSCO to create a cost estimate to close the adjacent impoundment would be speculative because no compliance requirements have been established for that impoundment at this time. Moreover, we note that closure of the ponds is only the first step in addressing groundwater contamination at the site, and that after the impoundments are closed, NIPSCO will continue to evaluate, and with input from IDEM, select groundwater corrective action to address CCR impact to the groundwater. Finally, as shown in Late Filed Exhibit 1, IDEM has approved NIPSCO's proposed Schahfer closure plan, which does not include a requirement to eliminate the slurry wall. As such, we conclude that the concerns raised by CAC and the OUCC were addressed as part of the process NIPSCO completed to obtain approval of its closure plan from IDEM.

Accordingly, we find that NIPSCO reasonably considered alternative plans for compliance with the federally mandated requirements. The evidence demonstrates that the Schahfer Ash Pond Compliance Project is reasonable and necessary. Pursuant to Ind. Code § 8-1-8.4-7(b)(3), we find that NIPSCO's request satisfies Ind. Code § 8-1-8.4-6(b)(l)(D).

(5) Useful Life of the Facility. (Ind. Code §§ 8-1-8.4-6(b)(1)(E) and 8-1-8.4-7(b)(3)). Ind. Code § 8-1-8.4-6(b)(1)(E) requires the energy utility's application for a CPCN to include "information as to whether the proposed compliance project will extend the useful life of an existing energy utility facility and, if so, the value of that extension." We note that Section 6(b)(1)(E) only requires a utility to provide this information, not to demonstrate the useful life of its facility *will* be extended by the proposed compliance project.

NIPSCO's substantial evidence shows it is required to comply with the RCRA and EPA CCR Rule at its R.M. Schahfer generating station. Therefore, the primary purpose of its Schahfer Ash Pond Compliance Project is compliance with these federally mandated requirements. Pursuant to Ind. Code § 8-l-8.4-7(b)(3), we find that NIPSCO's request satisfies the requirement in Ind. Code§ 8-1-8.4-6(b)(l)(E).

(6) Conclusion on CPCN. Having considered and made the required findings on each of the Section 6(b) factors, we now return to Section 7(b), having already approved the projected federally mandated costs. Based on the evidence presented, we find that the Schahfer Ash Pond Compliance Project is reasonable and necessary to comply with the federally mandated requirements, and serves the public convenience and necessity. Accordingly, the Commission grants a CPCN for the Schahfer Ash Pond Compliance Project under Chapter 8.4.

B. Chapter 8.4 Accounting and Ratemaking. Ind. Code§ 8-l-8.4-7(c) sets forth the accounting and ratemaking treatment for approved federally mandated costs associated with an approved compliance project. The statute provides the utility's authorized net operating income shall be adjusted to reflect any approved earnings for purposes of Ind. Code § 8-1-2-42(d)(3) and that actual costs that exceed the projected federally mandated costs of the approved compliance project by more than 25% shall require specific justification by the utility and specific approval by the Commission before being authorized in the next general rate case filed by the utility.

Retroactive Ratemaking

Witnesses for the CAC and OUCC recommended denial of cost recovery for NIPSCO's proposed Schahfer Ash Pond Compliance Project within the FMCA on the basis that such recovery would violate Indiana's prohibition against retroactive ratemaking and further that the Federal Mandate Statute allegedly only applies to costs incurred after the issuance of a CPCN. Mr. Wright argues that NIPSCO's "costs are being incurred under the same scenario as DEI's [Duke] past closure costs." (Wright, p. 12.) Mr. Inskeep offers a summary of the Supreme Court Decision and states that "[w]hile the Court did not interpret the Federal Mandates Statute in the case, it did suggest that Federal Mandate Statute's use of future tense also likely implied that it barred retroactive ratemaking." (Inskeep, p. 33.) Based upon the discussion below, we find these arguments unconvincing and approve NIPSCO's requested cost recovery as proposed.

The facts do not support the OUCC and CAC's interpretation and application of the Supreme Court Decision, nor the argument that NIPSCO's factual circumstances are "the same scenario as DEI's." (Wright, p. 12.) First, NIPSCO has not begun ash pond closure work as part of the Schahfer Ash Pond Compliance Project; instead, the costs incurred are associated with NIPSCO's planning, engineering, and estimate preparation, which are necessary for NIPSCO to file a request for cost recovery that includes the required elements under the Federal Mandate Statute. Additionally, in the Supreme Court Decision, Duke's depreciation rates for the cost of decommissioning its plant assets, including coal ash costs, were set in its 2004 rate order. Duke sought to re-adjudicate the recovery of its coal ash costs, which were governed by its prior rate order, in its rate case filed 15 years later. In this proceeding, NIPSCO is not attempting to re-adjudicate recoverable costs incurred during a period governed by its existing base rates set in Cause No. 45159, or any prior rate case order.[7] Importantly, NIPSCO's Cause No. 45159 depreciation study proposed rates that explicitly excluded the costs to comply with CCR regulations. As a result, NIPSCO's Cause No. 45159 testimony explained that the closure costs were estimated, and as for all estimated costs of removal in the future, are constantly being updated at each rate case to account for improved information. This type of updating is a fundamental part of conducting depreciation studies, as costs are updated based on known and expected changes over time. As a result, all parties were put on notice that NIPSCO's proposed revenue requirement was reduced to the benefit of customers, and as NIPSCO pointed out, no party in Cause No. 45159 objected to the exclusion of these costs from NIPSCO's depreciation study or, ultimately, in its rates. NIPSCO also put parties on notice that once it was prepared to recover those costs, it would consider a filing under the Federal Mandate Statute as it has in this case.

Given this history, we conclude that the Schahfer MCU closure costs that have been incurred before the date of this order are therefore not "unforeseen past losses" for which recovery in this Cause would be prohibited on the basis of retroactive ratemaking. Approving cost recovery for NIPSCO's CCR-related ash pond closure costs in this Cause will not undo,

[7] In its direct testimony, NIPSCO reduced its cost estimate by $1.3 million to reflect estimated closure costs embedded in and collected through depreciation rates commencing with NIPSCO's Cause No. 43969 rate case. (Gode Direct at p. 11.)

cancel or otherwise fix a previously established rate; therefore, NIPSCO's request does not run afoul of Ind. Code § 8-1-2-68.

OUCC and CAC also argue that the Federal Mandate Statute requires utilities to obtain pre-approval of an eligible investment before incurring costs that could be timely recovered in an FMCA tracker. Mr. Inskeep states that the "plain language of the future-tense usage" in the Federal Mandate Statute "indicates … that the federally mandated projects are to provide future benefits." (Inskeep, p. 32.) Mr. Wright asserts that, through its dicta, the Indiana Supreme Court "indicated Commission approval was a pre-requisite to recover federally mandated costs, and that the statute is 'framed in future tense and speaks of 'projected' costs for 'proposed' projects." (Wright, p. 11.)

We first acknowledge the very recent Indiana Court of Appeals decision in *Ind. Ofc. of Util. Consumer Couns. v. Duke Energy Indiana, LLC*, 21A-EX-2702, issued February 21, 2023, but note that, consistent with Indiana Appellate Rule 65(E), because the opinion is not yet certified, we are not permitted to take any action in reliance upon it. Moreover, the Court of Appeals does not address a utility ARP request, which we discuss below.

We have previously rejected the notion that the Supreme Court Decision has bearing on requests brought under the Federal Mandate Statute:

> Although the Supreme Court indicated what the Federal Mandate Statute seems to require for Commission approval, the Court specifically stated they have not yet interpreted the Federal Mandate Statute. Because the Court did not rely on those observations concerning the Federal Mandate Statute for its decision, such statements are dicta. Thus, the Supreme Court Decision does not provide a legal basis for disallowing any of the costs authorized under the Federal Mandate Statute. (Cause No. 42061 ECR-37, September 21, 2022, Order at p. 9, citations omitted, appeal pending.)

Further, in denying the Intervenors' Joint Motion for Judgment on the Evidence in Cause No. 45700, we concluded that Joint Movants' reliance upon the Supreme Court Decision was "questionable because that decision addressed cost recovery under traditional ratemaking authority, not under the federal mandate statute, Ind. Code ch. 8-1-8.4, or the Alternative Utility Regulatory statute, Ind. Code ch. 8-1-2.5." (Cause No. 45700, Presiding Officers' October 21, 2022 docket entry, p. 2.)

Unlike NIPSCO's case related to pond closure costs at the Michigan City Generating Station in Cause No. 45700, where the overwhelming majority of the total project cost was estimated to be expended prior to the issuance of an order, the costs incurred by NIPSCO prior to this order and the grant of a CPCN in this proceeding are very limited. The actual pond closure work is expected to begin after issuance of this order. As we found above, NIPSCO's Schahfer Ash Pond Compliance Project "will" serve the public convenience and necessity from the day that it is completed and for many years in the future. The Project also "will allow" NIPSCO the comply with the RCRA and CCR federal mandates. Moreover, the Federal Mandate Statute does not universally use future tense, and its usage of present and past tense in other sections is inconsistent with the Intervenors' arguments. For instance, "federally mandated costs" are defined in Ind. Code § 8-1-8.4-4 as "costs that an energy utility incurs in connection with a compliance project" (subpart (a)) and "does not include fines or penalties assessed against or imposed on an energy utility" (subpart (b)). If the legislature intended Sections 6 and 7 of the Federal Mandate Statute to mean that costs incurred before an order were ineligible, then Section 4, subpart (a) would be phrased in future tense as well, and there would be no need for subpart (b). Section 6(b)(1)(B) references "projected federally mandated costs" as a component of what an energy utility must "set forth in [its] application." Consistent with this provision, NIPSCO's Project cost estimate was a projection for the cost to complete the Project when it filed its petition, and it continues to be a projection, as the work is not yet complete.

This reading is also consistent with our prior considerations of how to apply the Federal Mandate Statute to federally mandated costs incurred on a federally mandated compliance project before the issuance of an order. *See* Cause No. 44791 (Petitioner received FMCA approval to recover compliance costs incurred beginning January 2017 with a petition filed August 3, 2017), Cause No. 45052, and Cause No. 44988. As opposed to the impractical, draconian standard put forward by the OUCC and CAC, we have permitted recovery of FMCA costs related to "pre-petition analysis, preparation, and plan development activities" which are necessary to submit the evidence required to obtain a CPCN. *Duke Energy Indiana LLC*, Cause No. 44367 FMCA 4 (IURC 12/4/2019) (Order on Reconsideration), pp. 2-3. In contrast, we have drawn a line at authorizing FMCA recovery of costs incurred years in the past without prior approval: "[b]y waiting more than six years to begin seeking cost recovery, completing the vegetation management projects in 2017 – 2018 without prior approval, and then seeking to recovery actual project costs, we find that DEI thwarted the Commission's opportunity to timely: (1) consider DEI's alternative plans …; and (2) provide direction to DEI on the most reasonable and prudent approach.") (*Id.* at 3.) The record in this Cause shows that NIPSCO received a letter of completeness from IDEM for its Schahfer closure plan in August 2022, issued an RFP for contractors in October 2022, and filed its petition in this Cause in November 2022. (Ridge Direct at p. 7.) We, therefore, conclude that they are federally mandated costs, as defined in statute, that are recoverable.

Approving cost recovery of NIPSCO's request in this Cause is also consistent with the practical realities of developing federally mandated compliance projects. The OUCC agreed: (1) the Schahfer MCU must be closed and (2) that the Schahfer Ash Pond Compliance Project is a federally mandated requirement. (Wright at p. 5.) To claim costs associated with preparation of the ash pond closure estimates and related engineering do not qualify for recovery under the Federal Mandate Statute because such planning work had to begin before this Order was issued is inconsistent with the purpose of the Federal Mandate Statute and elevates form over substance. To submit this case under the Federal Mandate Statute, NIPSCO had to demonstrate that it created a compliance plan that meets federally mandated RCRA and CCR Rule requirements and provide evidence supporting the cost estimate for this Project, which it has based on RFPs. NIPSCO also had to engage in engineering work to obtain estimated costs and consider alternative plans for compliance. Such costs have always been capitalized to projects per proper accounting. CAC and OUCC positions would potentially make it a requirement to complete an FMCA case before commencing any activity related to the mandated project. This is highly impractical and would risk both compliance with federal regulatory deadlines, as well as cost minimization. We do not believe this is what the General Assembly intended under the Federal Mandate Statute. Disallowing any costs incurred pre-order or even pre-petition from FMCA recovery would make it impossible for a utility to comply with the requirements of the Statute without incurring the kinds of costs the Intervenors suggest must be disallowed as a matter of law.

Accordingly, we reject OUCC witness Wright's and CAC witness Inskeep's recommendations and approve accounting and ratemaking treatment for the Schahfer Ash Pond Compliance Project as NIPSCO requested. Based on witness Gode's testimony, NIPSCO is to collect approximately $51,725,000 million ($53,025,000 - $1,300,000) through its FMCA, based on actual incurred closure costs. NIPSCO is permitted to recover 80% of the approved federally mandated costs through its FMCA mechanism pursuant to Ind. Code § 8-1-8.4-7 and to defer 20% of the federally mandated costs and ongoing expenses incurred in connection with the Schahfer Ash Pond Compliance Project for recovery in NIPSCO's next general rate case, where the deferred balance will be subject to a carrying charged based on the effective WACC on an interim basis until such costs are recognized for ratemaking purposes. NIPSCO is further permitted to recover any federally mandated costs incurred prior to and after approval of a Final Order in this proceeding to the extent such costs are reasonable and consistent with the scope of the Schahfer Ash Pond Compliance Project pursuant to Ind. Code § 8-1-8.4-4.

Carrying Costs

OUCC witness Latham recommended either eliminating NIPSCO's post-in-service carrying costs or reducing post-in-service carrying costs to NIPSCO's weighted average cost of debt. (Latham Direct, at pp. 6-7.) NIPSCO witness Blissmer responded that Ind. Code § 8-1-8.4-7(c)(2) allows for 20% of approved federally mandated costs to be deferred and that carrying costs are to be based on the overall cost of capital most recently approved by the Commission, which compensates a utility for its cost of capital while waiting to collect the federally mandated costs it incurred. (Blissmer Rebuttal at p. 7.) We agree with Petitioner that the OUCC's recommendation is inconsistent with the Federal Mandate Statute and would unfairly burden NIPSCO while it performed the Schahfer Ash Pond Compliance Project, which it is being required to do by RCRA and the CCR Rule. Mr. Latham also recommends (p. 9) that a carrying change be applied to NIPSCO's $1.3 million estimated collections of closure costs through depreciation rates. NIPSCO witness Gode responded that Mr. Latham provided no support for his recommendation and explained that cost of removal estimates the actual costs associated with an asset retirement and the adequacy of the cost of removal reserve is an ongoing component of ratemaking in the depreciation study, not a "loan from ratepayers" as Mr. Latham alleges. We find Mr. Latham's recommendation inconsistent with cost of removal accounting and depreciation ratemaking and decline to apply a carrying charge to NIPSCO's $1.3 million of estimated ash pond costs of removal through depreciation rates.

Return "On"

CAC witness Inskeep asserted that the Schahfer Compliance Project is not a capital project and therefore, no return "on" should be applied. (Inskeep Direct, p. 15.) Mr. Gode responded that through normal cost of removal ratemaking, once a retirement project is complete, it is closed out to Account 108 (accumulated depreciation), which serves to increase net book value of plant included in rate base. (Gode Rebuttal, p. 11.) We find that Petitioner's request is consistent with the recovery methodology set forth in the FMCA Statute, in which project costs are subjected to the weighted average cost of capital and a return "on" is earned.

Allocation Factors

There was also a dispute in this Cause regarding how NIPSCO's federally mandated costs should be allocated amongst the rate classes for purposes of structuring each class's FMCA rate. Through witness Blissmer, NIPSCO proposed that all federally mandated costs associated with the Schahfer Ash Pond Compliance Project be allocated based on the demand allocators set forth in the Cost of Service Study from NIPSCO's most recent electric base rate case in Cause No. 45159. (Blissmer Direct, p. 10.) CAC witness Inskeep argued coal ash costs should be treated similarly to fuel costs, which are allocated on an energy basis, and testified that using NIPSCO's 4 CP methodology creates a large cross-subsidy in rates, primarily benefitting large industrial customers taking service under NIPSCO's Rate 831. (Inskeep, pp. 20 -24.) NIPSCO witness Blissmer's rebuttal testimony explained that Petitioner's proposed allocation factors are the same as those that would have been used to allocate ash pond closure costs through base rates, and that the Commission has already approved NIPSCO's 4 CP allocation methodology. He further testified that NIPSCO's proposal to allocate coal ash costs only to Rate 831's Tier 1 service is consistent with the Commission's finding in NIPSCO's most recent base rate case that Rate 831 customers do not use NIPSCO's production resources for their Tier 2 and 3 loads. (Blissmer Rebuttal, pp. 3-5.) Industrial Group witness Collins also offered cross-answering testimony in support of NIPSCO's proposed 4 CP demand allocators, stating that coal ash pond costs are normally included in the production plant account, such as FERC Account 312, and that the costs of such fixed cost structures are appropriately allocated on a demand basis. He also explained that Rate 831 is a cost-based rate, and Rate 831 Tier 2 customers are not reliant upon NIPSCO's generation portfolio and do not receive the fuel cost benefits associated with that portfolio; therefore, there is no subsidy or "windfall" for Rate 831 Tier 2 under NIPSCO's demand allocation proposal. (Collins Cross-Answering at pp. 4 - 6.)

We agree with NIPSCO and the Industrial Group that coal ash costs are properly allocated on a demand basis as they are associated with NIPSCO's production facilities. We find that CAC witness Inskeep's proposal does not conform to the cost of service-based allocation we found reasonable in NIPSCO's most recent base rate case and decline to approve it. As such, we approve NIPSCO's proposed 4 CP demand allocation factors for costs associated with the Schahfer Ash Pond Compliance Project.

C. <u>Consideration of NIPSCO's Proposed Alternative Regulatory Plan ("ARP").</u> NIPSCO seeks approval of an ARP and elects to become subject to Ind. Code § 8-1-2.5-6 to the extent additional relief is necessary from the requirements of the Federal Mandate Statute or traditional accounting and ratemaking rules to allow for the requested accounting and ratemaking treatment and to support recovery of all federally mandated costs incurred in connection with the Schahfer Ash Pond Compliance Project. Such an alternative request is understandable given the timing of the Supreme Court Decision in relation to when work had to commence on the Schahfer Ash Pond Compliance Project and the position of the Intervenors in this and other cases concerning the applicability of the Federal Mandate Statute to costs incurred prior to issuance of the CPCN. We agree with NIPSCO's position concerning depreciation and cost of removal accounting and ratemaking and the eligibility for recovery of costs incurred prior to the issuance of a CPCN. Because the application of the Federal Mandate Statute to the recovery of NIPSCO's ash pond closure costs has been put at issue, we will consider NIPSCO's alternative request to support cost recovery in this case.

Indiana Code § 8-1-2.5-6(a)(1) authorizes the Commission to adopt alternative regulatory practices, procedures, and mechanisms that are in the public interest and that enhance or maintain the value of NIPSCO's retail energy services or property. Our consideration of the public interest is to be guided by our review of the factors set forth in Ind. Code § 8-1-2.5-5(b):

(1) Whether technological or operating conditions, competitive forces, or the extent of regulation by other state or federal regulatory bodies render the exercise, in whole or in part, of jurisdiction by the commission unnecessary or wasteful.

(2) Whether the commission's declining to exercise, in whole or in part, its jurisdiction will be beneficial for the energy utility, the energy utility's customers, or the state.

(3) Whether the commission's declining to exercise, in whole or in part, its jurisdiction will promote energy utility efficiency.

(4) Whether the exercise of commission jurisdiction inhibits an energy utility from competing with other providers of functionally similar energy service of equipment.

The unique factual and legal circumstances presented in this Cause informs our evaluation under Ind. Code § 8-1-2.5-5(b)(1) and (2) and our ultimate conclusion that NIPSCO's ARP is approved to the extent required to support its recovery of costs. As described in its testimony, NIPSCO relied upon the long-standing regulatory environment in place when it excluded ash pond closure costs from its Cause No. 45159 depreciation rates. For transparency, NIPSCO detailed that it knew CCR compliance costs were forthcoming and included an alternative revenue requirement that reflected preliminary compliance cost estimates in the event its proposal to exclude these costs was unacceptable. No party in that case objected to the subsequent recovery of those costs, and consistent with that recommendation, NIPSCO was planning to address ash pond closure costs in its next rate case.[8] Unlike Duke, NIPSCO did not create a regulatory asset for its ash pond closure costs, which made relying upon the Commission's approval of Duke's rate case request all the more reasonable. However, at the proverbial eleventh hour, the Supreme Court Decision was issued, including the Federal Mandate Statute *dicta* upon which the OUCC and CAC rely in this Cause and the long-standing regulatory environment was potentially thrown into a state of flux.

A stable regulatory environment is beneficial to the energy utility, its customers, and the state. The value of utility service in the state is diminished when a utility has relied on Commission precedent and must now incur costs to comply with federal mandates and be at risk that those costs will not be timely recovered because the Commission precedent has been upset. To the extent NIPSCO's cost of removal ratemaking through the FMCA is not directly contemplated within the Federal Mandate Statute, we also find that NIPSCO's ARP seeking relief from that portion of the Statute is consistent with the ARP statute. NIPSCO is following proper accounting practices and has recognized its future estimated liability as it interpreted the federal RCRA and CCR Rule regulations that it would be required to comply with as set forth in this case. It would further be unnecessary or wasteful for the Commission to deny FMCA tracker recovery of these costs as NIPSCO made this filing before any substantial work on the Project had started and without the substantial delay that was at play in Duke's request. Moreover, when NIPSCO filed its last rate case, it excluded these estimated compliance costs from depreciation rates, it did so in reliance on accepted accounting principles and on the Federal Mandate Statute as it has been interpreted at that time. From a timing standpoint, the legal and factual

[8] NIPSCO filed an electric rate case on September 19, 2022 in Cause No. 45772.

circumstances, including the positions raised by the opposing parties, are unique, which supports the need for an alternative regulatory mechanism to assure recovery of reasonable compliance costs.

In conclusion, we find, after considering the factors set forth in Ind. Code § 8-1-2.5-5, that NIPSCO's proposed ARP is in the public interest and that it will enhance or maintain the value of NIPSCO's energy retail services and property. We therefore find that NIPSCO's proposed ARP as outlined above should be approved.

D. **Ongoing Review.** In an effort to keep the Commission informed about the Compliance Projects, NIPSCO proposed to submit progress reports and any revisions in the cost estimates as part of its semi-annual FMCA proceedings. None of the parties opposed this proposal. The Commission finds the proposed ongoing review process is reasonable and should be approved.

5. **Confidentiality.** NIPSCO filed a Motion for Protection and Nondisclosure of Confidential and Proprietary Information and supporting affidavit on February 8, 2023, showing information to be submitted to the Commission were trade secret information within the scope of Ind. Code§§ 5-14-3-4(a)(4), (9), and 24-2-3-2. The Presiding Officers issued a Docket Entry on February 9, 2023, finding such information to be preliminarily confidential, after which such information was submitted under seal. We find all the information is confidential pursuant to Ind. Code § 5-14-3-4 and Ind. Code § 24-2-3-2, is exempt from public access and disclosure by Indiana law, and shall continue to be held confidential and protected from public access and disclosure by the Commission.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. NIPSCO's proposed closure, post-closure and coal ash related compliance projects detailed in the testimony in this proceeding constitute "federally mandated compliance projects" as defined by Indiana Code § 8-1-8.4-2.

2. NIPSCO is issued a Certificate of Public Convenience and Necessity for the for the Schahfer Ash Pond Compliance Project pursuant to Ind. Code §§ 8-1-8.4-6 and -7. This order constitutes the Certificate.

3. For purposes of Ind. Code § 8-1-8.4-7(c), NIPSCO's estimated total cost of the Schahfer Ash Pond Compliance Project in the amount of $53,025,000 is approved, and NIPSCO is authorized to recover its compliance-related costs presented in this proceeding, less $1,300,000 already collected, consistent with Ind. Code § 8-1-8.4.

4. NIPSCO's cost recovery in accordance with Ind. Code § 8-1-8.4-7(c) is approved. NIPSCO is authorized to timely recover 80% of the federally mandated costs, including carrying costs, through Rider 887 – Federally Mandated Cost Adjustment Rider and Appendix I – FMCA Factors and to defer the remaining 20% of the federally mandated costs incurred in connection with the Schahfer Ash Pond Compliance Project for recovery in NIPSCO's next general rate case. NIPSCO's request for the specific ratemaking accounting authority to implement this cost recovery as described within this Order is approved.

5. NIPSCO’s ARP as outlined in Paragraph 4(C) of this Order is approved.

6. The Confidential Information filed under seal in this Cause shall continue to be treated by the Commission as confidential and not subject to public disclosure under Indiana Code § 24-2-3-2 and Indiana Code § 5-14-3-4.

7. This Order shall be effective on and after the date of its approval.

HUSTON, FREEMAN, KREVDA, VELETA, AND ZIEGNER CONCUR:
APPROVED:

I hereby certify that the above is a true and correct copy of the Order as approved.

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Dana Kosco,
Secretary of the Commission

<u>Attachment A</u>

To the extent the Commission does not approve NIPSCO's Schahfer Ash Pond Compliance Project and issue a CPCN under the Federal Mandate Statute, or to the extent the Commission believes relief under Ind. Code § 8-1-2.5-6 is appropriate generally, NIPSCO is including this Attachment A, where the same result is reached under Ind. Code § 8-1-2.5-6.

C. <u>Consideration of NIPSCO's Proposed Alternative Regulatory Plan ("ARP").</u> NIPSCO seeks approval of an ARP and elects to become subject to Ind. Code § 8-1-2.5-6 to the extent additional relief is necessary from the requirements of the Federal Mandate Statute or traditional accounting and ratemaking rules to allow for the requested accounting and ratemaking treatment and to support recovery of all federally mandated costs incurred in connection with the Schahfer Ash Pond Compliance Project. Such an alternative request is understandable given the timing of the *Duke* decision in relation to when work had to commence on the Schahfer Ash Pond Compliance Project and the position of the Intervenors in this and other cases concerning the applicability of the Federal Mandate Statute to costs incurred prior to issuance of the CPCN. We also acknowledge that, while not yet certified, the February 21, 2023 decision by the Indiana Court of Appeals in Duke's coal ash closure subdocket in which it found (p. 15) that "a utility's litigation expenses and pre-petition costs are not federally mandated costs covered by the [Federal Mandate] Statute and are not included in the statutory language." (*Office of Util. Cons. Couns. v. Duke Energy Indiana, LLC*, 21 A EX 2702 (slip. op. 2/21/2023).)

We agree with NIPSCO's position concerning depreciation and cost of removal accounting and ratemaking. Because the application of the Federal Mandate Statute to the recovery of NIPSCO's pre-petition ash pond closure costs has been put at issue, we will consider NIPSCO's alternative request to support cost recovery in this case.

Indiana Code § 8-1-2.5-6(a)(1) authorizes the Commission to adopt alternative regulatory practices, procedures, and mechanisms that are in the public interest and that enhance or maintain the value of NIPSCO's retail energy services or property. Our consideration of the public interest is to be guided by our review of the factors set forth in Ind. Code § 8-1-2.5-5(b):

(1) Whether technological or operating conditions, competitive forces, or the extent of regulation by other state or federal regulatory bodies render the exercise, in whole or in part, of jurisdiction by the commission unnecessary or wasteful.

(2) Whether the commission's declining to exercise, in whole or in part, its jurisdiction will be beneficial for the energy utility, the energy utility's customers, or the state.

(3) Whether the commission's declining to exercise, in whole or in part, its jurisdiction will promote energy utility efficiency.

(4) Whether the exercise of commission jurisdiction inhibits an energy utility from competing with other providers of functionally similar energy service of equipment.

The unique factual and legal circumstances presented in this Cause informs our evaluation under Ind. Code § 8-1-2.5-5(b)(1) and (2) and our ultimate conclusion that NIPSCO's ARP is approved to the extent required to support its recovery of costs. As described in its testimony, NIPSCO relied upon the long-standing regulatory environment in place when it excluded ash pond closure costs from its Cause No. 45159 depreciation rates. For transparency, NIPSCO detailed that it knew CCR compliance costs were forthcoming and included an alternative revenue requirement that reflected preliminary compliance cost estimates in the event its proposal to exclude these costs was unacceptable. No party in that case objected to the subsequent recovery of those costs, and consistent with that recommendation, NIPSCO was planning to address ash pond closure costs in its next rate case.[1] Unlike Duke, NIPSCO did not create a regulatory asset for its ash pond closure costs, which made relying upon the Commission's approval of Duke's rate case request all the more reasonable. However, at the proverbial eleventh hour, the *Duke* opinion was issued, including the Federal Mandate Statute *dicta* upon which the OUCC and CAC rely in this Cause and the long-standing regulatory environment was potentially thrown into a state of flux. The Court of Appeals' February 21, 2023 further disrupts the Commission's established approach to pre-petition costs, which has historically been applied to CPCN proceedings and in Federal Mandate Statute cases for over a decade.

A stable regulatory environment is beneficial to the energy utility, its customers, and the state. The value of utility service in the state is diminished when a utility has relied on Commission precedent and must now incur costs to comply with federal mandates and be at risk that those costs will not be timely recovered because the Commission precedent has been upset. The public interest is further benefitted by well-designed compliance projects based on sound engineering, robust planning, and cost estimation processes. Applying rigor to these elements serves to avoid cost overages in the future, which provides customers and the Commission with certainty about the total impact a compliance project is expected to have. It would further be unnecessary or wasteful for the Commission to deny FMCA tracker recovery of these costs as NIPSCO made this filing before any substantial work on the Project had started and all of its pre-petition costs were incurred in order to develop the engineering, environmental, and regulatory plans necessary to comply with the RCRA and CCR Rule as well as the CPCN requirements under the Federal Mandate Statute. These kinds of pre-petition project costs are properly capitalized per GAAP. For example, allowing utilization of a single regulatory proceeding for recovery of all federally mandated costs (whether they are incurred before or after the issuance of an order) promotes energy utility efficiency, as well efficient and prudent use of the Commission's and all parties' time and resources. The exact opposite would occur if we required one proceeding for NIPSCO to seek recovery of engineering, planning, and related costs necessary to prepare a typical CPCN request and an independent, later proceeding to actually obtain project approval and issuance of a CPCN. Importantly, no party objected to the prudency of NIPSCO's pre-petition costs in terms of amount or scope. To now deny NIPSCO the ability to recover proper pre-petition costs through the FMCA would put NIPSCO at a disadvantage relative to the many utilities, which, through prior proceedings, received approval to timely recover similar pre-petition planning costs, which is a relevant consideration under Ind. Code § 8-1-2.5-5(b)(4). To be clear, a ruling against recovery of NIPSCO's pre-petition costs would only mean that such costs would not be recoverable *under the Federal Mandate Statute*, and it would not result in a "write-off," but rather would delay recovery until NIPSCO's next base rate case, without recognition of that delay in the form of a financing or carrying charge. This result would be wasteful and inhibit NIPSCO's competitiveness in relation to its Indiana peers.[2]

[1] NIPSCO filed an electric rate case on September 19, 2022 in Cause No. 45772.

[2] The Commission could further foresee an increase in utility requests for emergency relief in situations where projects must commence to meet compliance deadlines pre-order in order to obtain timely project review and approval Orders that are not in conflict with the Supreme Court Decision or *Duke*, as there could be instances where

Moreover, when NIPSCO filed its last rate case, it excluded its estimated compliance costs from depreciation rates, and did so in reliance on accepted accounting principles and on the Federal Mandate Statute as it has been interpreted at that time. From a timing standpoint, the legal and factual circumstances, including the positions raised by the opposing parties, are unique, which supports the need for an alternative regulatory mechanism to assure recovery of reasonable compliance costs.

To the extent NIPSCO's cost of removal ratemaking through the FMCA is not directly contemplated within the Federal Mandate Statute, we also find that NIPSCO's ARP seeking relief from that portion of the Statute is consistent with the ARP statute. NIPSCO is following proper accounting practices and has recognized its future estimated liability as it interpreted the federal RCRA and CCR Rule regulations that it would be required to comply with as set forth in this case.

In conclusion, we find, after considering the factors set forth in Ind. Code § 8-1-2.5-5, that NIPSCO's proposed ARP is in the public interest and that it will enhance or maintain the value of NIPSCO's energy retail services and property. We therefore find that NIPSCO's proposed ARP as outlined above should be approved.

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a federal mandate becomes final, work must begin immediately to achieve timely compliance, and waiting to begin planning engineering, cost estimation, or even substantive work until an order is issued would jeopardize compliance.