

STATE OF INDIANA

BEFORE THE INDIANA UTILITY REGULATORY COMMISSION

PETITION OF DUKE ENERGY INDIANA, LLC)	
FOR APPROVAL OF (1) ITS PROPOSED)	
DEMAND SIDE MANAGEMENT AND ENERGY)	
EFFICIENCY PROGRAMS FOR 2016-2018,)	
INCLUDING COST RECOVERY, LOST)	
REVENUES AND SHAREHOLDER)	
INCENTIVES IN ACCORDANCE WITH IND.)	
CODE §§ 8-1-8.5-3, 8-1-8.5-10, 8-1-2-42(a) AND)	CAUSE NO. 43955-DSM-3
PURSUANT TO 170 IAC 4-8-5 AND 170 IAC 4-8-)	
6; (2) AUTHORITY TO DEFER COSTS)	
INCURRED UNTIL SUCH TIME THEY ARE)	
REFLECTED IN RETAIL RATES; (3))	
RECONCILIATION OF DEMAND SIDE)	
MANAGEMENT AND ENERGY EFFICIENCY)	
PROGRAM COST RECOVERY THROUGH)	
DUKE ENERGY INDIANA, INC. STANDARD)	
CONTRACT RIDER 66A; AND (4) REVISIONS)	
TO STANDARD CONTRACT RIDER 66A)	

DUKE ENERGY INDIANA, LLC'S RESPONSE TO CONSUMER PARTIES'
JOINT PETITION FOR POST-HEARING RELIEF

Petitioner, Duke Energy Indiana, LLC ("Duke Energy Indiana"), by counsel, respectfully requests that the Commission clarify that its Order in this proceeding does not limit lost revenues for the life of measures approved in previous proceedings as advocated by the Citizens Action Coalition of Indiana, Inc. ("CAC"), Duke Industrial Group, Nucor Steel –Indiana ("Nucor"), and the Office of Utility Consumer Counselor ("OUCC") (collectively "Consumer Parties"), in their Joint Petition filed on March 29, 2016; rather, the limitation of lost revenues for four (4) years or life of measure applies only to the programs and measures approved in this proceeding (to be offered during calendar year 2016 through calendar year 2018 or until Duke Energy Indiana

submits and receives approval of a plan under Section 10, if earlier). In support of its request, Petitioner states:

Background

1. In Cause No. 43955 DSM1 (“DSM1”), the Commission approved a Settlement Agreement entered into between the OUCC and Duke Energy Indiana, which, *inter alia*, approved programs and cost recovery for calendar year 2014 and provided for the recovery of lost revenues over the life of the measure for those programs, as well as for those programs previously approved for 2012 and 2013. Consistent with that Order, Duke Energy Indiana timely filed its tariff reflecting the terms of the Commission Order and collected rates in accordance with that Order.

2. In Cause No. 43955 DSM2 (“DSM2”), the Commission approved a Settlement Agreement entered into between the OUCC and Duke Energy Indiana approving programs and cost recovery for calendar year 2015, in which, *inter alia*, there were no changes in the recovery of lost revenues (*i.e.* lost revenues for the programs approved in DSM2, plus lost revenues associated with programs approved in DSM1 and those programs approved for 2012 and 2013, were recoverable for the life of the measure). Consistent with that Order, Duke Energy Indiana timely filed its tariff reflecting the terms of the Commission Order and collected rates in accordance with that Order. Additionally, Duke Energy Indiana continued to collect lost revenues for the life of the measure of those programs approved in DSM1 as approved in that proceeding.

3. In Cause No. 43955 DSM3 (“DSM3”), Duke Energy Indiana requested approval for programs to be offered in 2016 - 2018, including lost revenues for life of measure. In its

Order, dated March 9, 2016,¹ the Commission limited lost revenue recovery to the shorter of four years or life of the measure. Duke Energy Indiana timely filed its tariff reflecting the terms of the Order and began collecting rates in conformance with its filed tariff, which was approved by the Commission on March 11, 2016. The filed tariff included lost revenues for the life of the measures installed in previous years, consistent with the Commission's Orders in the DSM1 and DSM2 cases.

Consumer Parties' Motion

4. The Consumer Parties filed a Petition for Post-Hearing Relief, pursuant to 170 IAC 1-1.1-22 and Ind. Code § 8-1-2-71. The Consumer Parties allege that a "logical reading of the Commission's Order ... is to apply the four year limitation of past vintages of persisting lost revenues." *Joint Petition, page 3*. Duke Energy Indiana respectfully submits that the Consumer Parties' reading of the Order is by no means logical. To the contrary, application of the Commission's ratemaking decision in this DSM3 case to programs and measures approved in previous DSM cases is inappropriate. Those programs and measures were not even at issue in this DSM3 case; DSM3 was filed to seek approval of programs, rates and charges for 2016 forward, not for the purpose of revisiting past Settlement Agreements and Orders. Furthermore, principles of res judicata also compel the conclusion that the Commission's lost revenue limitation in the DSM3 Order cannot be applied retroactively to programs and measures approved in the DSM1 and DSM 2 cases. The Commission should reject the Consumer Parties' motion and permit lost revenue recovery in conformance with previous Orders.

¹ The Commission subsequently issued a *Nunc Pro Tunc* Order adding a dissent of Commissioner Mays; the dissent was not outcome dispositive.

The Scope of DSM3

5. In this proceeding, Duke Energy Indiana sought approval of programs and rates and charges for 2016 and reconciliation of rates and charges for past programs; it did not seek to reopen the regulatory treatment for programs and measures approved in previous years, as those issues had been litigated and/or settled and subject to Final Orders. A reading of Duke Energy Indiana's Petition and supporting testimony in this case demonstrates this.

6. During the pendency of this proceeding, no party sought to reopen the recovery of lost revenues approved in DSM1 or DSM2.² The Consumer Parties seek to raise this issue for the first time in their post-hearing motion. The recovery of lost revenues pursuant to Final Orders in DSM1 and DSM2 was not part of the relief sought in this proceeding by any party, and there is no evidence in the record to support such relief. Moreover, any such evidence would have been outside of the scope of the pleadings and therefore improper; it follows that a Commission decision without evidence and beyond the scope of the pleadings would likewise be improper. See, e.g., *Clemans Truck Line, Inc. v. Public Service Com.*, 145 Ind. App. 385, 251 N.E.2d 464, 1969 Ind. App. LEXIS 399 (Ind. Ct. App. 1969).³ Accordingly, the post-hearing relief sought by the Consumer Parties here may not be granted by the Commission.

Res Judicata

7. With the exception of the OUCC, who entered into Settlement Agreements with Duke Energy Indiana for lost revenue recovery for the life of the measure, the Consumer Parties

² Had any party sought to reopen the recovery of lost revenues approved in DSM1 and DSM2, Duke Energy Indiana would have challenged the issue as beyond the scope of this proceeding and as barred by collateral estoppel, similar to this responsive pleading..

³ This case indicates that a party to a Commission proceeding cannot introduce evidence outside of the scope of the Petition/Application. In a case at the Indiana Court of Appeals, the Appellants, various truck companies, sought review from the judgment of the Indiana Public Service Commission, which granted a Certificate of Public Convenience and Necessity to the Appellee, another truck company, to haul freight over certain territory already served by Appellants. The Appellants argued that the evidence submitted was beyond the scope of the application and was further indicative of Appellants' contention that the Order granting the application was not supported by substantial evidence. The Court of appeals reversed the Commission's decision.

litigated against recovery of lost revenues for life of the measure in DSM1 and DSM2. In both proceedings, the Commission rejected their arguments. The Consumer Parties now seek to litigate the exact issue that the Commission already ruled upon, namely the appropriateness of life of measure lost revenues for those programs approved in DSM1 and DSM2.

8. The Court of Appeals has found that principles of *res judicata*, specifically collateral estoppel, apply to Commission proceedings. *See: Watson Rural Water Company, Inc. v. Indiana Cities Water Corp.*, 540 N.E.2d 131 (Ind. Ct. App. 1989). The Court has ruled that, so long as parties had a full opportunity to litigate an issue within the statutory jurisdiction of the Commission and that decision could have been appealed, collateral estoppel serves as a bar to subsequent litigation. *Id.* at 135.

9. In DSM1, no party filed testimony challenging the Settlement Agreement entered into between Duke Energy Indiana and the OUCC.⁴ Nucor Steel; however, conducted extensive cross-examination on the issue (*see: transcript of DSM1 hearing, pages 42 through 45; 64 through 68; pages 83-85*). Nucor also filed a Response to the Joint Proposed Order, in which it challenged lost revenue recovery for the life of the measure. The Commission rejected Nucor's argument and granted lost revenues for the life of the measure. Subsequently, Nucor filed a Motion for Reconsideration, which the Commission also rejected, noting that "Nucor reiterates the same arguments that it made in its case-in-chief, which we already considered in reaching our decision in this Cause." *Order on Reconsideration*; Cause No. 43955 DSM1, April 30, 2014.

10. In DSM2, CAC filed testimony of Mr. Kerwin Olson challenging, *inter alia*, the recovery of lost revenues (*Olson Direct Testimony, Cause No. 43955 DSM2, pages 6-7*). Additionally, CAC filed a Proposed Order that argued for the elimination of or a two-year cap on

⁴ The OUCC was a settling party on the issue of lost revenues for the life of the measure in both DSM1 and DSM2. The OUCC now seeks to deprive Duke Energy Indiana of the benefit of that Settlement Agreement as to this one issue.

lost revenues. The Commission Order rejected the CAC's argument and granted lost revenues for the life of the measure for programs approved for calendar year 2015. The issue of lost revenues for the life of the measure for those programs approved for 2014 and 2015 have been thoroughly litigated in previous cases and the parties are estopped from seeking, once again, to litigate the issue.

The Filed Rate Doctrine

11. The filed rate doctrine, found in Indiana Code § 8-1-2-44, prohibits a public utility from charging any rates other than those filed with the Commission; once a rate is properly filed with and accepted by the Commission, that filed rate is the lawful rate – and is the only lawful rate.

12. The Consumer Parties seek to have the Commission clarify that its Order rescinded lost revenues for the life of the measure for programs approved in previous Commission Orders, in clear contravention of the filed rate doctrine (and potentially in contravention of the prohibition against retroactive ratemaking). In this proceeding, the Commission exercised its authority to set rates for the future and limited lost revenue recovery *for those programs approved in DSM3* to four years. The Order did not (and should not be interpreted to) retroactively alter the lost revenues for life of measure approved in previous proceedings and reflected in Duke Energy Indiana's filed tariffs.

Conclusion

For the foregoing reasons, the Commission should clarify that its Final Order in this proceeding is intended to limit lost revenues to four years or life of measure for those programs and measures approved for 2016 – 2018 (or until a plan is approved under Section 10) and that the Final Order is not intended to have retroactive effect on ratemaking treatment for programs at

issue in previous DSM proceedings. To hold otherwise, as the Consumer Parties urge, would contravene Indiana law and longstanding regulatory principles, and would undermine expectations concerning the finality of Commission Orders.

Respectfully submitted,

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CERTIFICATE OF SERVICE


The undersigned hereby certifies that a copy of the foregoing *Duke Energy Indiana's Response to Consumer Parties' Joint Petition for Post-Hearing Relief* was electronically delivered this 8th day of April 2016, to:

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