

# ORIGINAL

Commissioner	Yes	No	Not Participating
Huston	√		
Bennett	√		
Freeman	√		
Veleta	√		
Ziegner	√		

## STATE OF INDIANA

### INDIANA UTILITY REGULATORY COMMISSION

**PETITION OF OHIO VALLEY GAS CORPORATION )  
AND OHIO VALLEY GAS, INC., FOR )  
MODIFICATION OF THE INDIANA UTILITY )  
REGULATORY COMMISSION'S JULY 28, 2021 ) CAUSE NO. 45932  
ORDER IN CAUSE NO. 45538 AUTHORIZING THE )  
ISSUANCE OF LONG-TERM DEBT TO INCREASE ) APPROVED: DEC 20 2023  
THE AUTHORIZED INTEREST RATE. )**

### ORDER OF THE COMMISSION

#### **Presiding Officers:**

**Sarah E. Freeman, Commissioner**

**Kehinde Akinro, Administrative Law Judge**

On August 7, 2023, Ohio Valley Gas Corporation (“OVGC”) and Ohio Valley Gas, Inc. (“OVGI”) (together, “Joint Petitioners” or “OVG”), filed their Verified Petition with the Indiana Utility Regulatory Commission (“Commission”) requesting that the Commission modify its July 28, 2021 Order in Cause No. 45538 (the “45538 Order”) to increase the authorized not-to-exceed interest rate on its long-term debt to 4.50% to allow for the elimination of the Excess Cash Flow (“ECF”) recapture payment term from its credit agreement. In the alternative, Joint Petitioners request approval of a new Financing Program with the same terms as proposed in Cause No. 45538, with the exception that the ECF recapture payment term shall be eliminated and the interest rate for the long-term debt shall not exceed 4.50%. On that same day, Joint Petitioners filed the testimony and attachments of Gregory P. Roach, Chief Financial and Regulatory Officer of OVGC.

On September 29, 2023, the Indiana Office of Utility Consumer Counselor (“OUCC”) prefiled the testimony of Leja D. Courter, Chief Technical Advisor of the OUCC’s Natural Gas Division.

On October 13, 2023, Joint Petitioners filed the rebuttal testimony and attachment of Mr. Roach.

On October 20, 2023, the Presiding Officers by docket entry requested additional information from Joint Petitioners to which a response was filed on the same day. On October 30, 2023, the Commission issued another docket entry requesting additional information from Joint Petitioners to which a response was filed on October 31, 2023. On November 1, 2023, the Commission issued another docket entry requesting additional information from Joint Petitioners to which a response was provided at the evidentiary hearing on November 2, 2023.

On October 31, 2023, Joint Petitioners filed a stipulation and admission of documents indicating that Joint Petitioners and the OUCC stipulated to the admission of certain Joint Petitioner Responses to OUCC Data Requests and that such agreement eliminated cross-examination of all witnesses.

The Commission held an evidentiary hearing in this Cause on November 2, 2023 at 10:30 a.m. in Room 224 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana. The testimony and attachments of Joint Petitioners and the OUCC were admitted into the record without objection.

Based on the applicable law and evidence herein, the Commission now finds:

**1. Notice and Jurisdiction.** Notice of the hearing was published as required by law. Joint Petitioners are public utilities as defined in Indiana Code § 8-1-2-1(a). Under Indiana Code §§ 8-1-2-72, 8-1-2-76 through 8-1-2-81 and 8-1-2-83 the Commission has jurisdiction over a public utility's issuance of bonds, notes, or other evidences of indebtedness payable at periods of more than one year. Therefore, the Commission has jurisdiction over Joint Petitioners and the subject matter of this proceeding.

**2. Joint Petitioners' Characteristics.** Joint Petitioners are affiliated public utility corporations organized and existing under the laws of the State of Indiana and have their principal office at 111 Energy Park Drive, Winchester, Indiana. They are engaged in rendering gas utility service in the State of Indiana, and own, operate, manage, and control, among other things, plant and equipment within the State of Indiana used for the distribution and furnishing of such service to the public.

**3. Relief Requested.** In this Cause, Joint Petitioners specifically requested the Commission amend the 45538 Order financing authorization to increase the not-to-exceed 3.75% interest rate on its long-term debt to 4.50%. Joint Petitioners request no other changes to the 45538 Order. Alternatively, if the Commission chooses not to amend the 45538 Order, Joint Petitioners request approval of a new Financing Program with the same terms as proposed in Cause No. 45538, with the exception that the ECF payment term shall be eliminated and the interest rate for the long-term debt to not exceed 4.50%.

**4. Background.** In Cause No. 45538, the Commission authorized Joint Petitioners to issue long-term debt in an amount not to exceed \$6 million from a commercial bank ("Bank"), to be repaid within five years at an interest rate of up to 3.75%. In the 45538 Order, the Commission ordered that:

1. Joint Petitioners are authorized to issue long-term debt in an amount not to exceed \$6 million, to be paid off within five years at an interest rate of up to 3.75%.
2. Joint Petitioners are authorized to pledge as collateral for the long-term debt approved in this Order their utility assets including plant, equipment, and accounts receivable and to enter into negative covenants intended to preserve the viability of the collateral.

3. Within 30 days of closing on the loan, Joint Petitioners shall make a filing under this Cause describing the final terms of the long-term debt, including the amount, maturity period, interest rate, any premiums or discounts paid, issuance expenses, a description of the collateral, and repayment terms.
4. Any financing authority granted in this Order that has not been used by December 31, 2023 shall lapse.
5. This Order is the sole evidence of the Commission's approval and shall constitute a certificate of authority granted to Joint Petitioners as provided in Ind. Code § 8-1-2-80.
6. This Order shall be effective on and after the date of its approval.

In compliance with ordering paragraph 3 of the 45538 Order, Joint Petitioners filed the Post-Closing Report on Financing Terms on September 1, 2021. The Post-Closing Report included the term loan note, the first amendment to credit agreement, and indicated the final interest rate was 3.25%. On the same day, the Post-Closing Report was served on the OUCC.

Joint Petitioners request approval to increase the 3.75% long-term debt interest rate cap authorized in the 45538 Order to 4.50%. The change in interest rate was negotiated in order to eliminate the ECF recapture payment term in the existing financing agreement between Joint Petitioners and the Bank (the "Modification") because the ECF has now been determined not to be in the best interest of Joint Petitioners or its customers.

## **5. Evidence of the Parties.**

**A. Joint Petitioners' Case-in-Chief.** Mr. Roach said Joint Petitioners seek an increase of 0.75% to the not-to-exceed interest rate authorized by the Commission in the 45538 Order, which, among other things, authorized the issuance of up to \$6,000,000 in long-term debt at an interest rate of up to 3.75%. In the alternative and to the extent necessary, Joint Petitioners request Commission approval of new financing authority. Joint Petitioners negotiated the increased interest rate with the Bank in return for the Bank eliminating the ECF recapture term included in the original financing terms. He stated that approximately \$1.2 million of the authority granted under Cause 45538 remains unissued.

Mr. Roach described the ECF recapture payment, and explained that as shown on Attachment GPR-2, p. 6, the agreement defines "Excess Cash Flow" as:

For any fiscal year of Borrower determined on a consolidated basis, the sum of (a) [Earnings Before Income Taxes, Depreciation, and Amortization ("EBITDA")], minus (b) cash interest expense, minus (c) cash taxes paid, minus (d) mandatory principal payments paid in respect of long-term Indebtedness, minus (e) voluntary principal prepayments of the Term Loan, minus (f) Unfunded Capital Expenditures, minus (g) extraordinary and non-recurring gains, minus (h) non-cash gains.

He said the agreement further requires (p. 8):

Mandatory Prepayments. In addition to the principal payments required pursuant to this Agreement, and without limiting the other provisions of the Loan Documents, commencing with the fiscal year ending July 31, 2023 and for each fiscal year thereafter until the Term Loan is paid in full, Borrower shall make additional principal payments to be applied as mandatory prepayments of the Term Loan on or before the following July 31<sup>st</sup>, in an amount equal to fifty percent (50%) of Excess Cash Flow for such applicable fiscal year and applied to installments in inverse order of maturity. Each Excess Cash Flow prepayment shall be accompanied by a certificate signed by the chief financial officer certifying the manner in which Excess Cash Flow and the resulting prepayment were calculated, which certificate shall be in form and substance satisfactory to Bank.

He stated that the term came to his attention after the Silicon Valley Bank and Signature Bank collapses in early March of 2023 when he directed Joint Petitioners finance group to review all of Joint Petitioners' financial agreements to identify early call provisions to which Joint Petitioners were a party. Mr. Roach explained that his concern was, and remains, that a source of additional short-term bank cash reserves is to call commercial loans that include such early call provisions when faced with deposit cash shrinkage. It was during this investigation that he discovered the ECF provision. He stated that now aware of the ECF provision, he immediately began negotiation with the lender to have the ECF provision removed with revised terms for the fixed-term loan.

Mr. Roach explained that having to make such a payment would put a strain on cash flow for Joint Petitioners, and it is a real possibility that a short-term line of credit would be needed to make this payment. He said as a result, Joint Petitioners determined it was prudent to prepare to delay the payment and to approach the Bank about removing this term. He explained that through discussions and negotiations with the Bank, Joint Petitioners were able to agree to a modification of the financing terms whereby the ECF recapture term would be removed in exchange for an increase to the interest rate of 4.50%. He presented Attachment GPR-4 which are the proposed changes to fixed term loan provisions. Mr. Roach testified that he believed this modification to the financing terms is in the best interests of Joint Petitioners and their customers, and thus Joint Petitioners are seeking Commission approval of a change in the financing authority granted in the 45538 Order to allow for an increase in the interest rate. He also presented Attachment GPR-5 which is the Joint Petitioners' Board approval.

Mr. Roach concluded the Modification was the preferred solution to a short-term financing strategy that could serve as a bridge for funding the ECF payments going forward. He described the detailed analysis he performed, which illustrates that by agreeing to the Modification, Joint Petitioners will be executing revised financing that is in the best interest of the customers for several reasons.

Mr. Roach described Joint Petitioners' method for estimating the magnitude of the mandatory prepayments resulting from the ECF provision in the existing fixed term loan agreement, which in summary, relied on the definition of "Excess Cash Flow" in the agreement. He presented a comparative analysis of the costs associated with a short-term financing strategy

versus accepting the Modification. He explained the presumptions made in the analysis of executing on the Modification versus continuing the existing long-term financing while making ECF payments through short-term financing in order to support cash flow and continued improvements to Joint Petitioners distribution system. He explained that the first presumption is that the Commission approves the Modification. The second presumption is that the ECF would result in a \$2M ECF payment in September 2023 and again in September 2024. The third presumption is that the ECF would result in a \$1.5M ECF payment in September 2023 and again in September 2024. He stated by executing on the Modification, Joint Petitioners will be saving customers at least \$68,000 depending on the eventual amount of the ECF payout, while maintaining long-term financing stability over the 2023 to 2026 timeframe. He further explained that he analyzed two financing alternatives to the Modification, which are defined by ECF payments in 2023 and 2024 of \$2M and \$1.5M respectively, funded by line-of-credit (“LOC”) draws of varying sizes in the 2023-2025 time frame. In each instance, Joint Petitioners employ LOC draws to fund these ECF payments and eventually finance the resulting LOC principal as a new fixed rate long-term financing in either 2025 or 2026.

Mr. Roach explained that higher cost of the ECF payment via short-term financing aside, the strategy of continuing with the existing terms of Joint Petitioners’ fixed long-term financing and making successive ECF payments poses four major financial and operating risks. He explained that first, such a strategy presumes that Joint Petitioners will be able to secure and renew its existing LOC (at similar terms and principal amounts) for successive 12-15 month terms in 2023 through 2026. Second, if unable to secure LOC financing in 2023 through 2026, Joint Petitioners would be limited to making ECF payments via funds generated from on-going operations, limiting the Company’s capability to continue to improve the reliability and safety of the system. Third, by relying on LOC financing in the 2023 through 2026 time frame, Joint Petitioners would be exposed to monthly interest rate changes driven by national financial and economic conditions, giving Joint Petitioners limited visibility and insulation from what could be significant interest rate changes. Lastly, if Joint Petitioners employ a strategy that relies on LOC financing until a new fixed term loan is executed in 2025, there is no guarantee that a 4.50% interest rate would be available to Joint Petitioners at that time. Rather, if current conditions do not change, Mr. Roach said he would anticipate that Joint Petitioners would face interest rates in excess of the proposed 4.50%. As compared to executing on the Modification, a future financing strategy based on ECF payment via LOC funding through 2026 exposes Joint Petitioners to significant financial and resulting operating risk that is not in the best interest of Joint Petitioners or its customers.

Mr. Roach detailed his analysis of the impact on Joint Petitioners’ weighted average cost of capital (“WACC”) resulting from execution of the Modification and reliance on payment of the ECF with LOC financing. He presented Joint Petitioners’ WACC at May 31, 2023, Joint Petitioners’ WACC presuming execution of the Modification in September of 2023, and Joint Petitioners’ WACC at December 31, 2025 presuming ECF payments via reliance of LOC financing. He said the strategy of continuing with the existing terms of Joint Petitioners’ fixed long-term financing and making successive ECF payments via LOC financing, would increase Joint Petitioners’ WACC from a current 8.66% to 9.00%, holding all non-long-term debt (“non-LTD”) WACC components steady, an increase of 0.34%. Conversely, by execution of the Modification, Joint Petitioners’ WACC would increase from a current 8.66% to 8.74%, holding all non-LTD WACC components steady, an increase of 0.08%. Thus, executing on the Modification results in real financing cost savings to the customer as opposed to moving forward

without the Modification. Mr. Roach also presented Attachment GPR-8, which shows the estimated rate impact for the elimination of the ECF provision in exchange for an increase in the fixed term debt rate from 3.25% to 4.50% is approximately \$0.0061 per dekatherm.

Mr. Roach testified that given the elimination of the ECF recapture, the increased interest rate included in the Modification is in the public interest and the proposed Modification is reasonably necessary in the operation and management of the utility's business so that the utility may provide adequate service and facilities. He further testified that the Modification is in the public interest for the same reasons set forth in Joint Petitioners' case-in-chief testimony in Cause No. 45538, which is attached as Attachment GPR-2, and as detailed in his testimony in this Cause. He stated that first, approval of the Modification ensures continued long-term financing at a fixed rate and cost to customers. Second, approval of the Modification results in lower interest costs (2023-2026) and a lower WACC (2025) to customers as compared to ECF payment via LOC financing. Third, approval of the Modification eliminates Joint Petitioners' risk exposure to four successive annual LOC reauthorizations at similar terms and principal amounts to those currently approved. Fourth, approval of the Modification insulates Joint Petitioners from future short-term interest rate risk and associated interest costs in what has been a rising interest rate environment since mid-2022. Lastly, executing the Modification locks in a fixed rate of 4.50% for the life of the existing term loan through 2026. Such a rate may not be available to Joint Petitioners in 2025 when ECF payments funded by LOC financing would be converted to long-term financing.

Mr. Roach detailed the alternative request and stated that in the alternative, Joint Petitioners request authority for a Financing Program extending through December 31, 2023, which includes the issuance of up to \$6,000,000 in long-term debt at an interest rate of 4.50% as shown in Attachment GPR-4. Joint Petitioners further request authorization to pledge as collateral for the long-term debt approved in this Order their utility assets including plant, equipment, and accounts receivable and to enter into negative covenants intended to preserve the viability of the collateral.

**B. OUC's Case-in-Chief.** Mr. Courter testified that Joint Petitioners violated the terms of the 45538 Order when it entered into a financially detrimental transaction that was contrary to the Order's expressed purpose. He said in this Cause, Joint Petitioners are asking the Commission to force customers to pay for a financial calamity of Joint Petitioners' own making. He said the Commission has the legal authority to hold Joint Petitioners accountable and protect Joint Petitioners' customers and should do so in this Cause.

He further discussed Joint Petitioners' requested relief, background of Cause No. 45538, current Cause 45932, and the next three plus years of long-term debt. He recommended changes to the capital structure and commented on affordability of rates. Mr. Courter argues that Joint Petitioners' management entered into a transaction two years ago that was contrary to the testimony filed in Cause No. 45538, and that Joint Petitioners' management failed to use the loan proceeds to buy back its stock from its parent company in contravention of the 45538 Order and the terms of the transaction. He argues that Joint Petitioners' customers should not be responsible for the ECF and mandatory prepayment terms of the long-term debt agreement signed by Joint Petitioners' management on August 3, 2021 and that Joint Petitioners' shareholders should be held responsible for paying 1.25% of the interest on the long-term debt.

Mr. Courter recommended the Commission exercise its legal authority to protect Joint Petitioners' customers by doing the following: (1) grant Joint Petitioners' request to increase the authorized long-term debt interest rate to 4.50%, but only require Joint Petitioners' customers to be responsible for paying a 3.25% interest rate in Joint Petitioners' capital structure; (2) approve the capital structure depicted in his Table 1, with a 3.25% long-term debt interest rate and the current long-term debt amount; and (3) deny Joint Petitioners' request for new financing authority.

**C. Joint Petitioners' Rebuttal.** Mr. Roach responded to Mr. Courter's testimony and explained why Joint Petitioners' actions after the Cause No. 45538 Order was issued were reasonable, in compliance with the Order, and in compliance with Indiana Code § 8-1-2-78. He explained that he and Joint Petitioners decided the ECF recapture and prepayment terms were a potential risk shortly after the Silicon Valley Bank and Signature Bank collapse in early March of 2023 and that Mr. Courter is evaluating Joint Petitioners' current request with hindsight, which is not the appropriate evaluation of reasonableness or prudence. Further, he explained why Mr. Courter's criticisms are ill-timed given the OUCC had access to the full loan terms in the post-closing report. Finally, he discussed why the use of a hypothetical capital structure as proposed by Mr. Courter has long been rejected in Indiana and is inappropriate.

In response to Mr. Courter's claims that Joint Petitioners violated the terms of the 45538 Order, Mr. Roach explained that the Commission's Order in 45538 Order is not as narrow as Mr. Courter implies and further, at the time of entering into the transaction, Joint Petitioners had no reason to think the ECF recapture or the mandatory pre-payment term posed the risk they now do. He stated that Mr. Courter is using hindsight analysis. He also responded to Mr. Courter's testimony that in addressing the Commission's authority to approve long-term debt financing under Indiana Code §§ 8-1-2-76 through 81, information regarding ECF and Mandatory Prepayment terms is "relevant information" the Commission should have considered before it issued the 45538 Order. Mr. Roach explained that the Commission did not approve the loan agreement, the Commission was not required to approve the loan agreement, and there is no statutory requirement for the agreement to be final before the Commission issues approval of a utility's requested financing authority. He said in fact, the Commission's routine practice in financing authority proceedings is to authorize future issuances up to a maximum amount for a defined period of years, well in advance of the time when documents are being executed. It has adopted this practice to afford the utility flexibility to take advantage of optimal market conditions, rather than delay each potential financing transaction for the receipt of an order. He further explained that while the Commission has the power to, and often does, condition a utility's financing authority on certain terms and conditions being as they were described in the evidence (such as the amount to be financed and sometimes a not-to-exceed interest rate), it rarely if ever establishes the precise language of any particular debt instrument.

Mr. Roach explained that Joint Petitioners did not need to amend the 45538 Order in response to Mr. Courter's apparent concerns that Joint Petitioners did not use the proceeds of the long-term debt to buy back the stock as was contemplated in Cause No. 45538. He testified that while the stock buy-back was one of the intended uses of proceeds included in Cause No. 45538, Joint Petitioners specifically stated that there were others, including the funding of capital projects. He said the 45538 Order acknowledges this and he provided certain citations to the order supporting his position. He testified that Joint Petitioners have used the proceeds to fund capital projects. Joint Petitioners' capital project needs were more than anticipated at the time of the Cause

No. 45538 filing, and that filing provided flexibility by including the potential need to fund such projects with the proceeds from the loan. Joint Petitioners could have immediately proceeded with the stock buy-back, but there would have been an equity infusion to obtain the capital needed for the capital projects. He said the bottom line is the capital structure would not have been materially different than it is today.

Mr. Roach explained that Mr. Courter mischaracterizes what happened when he claims that Joint Petitioners' management entered into a transaction two years ago with financially detrimental terms. Mr. Roach stated that Joint Petitioners' use of the proceeds to fund capital projects is not contrary to the evidence and authorization granted in 45538 Order. It was expressly contemplated. The presence or the absence of the ECF and Mandatory Prepayment provisions was not. That is expected because until recent events, it is unlikely those terms would be considered to carry significant risk for the borrower. When Joint Petitioners approached the Bank about lending money, the Bank provided an agreement containing proposed terms. Joint Petitioners at the time had no reason to think the terms the Bank proposed were not typical. Indeed, there remains no evidence that those terms were not standard market terms at the time they were proposed. Mr. Roach testified that it is merely the application of those terms in light of recent events that has made Joint Petitioners reassess the risk posed against the other terms of the loan, including the available interest rate. It can be assumed that the Bank viewed the terms holistically, and pushing back on the inclusion of ECF and Mandatory Prepayment terms at the time would have affected other terms of the agreement, including but not limited to the interest rate. He said moreover, one could reasonably assume if there was a reason to be worried, the OUCC would have brought it up upon filing of the post-closing report. If they had at that time, Joint Petitioners might have been able to negotiate an interest rate lower than 4.50%, maybe even within the not-to-exceed 3.75% authorized in 45538 Order, to be rid of these terms.

Mr. Roach said, in light of Mr. Courter's testimony that the presence of those provisions was not authorized by the 45538 Order, he would have expected the OUCC to raise an objection if it felt Joint Petitioners were not in compliance with the 45538 Order, particularly if those terms were the source of a "financial calamity." He said the failure of the OUCC to do so suggests that Mr. Courter is instead applying hindsight to ascribe to these provisions a greater significance within the context of the 45538 Order's grant of financing authority, in order to advocate for a punitive order in this case.

Mr. Roach further explained what he meant by hindsight analysis and punitive order. He said the 45538 Order establishes a maximum interest rate for the debt that it authorized. Joint Petitioners are seeking new borrowing authority so as to increase that maximum long-term debt interest rate so that Joint Petitioners may negotiate to remove these terms. This is because, based on current circumstances and recent events, the relative risk posed by these terms has grown. He said the Silicon Valley Bank and Signature Bank collapse in early March of 2023 raised concerns that banks will turn to early call provisions with respect to commercial loans as a source of additional short-term bank cash reserves. He said these circumstances are unusual. If Joint Petitioners could have known these terms would present the risk they do today, it could have sought this modification sooner and perhaps secured a more favorable interest rate. Additionally, if the OUCC had raised the concerns it raises today upon the receipt of the post-closing report, Joint Petitioners could have pursued that course of action. The reality is neither party recognized these terms as particularly risky until recent events highlighted the potential for them to be invoked.



He also explained that Mr. Courter is recommending that the Commission authorize Joint Petitioners to increase the authorized long-term debt interest rate to 4.50%, but only allow it to include a 3.25% interest rate in its capital structure. This is not only punitive – having the effect of arbitrarily lowering Joint Petitioners’ authorized return for ratemaking purposes– but it also employs a hypothetical capital structure, which has long been prohibited in Indiana.

Mr. Roach explained that Mr. Courter, by his own words, is proposing the Commission approve something other than Joint Petitioners’ actual capital structure: “*With one exception*, I am recommending the same capital structure as depicted on Petitioner’s Exhibit No. 1, Attachment GPR-7, page 1, which is the same capital structure as Table 1. The exception being the long-term debt amount should be updated to reflect the current balance. However, the interest rate remains at 3.25%. This capital structure reflects Joint Petitioners’ actual common equity amount, and not the reduced amount that should have occurred - since Joint Petitioners did not buy back any of the stock it sold to Beynon.” Jt. Pet. Ex. 3 at 11 (quoting Pub. Ex. 1 at 22 (emphasis added)). Mr. Roach further explained that Mr. Courter’s reason for defending his recommendation as not invoking a hypothetical capital structure is that the increase in the long-term debt interest rate to 4.50% is the result of “unauthorized terms.” This misstates what was approved in Cause No. 45538 and what Joint Petitioners seek in this proceeding. Joint Petitioners seek authority to increase its long-term debt interest rate to 4.50% in exchange for removing the ECF and Mandatory Repayment terms. He said regardless of whether one accepts Mr. Courter’s “unauthorized terms” characterization, if the Commission authorizes 4.50% long-term debt interest rate, that is what must be reflected in Joint Petitioners’ capital structure for ratemaking purposes. If the Commission does not authorize it, Joint Petitioners will withdraw the request to modify the loan agreement and what will apply are the terms as they exist today. If the bank calls the loan, Joint Petitioners’ capitalization would return to 100% equity. It is Joint Petitioners’ position this presents a risk that will be more detrimental to customers than the proposed increased interest rate.

**6. Commission Discussion and Findings.** Pursuant to Indiana Code §§ 8-1-2-76 through 8-1-2-80, the Commission has the authority, after consideration of all information that may be relevant or required by the Commission, to investigate and approve or disapprove a proposal by a public utility to issue bonds, notes, or other evidence of indebtedness payable more than one year from the execution thereof. In pertinent part, the Commission must determine whether the proposed issue is in the public interest in accordance with the laws addressing the issuance of securities by public utilities. The Commission must also find that the proposed issue is reasonably necessary in the operation and management of the utility's business in order that the utility may provide adequate service and facilities. The Commission made such findings in the 45538 Order.

As explained by Mr. Roach, Joint Petitioners seek an increase of 0.75% to the not-to-exceed interest rate of the Financing Program authorized by the Commission in the 45538 Order. No other changes to the Commission’s approval and of the certificate of authority granted to Joint Petitioners as provided in Indiana Code § 8-1-2-80 was requested. Therefore, the proposed financing is still in compliance with Indiana Code § 8-1-2-78. Additionally, pursuant to Indiana Code § 8-1-2-79, Joint Petitioners properly filed with the Commission a Verified Petition and set forth the required description of the amended proposed Financing Program. Joint Petitioners also provided evidence regarding the total outstanding capitalization of the utility in relation to the total value of the property of the utility.

Joint Petitioners seek only an increase in the not-to-exceed interest rate authorized by the 45538 Order. Joint Petitioners indicate that the higher interest rate was the product of negotiations with the Bank in order to remove terms that Joint Petitioners have recently determined to be unfavorable. As all other terms remain the same, the Commission must determine whether increasing the interest rate associated with the long-term debt in order to remove the ECF recapture term is in the public interest in accordance with the laws addressing the issuance of securities by public utilities. Further, the Commission must determine whether the proposed financing is reasonably necessary in the operation and management of the utility's business in order that the utility may provide adequate service and facilities.

The OUCC raised concerns regarding Joint Petitioners' past actions and current request, but ultimately our decision rests on what was just described, whether the long-term debt with an increase of 0.75% to the not-to-exceed interest rate of the Financing Program to 4.50% is in the public interest in accordance with the laws addressing the issuance of securities by public utilities and reasonably necessary in the operation and management of the utility's business in order that the utility may provide adequate service and facilities.

Mr. Courter argues that the ECF recapture and the Mandatory Prepayment terms are "relevant information" under Indiana Code §§ 8-1-2-76 through 81 and should have been considered before the 45538 Order was issued. Mr. Courter appears to be more narrowly referring to Indiana Code § 8-1-2-79, which states:

(a) Whenever a public utility desires to issue bonds, notes, or other evidences of indebtedness, payable more than one (1) year from the execution thereof, or preferred or common stock, it shall file with the commission a petition verified by its president or vice president, and secretary or assistant secretary, or by two (2) of its incorporators, if it has no such officers, setting forth:

(1) the principal amount of bonds, notes, or other evidences of indebtedness, and the par value or number of shares of preferred and common stock;

(2) the minimum price for which said securities are to be disposed of or sold;

(3) the purposes for which said securities are to be disposed of or sold;

(4) the description, cost, or value of any property acquired or to be acquired from the proceeds of the disposal or sale of said securities;

(5) a balance sheet and income account; and

*(6) all other information that may be relevant or that may be required by the commission.*

For the purpose of enabling it to determine whether the proposed issue is in the public interest, in accordance with laws touching the issuance of securities by public utilities, and reasonably necessary in the operation and management of the business of the utility in order that the utility may provide adequate service and facilities, the commission also may consider the total outstanding capitalization of the utility, including the proposed issue, in relation to the total value of or investment in the property of the utility, including the property to be acquired by the proposed issue, as shown by the balance sheet, accounts, or reports of the utility, the records of the commission, or other evidence, and the character and proportionate amount of each kind of security, including the proposed issue, and the unamortized discount suffered by the utility in the sale of the outstanding securities. The commission shall make such further inquiry or investigation, hold such hearing or hearings, and examine such witnesses, books, papers, documents, or contracts as it may deem of importance in enabling it to reach a decision.

(emphasis added).

Under Indiana Code § 8-1-2-79 and even more broadly under Indiana Code §§ 8-1-2-76 through 81, the Commission's routine practice in financing authority proceedings is to authorize future issuances up to a maximum amount for a defined period of years, in advance of the time when documents are being executed. The Commission further can, and we often do, condition a utility's financing authority on certain terms and conditions being as they were described in the evidence including the amount to be financed and sometimes a not-to-exceed interest rate. We have not approved the precise language of any particular debt instrument, because the statute does not require such approval. Consistent with this understanding, in Cause No. 45538, we set conditions, but otherwise did not approve the specific language of the debt instrument. We further agree with Mr. Roach that this practice affords a utility flexibility to take advantage of optimal market conditions, rather than delay each potential financing transaction for the receipt of an order.

Mr. Roach explained that at the time of signing the agreement, Joint Petitioners had no reason to believe the terms were not standard and that the relative risk of such terms after the Silicon Valley Bank and Signature Bank collapses in March 2023 gave rise to Joint Petitioners pursuing the Modification that is before the Commission in this proceeding. Further Mr. Roach pointed out that the OUCC did not raise any of these concerns or objections until this filing. The Commission cannot scrutinize Joint Petitioners' actions with the benefit of hindsight. The Commission has refused on many occasions to use hindsight analysis when evaluating the reasonableness and prudence of a utility's decision. The Commission's long-standing policy is to base prudence reviews on "the facts and circumstances as they existed at the time" a decision was made. *N. Ind. Pub. Serv. Co., Cause No. 43849* at 11 (IURC July 13, 2011); see also *Indiana Gas Co., Inc., Cause No. 37394* GCA 54 at 4 (IURC May 28, 1997). The Commission accepts Mr. Roach's explanation that when Joint Petitioners approached the Bank about lending money, the Bank provided an agreement containing proposed terms. Joint Petitioners at the time had no reason to think the terms the Bank proposed were not typical. Moreover, it is merely the application of those terms in light of recent events that has made Joint Petitioners reassess the risk posed against the other terms of the loan, including the available interest rate.

Mr. Courter also takes issue with how the proceeds of the loan were used; it is his position that the loan proceeds should have been used to buy back stock sold to Joint Petitioners' parent company Beynon Farm Products. Mr. Roach explained that so far, Joint Petitioners have used the proceeds to fund capital projects. Joint Petitioners' capital project needs were more than anticipated at the time of the Cause No. 45538 filing, and that filing provided flexibility by including the potential need to fund such projects with the proceeds from the loan. Joint Petitioners could have immediately proceeded with the stock buy-back, but there would have then been an equity infusion to obtain the capital needed for the capital projects. The bottom line is the capital structure would not have been materially different than it is today. Based on Joint Petitioners' response to the Commission's docket entry request dated November 1, 2023, Joint Petitioners have extensively invested in capital projects. Joint Petitioners provided a list of projects that have been placed in service since the closing on the loan to date, excluding construction work in progress, with a total spend of \$12,845,774.58. We do not find Joint Petitioners' use of the proceeds to have been unreasonable. While Joint Petitioners could have executed the stock buy-back, doing so would have required an equity infusion to fund these capital improvements, putting the capital structure back in the same position it is today.

Mr. Courter proposes an adjustment to Joint Petitioners' capital structure which we find amounts to a request that we impose a hypothetical capital structure since it is something other than the utilities' actual capital structure. The Commission has also consistently rejected hypothetical capital structures based on the Indiana Supreme Court's holdings that rates cannot be set on the basis of "a hypothesis or a situation never in existence." See *Northern Indiana Public Service Company*, Cause No. 43526, 284 P.U.R.4th 369, (IURC Aug. 25, 2010) (citing *Pub. Service Comm'n of Ind. v. City of Indianapolis*, 235 Ind. 70, 91, 131 N.E.2d 308, 317 (Ind. 1956) and *Pub. Service Comm'n of Ind. v. Ind. Bell Tel. Co.*, 235 Ind. 1, 130 N.E.2d 467 (Ind. 1955)). The Commission refuses once again to order a hypothetical capital structure.

As to the ultimate questions regarding the public interest and the reasonableness, the Commission agrees with Joint Petitioners' analysis that an increase in the interest rate is more advantageous to Joint Petitioners and their customers than having to make the ECF recapture payments beginning in December 2023, especially given the potential that Joint Petitioners would need to utilize short-term financing to make these payments or get an equity infusion from its parent company. As Mr. Roach explained, the negotiated 4.50% interest rate is in line with current rates as the prime rate as of May 4, 2023, was approximately 8.25%. The federal funds rate at the time of Mr. Roach's direct testimony in this Cause was 5.00% to 5.25%. While the OUCC took issue with Joint Petitioners' actions as discussed above, the OUCC did not dispute the reasonableness of the 4.50% interest rate. In fact, Mr. Courter recommended, among other things, that the Commission grant Joint Petitioners' request to increase the authorized long-term debt interest rate to 4.50%. As presented in Mr. Roach's direct testimony, we agree that a future financing strategy based on ECF payment via LOC funding through 2026 exposes Joint Petitioners to significant financial and resulting operating risk that is not in the best interest of Joint Petitioners or its customers.

The Commission understands that this change will have an estimated impact to customer rates of approximately \$0.0061 per dekatherm, as presented by Mr. Roach. However, this analysis assumes Joint Petitioners' capital structure remains at its present weights. Mandatory pre-payments of the loan will result in a capital structure bearing a higher percentage of equity. This

risk ultimately drives us to the conclusion that the requested amendment is in the public interest. Such a pre-payment will increase Joint Petitioners' equity ratio and WACC. The amendment of the terms of the loan is therefore not only in the best interests of Joint Petitioners, but also in the best interest of Joint Petitioners' customers. We therefore find that the requested Modification to the authorization granted in 45538 Order to be reasonable and in the public interest.

In accordance with our findings above, the Commission approves Joint Petitioners' requested authority to increase the interest rate associated with authority granted in the 45538 Order for Joint Petitioners to issue bonds, notes, or other evidence of indebtedness payable more than one year from the execution thereof pursuant to Indiana Code §§ 8-1-2-76 through 8-1-2-80. The Commission finds that increasing the interest rate associated with the financing is reasonably necessary in the operation and management of the utility's business in order that the utility may provide adequate service and facilities. Under Indiana Code § 8-1-2-80, the Commission has authority to impose conditions upon a public utility issuing securities as the Commission deems reasonable. Given the narrow request only to amend the 45538 Order to increase the interest rate, the Commission sees no need for any conditions other than for Joint Petitioners to file a report with the Commission, and serve a copy on the OUCC, with the final terms of the Modification. So long as Joint Petitioners enter into the Modification within the parameters herein, it is deemed prudent and not subject to relitigation.

Because the Commission has approved Joint Petitioners' request to modify the 45538 Order as discussed herein, the request for alternative relief is moot and does not need any further discussion.

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

1. Ordering Paragraph 1 of the 45538 Order is amended to state that: "Joint Petitioners are authorized to issue long-term debt in an amount not to exceed \$6 million, to be paid off within five years at an interest rate of up to 4.50%."
2. Ordering Paragraph 5 of the 45538 Order is amended to state that: "This Order and the Order in Cause No. 45932 are the sole evidence of the Commission's approval and shall constitute a certificate of authority granted to Joint Petitioners as provided in Indiana Code § 8-1-2-80."
3. Joint Petitioners shall file a report with the Commission, and serve a copy on the OUCC, with the final terms of the Modification.
4. This Order shall be effective on and after the date of its approval.

**HUSTON, BENNETT, FREEMAN, VELETA, AND ZIEGNER CONCUR:**

**APPROVED: DEC 20 2023**

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

---

**Dana Kosco  
Secretary of the Commission**