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IN THE
INDIANA COURT OF APPEALS

Case No. 20A-EX-01404

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR, DUKE INDUSTRIAL GROUP, SIERRA CLUB, CITIZENS ACTION COALITION OF INDIANA, INC., ENVIRONMENTAL WORKING GROUP, and INDIANA COMMUNITY ACTION ASSOCIATION,	)	Appeal from the Indiana Utility Regulatory Commission
	)	Cause No. 45253
Appellant (Statutory Party and Intervenors below),	)	Hon. James F. Huston, Chairman, Hon. Sarah E. Freeman, Hon. Stefanie Krevda, Hon. David Ober, Hon. David E. Ziegner, Commissioners
v.	)	
DUKE ENERGY INDIANA, LLC,	)	Honorable David E. Veleta, Senior Administrative Law Judge
Appellee (Petitioner below).	)	

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STATEMENT OF THE ISSUES

1. Whether the Indiana Utility Regulatory Commission's (the "Commission") conclusion that Appellee Duke Energy Indiana, LLC's ("Duke") cost allocation between wholesale and retail customers was reasonable, where the allocation was based on an actual—as opposed to a hypothetical—level of wholesale native load sales, where there was no evidence Duke has excess generating capacity, where there was no evidence of imprudence on Duke's part, and where the Commission found all of Duke's generating plants to be "used and useful" in providing service to retail customers.

2. Whether the Commission's authorization of recovery for Duke's government-mandated Coal Ash remediation costs under traditional ratemaking principles was reasonable, where Duke was waiting for IDEM to rule on its proposed compliance plans, where Duke preserved such costs for rate recovery consideration by segregating them in a regulatory asset account in conformity with applicable accounting rules, and where there was no evidence of imprudence on Duke's part.

3. Whether the Commission's conclusion that Duke could recover the O&M costs for operating its Edwardsport Plant as an IGCC coal-fired plant consistent with its actual operation, rather than as a natural gas-fired plant, was reasonable, where Edwardsport was preapproved and certificated by the Commission as an IGCC facility and has been operated as an IGCC facility since 2013.

STATEMENT OF THE CASE

On July 2, 2019, Duke petitioned the Commission to increase Duke's annual base electric service rates (Cause No. 45253) by approximately $390 million, and prefiled its supporting testimony, exhibits, and workpapers. (Joint Appellants' Appendix ("App.") Vol.II:2.) Sixteen entities intervened ("Intervenors"), including the Duke Industrial Group (the "Industrial Group"), Citizens Action Coalition of Indiana, Inc. ("CAC"), the Indiana Community Action Association ("INCAA"), Environmental Working Group ("EWG"), and Sierra Club. (*Id.* at 22-23.) The Indiana Office of Utility Consumer Counselor (the "OUCC") also participated in the case. (*Id.* at 23-27.) On September 9, 2019, Duke filed a Motion to Amend Verified Petition and submitted certain revisions to its case-in-chief testimony, exhibits, and workpapers. (*Id.* at 23.) Duke's Motion to Amend was granted on September 26, 2019, and Duke subsequently filed corrections to certain revised testimony. (*Id.*)

On October 30, 2019, Intervenors prefiled testimony consisting of their respective cases-in-chief, and later filed workpapers and revised/corrected testimony. (*Id.* at 24.) Duke filed its rebuttal testimony on December 4, 2019, and submitted revised rebuttal testimony for certain witnesses on January 21 and 28, 2020. (*Id.* at 12, 15-16.)

Between January 22 and February 7, 2020, the Commission conducted 11 days of evidentiary hearings during which Duke and Intervenors presented testimony and evidence. (*Id.* at 16-17.) Duke filed its proposed order on March 3, 2020, and the OUCC and several Intervenors filed proposed orders and post-hearing briefs on

March 30, 2020. (*Id.* at 17-18.) Duke filed a reply brief, and the Industrial Group and Intervenor the Kroger Co. filed cross-answering briefs on April 8, 2020. (*Id.* at 18.)

The Commission's Order was issued on June 29, 2020 (the "Order"). (*Id.* at 20.) In its Order, the Commission approved certain requested increases to Duke's base rates and charges, including an annual increase of $145,867,000 (5.7%) in Duke's operating revenue. (*Id.* at 192.) On July 29, 2020, the OUCC timely filed a Notice of Appeal, which the Industrial Group, CAC, INCAA, EWG, and Sierra Club joined. (*Id.* at 19; *see* Appellate Docket.)

STATEMENT OF FACTS

Appellants' respective Statement(s) of Facts violate Appellate Rule 46(A)(6)(b) because they are not "in accordance with the standard of review appropriate to the judgment or order being appealed." *Company v. Rev. Bd. of Ind. Dep't of Workforce Dev.*, 113 N.E.3d 1214, 1216 n.2 (Ind. Ct. App. 2018). As explained below, all issues on appeal are subject to deferential review. Appellants not only fail to state facts in accordance with the applicable standard of review, but also include facts favoring their desired outcome, while omitting facts supporting the Order. This is improper. *See, e.g., id.; see also Gabriel v. Windsor, Inc.*, 843 N.E.2d 29, 49 (Ind. Ct. App. 2006).

Duke is an Indiana limited liability corporation engaged in the business of generating and supplying electric utility service to approximately 840,000 customers located in 69 counties in Indiana. (App.Vol.II:28.) Duke provides electricity through generating plants and other transmission and distribution facilities it owns. (*Id.*) Additionally, Duke supplies steam service to one customer and sells electric energy

for resale to other Indiana utilities that in turn supply electric utility service to customers in areas not served directly by Duke. (*Id.*)

Like other public utilities, Duke's base electric services rates and charges "are traditionally set or adjusted through a general ratemaking case … before the Commission. This is a comprehensive process in which the Commission 'examine[s] every aspect of the utility's operations and the economic environment in which the utility functions ….'" *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co. ("NIPSCO 2019")*, 125 N.E.3d 617, 620 (Ind. 2019) (quoting *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co. ("NIPSCO 2018")*, 100 N.E.3d 234, 238 (Ind. 2018)). This "detailed review allows the Commission to ensure that utility rates are fair to both the utility and its customers." *Id.*

On July 2, 2019, Duke initiated a base rate case with the Commission, seeking to increase its base electric services rates and charges for the first time since 2004. (App.Vol.II:22, 28.) The Commission granted Duke's request in part, much of which is not at issue in this appeal. (*Id.* at 173-175; *accord* Industrial Group Br. at 11.) Facts relating to those portions of the Order at issue on appeal are addressed below.

<u>Demand and Cost Allocation</u>

Duke serves three main categories of customers: retail electric customers purchasing power from Duke as ultimate customers; wholesale electric customers purchasing firm power from Duke and reselling it to their ultimate customers; and one high-pressure-steam customer. (App.Vol.II:134.) The first two categories are at issue here.

There are four main steps to developing retail utility rates: (1) developing annual revenue requirements; (2) allocating costs between retail and wholesale jurisdictional customers; (3) further allocating costs among retail customer classes (*e.g.*, industrial, commercial, and residential); and (4) designing rates for each retail customer class to recover its annual revenue requirements. (Ex.Vol.2:152-158; Ex.Vol.15:66-73.) The second step of this process—the jurisdictional separation study—is at issue here.

Duke developed demand and energy allocators for its retail and wholesale jurisdictional customers, to apportion the fixed and variable costs of serving those different types of customers. (App.Vol.II:134.) Production costs and related expenses were allocated to firm native load wholesale customers. Excluded from this allocation were costs to serve short-term non-native load customers; for example, one short-term bundled 100 MW non-native contract that terminates in 2021. (*Id.*) Duke determined the peak demand (and usage) of its electrical system, and the applicable native load wholesale customers' share of the demand peak (and usage), and allocated that demand and usage to its native load wholesale customers. (*Id.*) Duke allocated the remainder of the demand (and usage) of its electrical system to its retail customers. (*Id.*) In total, the native load wholesale customers accounted for approximately 8% of the total demand (and usage) of Duke's electrical system, which approximates the same percentage from Duke's last base rate case in 2004. (*Id.*)

For purposes of this retail rate proceeding, Duke treated its retail customers as "jurisdictional" (i.e., subject to the Commission's retail electric ratemaking

authority), while its wholesale customers and steam customer were treated as "non-jurisdictional." (*Id.*)

The Industrial Group objected to Duke's proposed jurisdictional allocation, contending the short-term 100 MW contract should be treated as wholesale/non-jurisdictional. (*Id.*) Additionally, the Industrial Group argued the Commission should impute the amount of Duke's historical long-term wholesale sales that (a) have terminated since 2013, and (b) have not been replaced with new long-term wholesale contracts, as long-term wholesale sales for jurisdictional allocation purposes. (*Id.*)

In its Order, the Commission concluded Duke's jurisdictional separation "is a reasonable allocation of costs among the various jurisdictions, both its wholesale and retail electric and steam jurisdictions." (*Id.* at 135.) The Commission rejected the Industrial Group's request to make adjustments for the recent termination of certain wholesale contracts, finding persuasive that the level of sales allocated to wholesale customers is approximately the same as it was in Duke's last rate case, while Duke's "retail customers are being allocated a lower percentage of production demand costs than they were in the last base rate case." (*Id.*) It also rejected the Industrial Group's proposal to allocate the single, short-term 100 MW contract to the wholesale native load jurisdiction. (*Id.*) The Commission found it "differ[ed] markedly from traditional long-term wholesale native load contracts that are allocated to wholesale in the jurisdictional separation study process, and significantly, the evidence shows that [Duke] does not plan or build for this contract, in contrast to traditional wholesale native load customers." (*Id.*)

<u>Coal Ash Remediation</u>

Duke sought recovery of past compliance costs for federal and state coal ash remediation requirements. (*Id.* at 50.) Coal ash is a byproduct of Duke's coal-fired generators that burn coal to produce electricity. Historically, Duke placed coal ash on the ground in designated areas; however, federal and state environmental laws now require Duke to take significant action to maintain and store its coal ash in a manner more protective of public and environmental health than was previously required. (*Id.* at 60-61.) Duke sought to include in its rate base a "regulatory asset" consisting of the retail jurisdictional portion of its past coal ash analysis, engineering, closure, and related costs, and to recover those costs over 18 years. (*Id.* at 50.)

Specifically, Duke sought to recover past costs incurred between 2015 and 2018 to comply with the federal Environmental Protection Agency's Coal Combustion Residuals ("CCR") Rule (hereinafter "CCR Projects"), as well as costs incurred through 2018, and to be incurred in 2019 and 2020, to comply with the Indiana Department of Environmental Management's ("IDEM") solid waste management rules ("IDEM Projects"). (These costs are referred to collectively as "Coal Ash" costs.) (*Id.*) Duke offered two bases for recovery: (1) traditional ratemaking recovery of previously deferred, prudent, and reasonable costs associated with providing utility service, and (2) Indiana's Federal Mandate Statute, Ind. Code ch. 8-1-8.4. (*Id.*)

Consistent with applicable accounting rules, Duke accounted for the Coal Ash costs incurred from April 2015 (when the CCR Rule was promulgated) through December 2018 in a "regulatory asset" account. (*Id.*) But for Duke's regulatory asset

accounting of these Coal Ash costs, they would have been included as a cost of removal—i.e., part of the plant assets included in base rates that are being depreciated. (*Id.* at 50-51.)

The OUCC, Industrial Group, and other Intervenors opposed Duke's recovery of its Coal Ash costs, arguing—among other things—that the costs incurred from 2015 through 2018 for CCR Projects should not be included in rates because Duke did not seek the Commission's approval prior to incurring them. (*Id.* at 52-53.) They also contended the Federal Mandate Statute applies only to future, not-yet-incurred costs, and not to costs already incurred. (*Id.*)

In its Order, the Commission concluded "the [Coal Ash] costs were properly deferred and preserved for recovery consideration in this proceeding," and were properly recoverable under traditional ratemaking. (*Id.* at 67.) Specifically, the Commission found "the costs at issue are significant and infrequent (stemming from federal and state mandated requirements) and will provide longstanding benefits in terms of compliance with such federal and state mandates, improved environmental footprints, and the ability to continue to use utility properties." (*Id.*) The Commission cited to prior orders to highlight it has "consistently allowed recovery of environmental compliance costs generally and coal ash-related compliance costs in particular." (*Id.*) Additionally, the Commission emphasized that absent certain special accounting rules, these costs would be recovered in rate base as a cost of removal. (*Id.*)

Edwardsport's O&M Expenses

The Edwardsport Plant is an integrated gasification combined cycle ("IGCC") generating facility that was designed and approved as a coal plant, with the ability to operate on natural gas as needed (for example, during maintenance outages for the gasifiers). (Ex.Vol.31:138; Ex.Vol.32:8-9.) The Edwardsport Plant was preapproved by the Commission and placed in service in 2013. (Ex.Vol.32:9; App.Vol.II:115.) Duke sought recovery of its annual O&M expenses for Edwardsport as part of its base rates. (App.Vol.II:111.)

The Industrial Group and Sierra Club opposed Duke's requested recovery for Edwardsport's O&M expenses.[1] Sierra Club argued Edwardsport should be retired immediately, contending it had cost ratepayers $93 million from 2016 through 2018, and Duke could not meet its burden to show the requested costs were prudently incurred. (*Id.* at 114.) The Industrial Group, on the other hand, argued Edwardsport should be treated for ratemaking purposes as if it operated solely on natural gas, rather than as an IGCC, purportedly reducing costs to customers. (*Id.* at 113.)

The Commission found Edwardsport's continued operation as an IGCC using coal was reasonable, and Duke's requested O&M expenses were reasonable. (*Id.* at 116.) It rejected Sierra Club's argument, finding "it is premature to make a decision to retire Edwardsport when [it] is relatively early in its life cycle." (*Id.* at 115.) Specifically, the Commission emphasized the importance of Edwardsport as an IGCC

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[1] The OUCC also opposed Duke's request (*see* App.Vol.II:111-112), but does not challenge this aspect of the Commission's Order on appeal, (*see generally* OUCC Br.).

facility for fuel diversity and reliability purposes—especially in light of the upcoming retirements of other large coal-fired units—and it cited numerous prior orders to that effect. (*Id.*)

Additionally, the Commission "reject[ed] the Industrial Group's proposal to effectively convert the plant to a gas plant," because that "would put the future use of the plant as a dual-fueled syngas/natural gas plant at risk." (*Id.*) The Commission also found persuasive that it "would be operationally difficult, time consuming, and costly to switch fuels in response to short-term natural gas price signals in an attempt to capture benefits for customers," and doing so would result in Duke losing its highly-trained and qualified workforce. (*Id.*) Further, if Edwardsport were to switch from coal to natural gas for any length of time, it would be oversupplied with coal. (*Id.*)

SUMMARY OF ARGUMENT

Appellants challenge three aspects of the Commission's 175-page Order: (1) allocation of certain generating capacity as retail, instead of wholesale; (2) recovery of Duke's Coal Ash costs; and (3) recovery of O&M costs for the Edwardsport Plant. Appellants attempt to convince this Court its review of the Commission's Order should be de novo, when in reality, the Court's review should be deferential to the Commission's expertise in ratemaking. None of the issues Appellants raise involve an issue of law; rather, they involve the Commission's application of its industry expertise, and its interpretation of the facts. When viewed through the proper review scope, there is no doubt the Order should be affirmed.

As to the allocation issue, the Industrial Group maintains the Commission should have based Duke's cost allocation on a hypothetical level of generating capacity, rather than the actual amount of Duke's generating capacity currently devoted to wholesale customers. This argument contravenes law and logic. The Commission explained the key factual distinctions between the case relied on by the Industrial Group and this one—no shift in cost allocation and lack of management foresight—which required a different result. Importantly, the Industrial Group downplays that while Duke's wholesale native load contractual commitments fluctuate from time to time, Duke's retail customers are now being allocated approximately the same percentage of Duke's generating capacity as they have been since Duke's last rate case in 2004, despite the addition of a major new generating unit (Edwardsport) in 2013. There is no evidence that Duke has excess capacity, or that its management decisions were anything but prudent. And the Industrial Group's laser-focus on Duke's reserve margins is unreasonable and unpersuasive. The Commission considered all of these factors and found Duke's jurisdictional separation study and allocation were reasonable. The Court should not disturb these findings.

Similarly, the Commission's conclusion that Duke could recover its Coal Ash costs was entirely reasonable. Contrary to Appellants' claims, the Commission did not base this decision on the Federal Mandate Statute. Rather, it allowed recovery based on its general ratemaking authority. Appellants' contention that Duke was required to get preapproval from the Commission before creating a regulatory asset

to defer its Coal Ash costs is belied by the evidence, applicable accounting rules, and Commission precedent, as is their argument that Duke's actions violate the principle prohibiting retroactive ratemaking. Here, Duke's Coal Ash costs were appropriately deferred, and even if retroactive ratemaking were at issue, Duke's actions fall within recognized exceptions to that rule. The Coal Ash costs are significant, precisely fixed, known and measurable; at the same time, due to the amortization of the Coal Ash costs over 18 years, the impact on ratepayers will not be substantial. The Commission's conclusion that they are recoverable was supported by detailed factual findings and precedent, and should be affirmed.

Finally, the Industrial Group's challenge to the Commission's approval of Edwardsport's O&M costs must be rejected. The Industrial Group's challenge is nothing more than an impermissible back-door challenge to Edwardsport's continued operation as a coal-fired IGCC plant. The Record is replete with evidence supporting the Commission's approval of Edwardsport's O&M costs, and the Order contained specific findings supporting the Commission's conclusion. The Industrial Group's argument that Duke should be forced to operate Edwardsport on natural gas alone is contrary to the law, the evidence presented, and public policy. For all of these reasons, the Order should be affirmed.

ARGUMENT

I. Standard of Review

The General Assembly created the Commission "'primarily as a fact-finding body with the technical expertise to administer the regulatory scheme devised by the

legislature.'" *Mullett v. Duke Energy Ind., LLC*, 103 N.E.3d 661, 664 (Ind. Ct. App. 2018), *reh'g denied, trans. denied* (quoting *Ind. Gas Co. v. Ind. Fin. Auth.*, 999 N.E.2d 63, 65 (Ind. 2013)). This Court has previously noted that "[b]ecause the complicated process of ratemaking is a legislative rather than judicial function, it is more properly left to the experienced and expert opinion present in the Commission." *Citizens Action Coal. of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 76 N.E.3d 144, 151 (Ind. Ct. App. 2017) (cleaned up). An order from the Commission "is presumed valid unless the contrary is clearly apparent." *Id.*

Appellate review of the Commission's Order is guided by Ind. Code § 8-1-3-1, which provides:

> An assignment of errors that the decision, ruling, or order of the commission is contrary to law shall be sufficient to present both the sufficiency of the facts found to sustain the decision, ruling, or order, and the sufficiency of the evidence to sustain the finding of facts upon which it was rendered.

NIPSCO 2019, 125 N.E.3d at 623 (citing *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp. ("U.S. Steel")*, 907 N.E.2d 1012, 1015 (Ind. 2009)). When presented with an appeal under this section, the reviewing court "appl[ies] three levels of review: one for factual findings; another for mixed questions of law and fact; and a third for questions of law." *Id.* at 623-24 (cleaned up).

As to the first, the Court will "not try the facts de novo," but will "defer to the agency's findings if they are supported by substantial evidence." *Moriarity v. Ind. Dep't of Nat'l Res.*, 113 N.E.3d 614, 619 (Ind. 2019) (cleaned up). In doing so, the Court "recognize[s] an agency has expertise in its field and the public relies on its authority

to govern in that area." *Id.* (cleaned up). This Court recently elaborated on this level of review:

> An appeal of the Commission's decision amounts to a two-tiered review by the appellate court. On the first level, it requires a review of whether there is substantial evidence in light of the whole record to support the Commission's findings of basic fact. Such determinations of basic fact are reviewed under a substantial evidence standard, meaning the order will stand unless no substantial evidence supports it.
>
> During its substantial evidence review, the appellate court neither reweighs the evidence nor assesses the credibility of witnesses and considers only the evidence most favorable to the Commission's findings. The Commission's order is conclusive and binding unless (1) the evidence on which the Commission based its findings was devoid of probative value; (2) the quantum of legitimate evidence was so proportionately meager as to lead to the conviction that the finding does not rest upon a rational basis; (3) the result of the hearing before the Commission was substantially influenced by improper considerations; (4) there was no substantial evidence supporting the findings of the Commission; (5) the order of the Commission is fraudulent, unreasonable, or arbitrary. This list of exceptions is not exclusive. At the second level, the order must contain specific findings on all the factual determinations material to its ultimate conclusions. We review the Commission's conclusions of ultimate facts for reasonableness, the deference of which is based on the amount of expertise exercised by the agency.

IPL Indus. Group, et al. v. Indianapolis Power & Light Co., ---N.E.3d----, 2020 WL 6479600, at *2-3 (Ind. Ct. App. Nov. 4, 2020) (cleaned up).

For the second level, appeals involving claims of insufficient findings to sustain the ultimate conclusions contained in the order, the Court will "review the Commission's conclusions for reasonableness, deferring to the Commission 'based on the amount of expertise exercised by [it].'" *NIPSCO 2019*, 125 N.E.3d at 624 (quoting *U.S. Steel*, 907 N.E.2d at 1016). In doing so, the Court will "give more deference to orders on subjects within the Commission's expertise and less deference to orders

dealing with matters outside its expertise," and "may examine the logic of inferences drawn and any rule of law that may drive the result" in either situation. *Id.*

As to the third level, the Court will "ordinarily review legal questions addressed by an agency de novo." *Moriarity*, 113 N.E.3d at 619. While the Court is "not bound by the [agency's] conclusions of law, … [a]n interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself." *Id.* (cleaned up). "In fact, if the agency's interpretation is reasonable, [the appellate court will] stop [its] analysis and need not move forward with any other proposed interpretation." *Id.*

Appellants incorrectly claim all issues presented on appeal are subject to this third level of review. (Industrial Group Br. at 26; OUCC Br. at 11.) Rather, each issue challenges the Commission's industry expertise, as well as its interpretation of facts, and thus, is subject to a deferential review.

II. The Commission's conclusion that Duke's cost allocation between retail and wholesale customers was reasonable and supported by substantial evidence.

The Industrial Group contends the Commission should have imputed a hypothetical level of wholesale sales for purposes of allocating costs between Duke's retail and wholesale native load customers. In doing so, the Industrial Group attempts to convert this question of fact to one of law. As set forth below, the Court should reject the Industrial Group's invitation to do so. Because the Commission correctly concluded Duke's cost allocation should reflect the actual amount of

generating capacity currently devoted to wholesale native load customers, rather than a hypothetical amount as proposed by the Industrial Group, this portion of the Order should be affirmed.

A. "Native load" customers

Before addressing the Industrial Group's arguments, it is important to understand what is meant by the term "native load customers." A native load service obligation refers to a requirement applicable to an electric utility under federal, state, or local law, or under long-term contracts, to construct and operate its system to provide electric service to end-users (or to another utility for resale to end-users) to meet their reliable electricity needs. *See* 18 C.F.R. § 33.3(d)(4)(i); *see also* 16 U.S.C. § 824q(a)(3) (defining "native load service obligation").

Regulated utilities such as Duke plan and build generating facilities to serve their retail and wholesale native load customers, to fulfill their statutory and/or contractual obligation to serve such customers. Retail native load customers are "ultimate," or "end use" customers. Wholesale native load customers, on the other hand, are other utilities that purchase electricity from Duke and, in turn, provide retail electric utility service to their own customers. Regulated utilities such as Duke do not plan or build generating facilities to serve other, shorter-term customers to whom they owe no such firm, long-term obligation. However, they may opportunistically sell surplus energy to such customers from time to time, when their generating facilities (built to serve their native load customers) are not serving such native load customers.

Although the Industrial Group is correct that the federal government has allowed competitive pricing in wholesale markets (Industrial Group Br. at 28), long-term native load wholesale contracts still exist, and regulated utilities still plan and build to serve those long-term contract requirements. Thus, contrary to the Industrial Group's suggestion, the native load wholesale contracts and load at issue here are not speculative. While they have end dates, they are long-term, firm commitments for which Duke has planned and built generating facilities to serve, similar to the planning and building Duke does to meet its retail customers' electricity demands.

B. The Industrial Group relies on inapposite Commission precedent.

The Industrial Group contends a recent Indiana Michigan Power Company ("I&M") rate case should control resolution of this issue and criticizes the Commission for not explicitly addressing that case in the Order. This is not, as the Industrial Group claims, an error of law (Industrial Group Br. at 35-37), but rather, involves the Commission's interpretation of facts in each case, which differ greatly.

In *I&M*, a long-term I&M contract with a group of municipal utilities was set to expire, and the municipal group was not interested in renewal. *See Ind. Mich. Power Co.*, No. 45235, 2020 WL 1656243, at *89 (Ind. U.R.C. Mar. 11, 2020). Pursuant to I&M's proposed jurisdictional separation study, this contract expiration would cause I&M's retail customers to bear an increased amount of the utility's generating capacity. *Id.* at *90. The Commission disallowed this shift to retail customers, finding

the evidence demonstrated a lack of utility management foresight in allowing a wholesale contract misalignment of load and resources. *Id.*

In contrast, here, Duke demonstrated that, while the level of Duke's wholesale native load sales have fluctuated from time to time over the last few years, the level of such sales allocated to wholesale customers in the rate case jurisdictional separation study (8%) is approximately the same as it was in Duke's last rate case. (Ex.Vol.12:197.) Further, in this rate case, Duke's retail customers are actually being allocated a somewhat *lower* percentage of generating capacity costs than they were in Duke's last rate case: the proposed retail production demand allocator in this proceeding has actually slightly decreased, from 91.79% to 91.52%. (Ex.Vol.3:36.)

Accordingly, under Duke's proposed jurisdictional allocations, its retail customers are allocated approximately the same (indeed, a slightly lower) percentage of the cost structure than in the prior rate case. (*Id.*) Thus, unlike the *I&M* case, there is no shift to Duke's retail customers. Duke's proposed jurisdictional allocations, as approved by the Commission, asked its retail customers to shoulder a slightly lower percentage of generating capacity costs than they have been since 2004 (the date of Duke's last rate case).

Additionally, and contrary to *I&M*, there was no evidence and no findings concerning any lack of management foresight with respect to Duke's wholesale contracts, load, and resources. Instead, the evidence demonstrated that market forces were driving the decline in Duke wholesale native load sales, and that Duke was making efforts to replace terminated contracts. (Ex.Vol.3:34-36; Ex.Vol.36:86-89, 108,

119-120.) Although the Order does not mention *I&M* by name, it notes this important factual distinction between the two cases:

> We decline to accept the Industrial Group's proposal to make adjustments for historical wholesale sales that have terminated in a managed amount in recent years. Ms. Diaz testified that the level of sales allocated to wholesale in the jurisdictional separation study is approximately the same as it was in [Duke]'s last rate case several years ago, and Mr. Davey testified that in this case, retail customers are being allocated a lower percentage of production demand costs than they were in the last base rate case. These facts are persuasive and as such we find that imputing a historical level of sales, for the circumstances in this proceeding, is not needed.

(App.Vol.II:135.)

The Industrial Group's argument that a shift between wholesale and retail loads has taken place is based on fluctuations in Duke's wholesale load that occurred between 2013 and the present. This ignores that Duke's base rates were last set in 2004, and Duke's retail customers have been paying those same base rates since 2004, notwithstanding any fluctuations in Duke's wholesale customer makeup. The Industrial Group's choice of 2013 as a point of comparison[2] is an arbitrary attempt to demonstrate a shift in load where there actually has not been one with any ratemaking implications.

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[2] As is discussed in greater detail in Section IV, *infra*, Duke's Edwardsport Plant was placed in service in 2013, resulting in a temporary increase in Duke's reserve margin. (Ex.Vol.32:5.) It appears the Industrial Group may be attempting to collaterally attack the prudence of the decision to construct Edwardsport through this wholesale load argument, perhaps because it is legally foreclosed (by Ind. Code ch. 8-1-8.5) from directly attacking it. For the reasons expressed in Section IV, such an attack should be rejected.

In short, as a result of the Commission's Order, Duke's retail customers will continue to pay for about 92% of the utility's generating capacity. No shift in cost responsibility and associated rates occurred.

C. The Industrial Group's "used and useful" argument ignores both the facts and law.

The Industrial Group next argues the portion of Duke's generating capacity represented by the imputed wholesale load should be excluded from rates because it is not "used and useful." This argument fails for several reasons.

1. There is no evidence Duke has excess capacity.

The Industrial Group's "proof" supporting its excess capacity/"used and useful" argument is simply a table showing Duke's generating capacity is currently (and temporarily) greater than its 15% planning reserve margin. (*See* Industrial Group Br. at 32.) The Industrial Group claims this demonstrates "unequivocal[ly]" that Duke has excess capacity that is not used and useful. (*Id.*) This is far from the case. There is no law, rule, or precedent that equates excess capacity with capacity above a target reserve margin. In fact, as discussed below, Indiana law makes clear a finding of excess capacity may *not* be based solely on a utility's reserve margin. A number of other findings—most prominently, a finding of imprudence on the utility's part—is necessary to support a finding of excess capacity.

An analysis of the issues surrounding a claim of excess capacity begins with the Commission's statutory obligation set forth in Ind. Code § 8-1-2-6, which requires it to "value all property of every public utility actually used and useful for the convenience of the public at its fair value." *See In re N. Ind. Pub. Serv. Co.*

("NIPSCO"), No. 37458, 1985 WL 1208669, 67 P.U.R.4th 396, 399 (Ind. P.S.C. June 19, 1985). Before any generation facility may be included in a utility's rate base for rate purposes, the Commission must find such facility to be "used and useful." *Id.* at 399-400. The Commission must find: "(1) that the utility plant be actually devoted to providing utility service, and (2) that the plant's utilization be reasonably necessary to the provision of utility service." *City of Evansville v. S. Ind. Gas & Elec. Co.*, 339 N.E.2d 562, 589 (Ind. Ct. App. 1975). The "in service" portion of this test concentrates on whether the plant will continue to be actually employed in future operations; the "reasonably necessary" portion of the test focuses on whether the plant is needed for "the efficient and reliable provision of utility service." *Id.* at 590.

In determining whether the second portion of the test is satisfied, the Commission must inquire as to the business judgments made by the utility—i.e., a prudence analysis. "Existing needs and projected needs require a business judgment on the part of utility management. Before the Commission can approve of plant investments for expanded capacity and include the capacity in rate base, it must make inquiries into the business judgment used and the facts which support them." *L.S. Ayres & Co. v. Indianapolis Power & Light Co.*, 351 N.E.2d 814, 834 (Ind. Ct. App. 1976). Hindsight cannot be used in judging management's decisions. *NIPSCO*, 67 P.U.R.4th at 400-401. Further, the Commission is not required "to make a specific finding of the reserve margin necessary to the efficient and reliable provision of utility service." *Util. Consumer Counselor v. Pub. Serv. Co. of Ind., Inc.*, 463 N.E.2d 499, 501 (Ind. Ct. App. 1984) (emphasis omitted).

The Commission has never adopted an approach requiring that all capacity above an arbitrarily established margin be excluded from rate base, whether the utility's decision to construct the facility(ies) was prudent. *NIPSCO*, 67 P.U.R.4th at 401. The Commission has noted such an approach would have several shortcomings, such as: it would require the establishment of "some arbitrary reserve margin"; it would "give[] little recognition to the utility's obligation to provide adequate and dependable service"; it would ignore "the fact that any particular utility's need for reserve capacity is based upon that utility's unique circumstances"; it "could threaten the availability of vital utility services"; and "blind adherence to this approach could increase the risk of investing in utility property, resulting in increased rates for all those who are served by the utility." *Id.* (cleaned up).

Instead, the Commission has adopted an equitable, balanced approach to analyzing excess capacity, and considers the following factors: (1) the prudence of the management decisions to construct the generating facility(ies) at issue; (2) the reasonableness of the demand forecasts at the time it decided to construct the facility(ies); (3) whether changed circumstances actually occurred and whether the utility re-evaluated its ongoing construction program as its planning environment changed; (4) the lead time required to construct generating facilities; (5) the necessity for the utility to provide adequate and reliable electric energy; (6) the utility's circumstances and how they affect its needs for reserve capacity; (7) the financial effects on the utility which a decision to exclude certain generating capacity will have and the resulting long term effects on the ratepayers from this decision; and (8) the

effects that changes in the demand forecasts may have on the adequacy of the utility's reserves and its ability to serve its customers. *Id.* at 401-402.

Here, the Industrial Group ignored this thoughtful Commission precedent and presented little to no evidence on these factors. Indeed, a review of the Record demonstrates that most of these factors support the Commission's Order. First and foremost, the prudence of Duke's management decisions to construct all of its existing and new generating facilities are demonstrated by both previous rate case decisions finding such facilities to be used and useful, as well as prior certificates of public convenience and necessity ("CPCNs") finding construction (or purchase) of such facilities to be reasonable, necessary, and in the public interest.[3] In fact, all of Duke's generating units added since 1983 were constructed after receiving CPCNs under Ind. Code ch. 8-1-8.5, which requires Commission preapproval of a utility's decision to construct or purchase new generating units. (*See supra* note 3.) Receipt of a CPCN under Chapter 8.5 conclusively establishes the prudence of a decision to construct or purchase a generating facility up-front. Ind. Code §§ 8-1-8.5-5 and 8-1-8.5-6.5. And absent fraud, concealment, or gross mismanagement (none of which is at issue here),

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[3] *See In re Duke Energy Ind., LLC*, No. 45002, 2018 WL 2739914 (Ind. U.R.C. May 30, 2018); *In re Duke Energy Ind., LLC*, No. 44767, 2016 WL 7407231 (Ind. U.R.C. Dec. 14, 2016); *In re Duke Energy Ind., LLC*, No. 44734, 2016 WL 3667121 (Ind. U.R.C. July 6, 2016); *Joint Pet. of Duke Energy Ind., LLC, et al.*, No. 43956, 2011 WL 6960153 (Ind. U.R.C. Dec. 28, 2011); *In re Duke Energy Ind., LLC*, Nos. 43114 and 43114-S1, 2007 WL 4150583 (Ind. U.R.C. Nov. 20, 2007); *In re PSI Energy, Inc.*, No. 42469, 2005 WL 2621095 (Ind. U.R.C. Aug. 3, 2005); *In re PSI Energy, Inc.*, No. 42359, 2004 WL 1493966 (Ind. U.R.C. May 18, 2004); *In re PSI Energy, Inc.*, No. 42145, 2002 WL 32089933 (Ind. U.R.C. Dec. 19, 2002); *In re PSI Energy, Inc.*, No. 39312, 1993 WL 328722 (Ind. U.R.C. May 26, 1993); *In re PSI Energy, Inc.*, No. 39175, 1992 WL 207191 (Ind. U.R.C. May 13, 1992).

Chapter 8.5 requires that the utility be allowed to recover the costs of the certificated generating plant—regardless of any changed future circumstances.

Additionally, while the Industrial Group tied its argument to a 15% planning reserve margin (Industrial Group Br. at 32), under various circumstances, such as higher customer demand for electricity (e.g., hotter than normal weather or higher economic growth), faster retirement of older generating units, or more unit outages, Duke would need a higher level of reserves to reliably meet its customers' demands for electricity.

NIPSCO makes clear that such a singular focus on reserve margin is inappropriate. As the Commission has noted, "reserve margin capacity is not perceived as capacity which is unfailingly and wholly available to meet demand." *NIPSCO*, 67 P.U.R.4th at 402. There can be "maintenance requirements, unavoidable and unpredictable instances of units' random outages, … deratings of units' capacity, and all other vagaries of operating very complex physical assets." *Id.* at 403.

Even if a singular focus on reserve margin were appropriate (it is not), in *NIPSCO*, the Commission found no excess capacity and concluded NIPSCO's generating units were used and useful, with reserve margins of up to 62.8%. *Id.*; *see also Office of Util. Consumer Counselor v. Pub. Serv. Co. of Ind.*, 463 N.E.2d 499 (Ind. Ct. App. 1984) (affirming Commission's conclusion that generating facilities resulting in reserve margins of up to 47% were "used and useful"). These cases demonstrate the reality of utility additions to its generating capacity: To achieve economies of scale, utilities construct sizable generating units. When such a sizable generating

unit is added to a utility's portfolio, the utility's reserve margin is (temporarily) high, until either an increase in customer demand or a retirement of existing generation allows it to "grow into" that generating addition. As both the Commission and this Court have noted, reserve capacity necessarily increases dramatically when a new large facility is brought on-line. This reserve generating capacity then decreases for a number of years as demand increases and other plants are taken out of service. "'This situation of *temporary* 'excess reserves,' however, provides ratepayers with the benefits of economies of scale.'" *Pub. Serv. Co.*, 463 N.E.2d at 504 (quoting *In re Public Service Co. of Ind.*, No. 36818, 1983 WL 909363 (Ind. P.S.C. Jan. 20, 1983)). Such benefits can include stability and less of a need to buy purchased power in the wholesale markets. *Id.*

Notably, in this case, although Duke added a sizeable generating facility in 2013 (Edwardsport), the reserve margins the Industrial Group relies upon in support of its argument that Duke has excess capacity are much lower than the reserve margins previously found to be "used and useful" (up 42% and up to 62%) in *NIPSCO* and *Public Service*.[4] (Conf.Ex.Vol.17:180.)

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[4] Other facts support a finding that Duke does not have excess capacity. Duke's most recent integrated resource plan ("IRP") was admitted as evidence. (Appellee's Appendix at 2-11.) A review of the IRP indicates Duke examined numerous different future scenarios in determining when, how much, and what type of capacity to add (or retire). Significantly, the IRP indicates Duke plans to *add* a net amount of capacity, in the form of new generation or reduced load (*e.g.*, energy efficiency or demand response), every year throughout the 20-year planning period (2018-2037). (*Id.* at 10.)

In sum, while Duke's wholesale native load contractual commitments fluctuate from time to time, Duke's retail customers are now being allocated approximately the same percentage of Duke's generating capacity as they have been since Duke's 2004 rate case. The Industrial Group ignores the detailed and thoughtful prudence analysis required by the Commission in past cases to demonstrate excess capacity and presented little to no evidence on any factors other than Duke's planning reserve margin and changes in its wholesale native load contractual commitments, nor did it present any evidence of imprudence on Duke's part. Instead, the Industrial Group tries to claim—without any legal support and in the face of contrary Commission precedent—that the mere existence of a reserve margin in excess of the target planning reserve margin of 15% is grounds for its desired disallowance. The Industrial Group's argument should be rejected.

2. The Industrial Group misunderstands and misapplies the "used and useful" doctrine.

The Industrial Group's reliance on the "used and useful" doctrine is misplaced as well. As noted above, "used and useful" means "(1) that the utility plant be actually devoted to providing utility service, and (2) that the plant's utilization be reasonably necessary to the provision of utility service." *City of Evansville*, 339 N.E.2d at 589.

The Industrial Group ignores that Indiana law draws a clear distinction between new facilities that have never before been used, and facilities that have been used to provide utility service to customers for years. *See Citizens Action Coal. of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 485 N.E.2d 610 (Ind. 1985). Our Supreme Court has noted there is

> a long-adhered to administrative interpretation of allowing amortization of abandoned plants, i.e. plants that were "used and useful" property and then retired from service. This is clearly distinguishable from allowing amortization of cancelled plants that never became "used and useful." Allowance of amortization of cancelled plants would encourage uneconomical or unproductive ventures; whereas, allowance for amortization of abandoned or retired plants encourages utilities to remove obsolete plants and property from the ratebase. This treatment also benefits consumers because obsolete and inefficient property is removed from the ratebase.

Id. at 616.

All the major components of Duke's current generating portfolio have been "used and useful" for years. The majority of Duke's portfolio is comprised of plants added as recently as 2013 (Edwardsport), along with plants that were constructed in the 1980s and earlier. Accordingly, this case involves neither a cancelled nor a brand-new plant. Even if Duke were found to have excess capacity (it does not), the Supreme Court's decision above demonstrates Duke would nevertheless be entitled to recover the costs of its generating plants that have been used for years to serve customers.

Indiana's CPCN Statute further supports the conclusion that even if there were excess capacity (there is not), Duke would be entitled to recover the costs of such capacity for which it obtained CPCNs. Indiana Code ch. 8-1-8.5 provides that, absent fraud, concealment, or material mismanagement, a utility is entitled to recover the costs of its generating plants for which it has obtained a CPCN—including a return thereon. All of Duke's generating plants constructed or purchased since 1983 were preapproved and received CPCNs.[5] (*See supra* note 3.)

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[5] Similarly, under Ind. Code ch. 8-1-8.7, the Edwardsport Plant and many of the environmental retrofits on Duke generating plants received CPCNs. (*See, e.g., In re*

3. Rates may not be based upon a hypothetical situation.

The evidence is clear that the Order's approved allocation is based upon Duke's actual level of wholesale native load sales, while the Industrial Group's proposal was based upon a hypothetical, imputed level of wholesale native load sales. (Industrial Group Br. at 32-33.) It would be unlawful to base Duke's rates on a hypothetical situation, as the Industrial Group proposed—i.e., the imputation of a level of wholesale native load that does not exist. Hypothetical situations cannot be the basis for ratemaking in Indiana. *See, e.g., Pub. Serv. Comm'n v. City of Indianapolis*, 131 N.E.2d 308, 316-17 (Ind. 1956) ("The statute does not permit the fixing of rates on a hypothesis or a situation never in existence.") The Commission has repeatedly upheld this proposition of law, noting "[o]ne of the compelling reasons why regulatory bodies reject establishing rates based upon a hypothetical capital structure is quite simply that such rate making ignores reality," *In re Indianapolis Water Co.*, No. 37612, 0085 WL 1271157, at *15 (Ind. P.S.C. Mar. 20, 1985), and emphasizing "[t]he Indiana Courts have made it clear that we cannot base rates on a hypothetical," *In re S. County Util., Inc.*, No. 39999, 1995 WL 17997331, at *22 (Ind. U.R.C. Jan. 18, 1995).

It is the actual level of wholesale native load that must be used to allocate production costs between Duke's wholesale and retail jurisdictions in the base case rate-setting process. Indiana law precluding the setting of rates based on hypothetical situations, combined with Duke's evidence establishing that this situation results

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Duke Energy Ind., LLC, Nos. 43114 and 43114-S1, 2007 WL 4150583; *In re PSI Energy, Inc.*, Nos. 42622 and 42718, 2006 WL 1684787 (Ind. U.R.C. May 24, 2006); *In re PSI Energy, Inc.*, Nos. 41744-S1 and 42061, 2002 WL 2006154 (Ind. U.R.C. July 3, 2002).

from market forces outside Duke's control, demonstrates the Commission correctly determined Duke's jurisdictional separation study reasonably apportioned the amount of capacity to be allocated to wholesale native load. *See, e.g., In re S. Ind. Gas & Elec. Co.*, No. 42340, 2003 WL 21002456 (Ind. U.R.C. Feb. 12, 2003) (due to termination of wholesale contract and shift of customers from wholesale to retail, "the Commission finds that Petitioner's proposed modification to its jurisdictional allocation factors should be approved in order to reflect the change in the Boonville service area from wholesale to retail service."). Any other conclusion is inconsistent with both the evidence and the law.

D. The Order does not make Duke's customers guarantors or insurers.

Duke has an obligation to provide electric utility service to all retail customers. Part of that obligation involves planning, building, and/or buying generating facilities to meet the forecasted demands of its customers. Duke has met this obligation, in part, by constructing and operating a number of generating plants over the years, which are used by retail customers and remain available to serve customers' demands at all times. Indiana law places burdens on electric utilities to demonstrate the necessity and reasonableness of new generating facilities up-front. Before 1983, this up-front demonstration took place in the first rate case after construction of a new generating unit. *See In re N. Ind. Pub. Serv. Co.*, No. 37023, 1983 WL 883531 (Ind. P.S.C. Dec. 21, 1983). Since 1983, this up-front demonstration has taken place in CPCN proceedings under Ind. Code ch. 8-1-8.5. Thus, Indiana law places the burden on utilities to demonstrate up-front the need for and reasonableness of its generating

plant decisions, while placing on customers the responsibility of paying for the costs of such plants once that up-front demonstration has been made. This does not make customers guarantors or insurers. It simply allocates risk and responsibility between the utility and its customers, precisely as contemplated by the Legislature in Ind. Code ch. 8-1-8.5.

For any of these reasons, the Court should reject the Industrial Group's challenge to the Commission's finding that Duke's jurisdictional separation study and allocation between its retail and wholesale customers was reasonable.

III. The Commission correctly found Duke's Coal Ash costs were recoverable as part of Duke's rates.

Duke sought recovery of its past costs associated with activities taken to comply with federal- and state-mandated requirements applicable to coal ash surface impoundments and other ash management areas. Specifically, Duke sought to include in its rate base a regulatory asset consisting of the retail jurisdictional portion of its past coal ash basin planning, closure and related costs for CCR and IDEM Projects, and to recover the costs over the next 18 years (which coincides with the estimated retirement date of a major coal-fired plant). (App.Vol.II:50.)

Duke grounded its requests for recovery of Coal Ash costs on two bases: first, traditional rate case recovery of previously deferred, prudent, and reasonable costs associated with providing utility service; and second, the Indiana "Federal Mandate Statute," Indiana Code ch. 8-1-8.4. (*Id.*) Several Duke witnesses testified in great detail about the applicable federal and state requirements; the interrelationship between federal and state compliance requirements; the reasonableness of Duke's

actions taken to comply with such requirements; the resulting Coal Ash costs; and accounting rules applicable to the Coal Ash costs.

Among other things, Duke witnesses emphasized that, while the federal requirement deadlines were imminent, IDEM had not yet approved Duke's plans for complying with the federal requirements. (*Id.* at 58.) Thus, while Duke was required to begin compliance activities several years ago, to be in a position to comply with the federal requirements, Duke's compliance plans cannot be considered "final" until IDEM has approved them—which is why Duke waited until this rate case to present its request for cost recovery to the Commission. (*Id.* at 66.)

Duke witnesses also emphasized that, because the Coal Ash costs were a legal obligation incurred to comply with federal and/or state rules, Duke was required to treat them as an "Asset Retirement Obligation," or "ARO," under generally accepted accounting principles. (*Id.* at 51.) Importantly, if these costs were not considered a legal obligation under ARO accounting, they would have been included as a "cost of removal" in Duke's depreciation rates and recovered through depreciation expense. (*Id.* at 50-51; Ex.Vol.40:29 (discussing the Commission's approval of these costs through depreciation rates for other Indiana utilities).) Thus, Duke's requested recovery of Coal Ash costs through the regulatory asset is the same ratemaking treatment the costs would have received had they been treated as a cost of removal in a normal plant retirement situation, and is consistent with the historical Indiana practice of cost recovery for reasonable and necessary generating station costs of removal such as these.

No party disputed that Duke must comply with the federal and state mandates that necessitated the Coal Ash costs. Nor did any party provide evidence of any imprudence on Duke's part with respect to its coal ash basin closure and remediation activities to date. Nevertheless, the OUCC and Industrial Group contend the Commission should have disallowed recovery of Duke's Coal Ash costs. Their arguments must fail.

A. The Commission appropriately allowed recovery of Coal Ash costs based on its general ratemaking authority, not the Federal Mandate Statute.

In the proceeding below, Duke argued that recovery of its Coal Ash remediation costs was allowed under either the Federal Mandate Statute or traditional ratemaking principles, and provided evidence to support both avenues of relief. The Commission granted recovery of those costs based on its general ratemaking authority, not the Federal Mandate Statute, and simply noted the Federal Mandate Statute's analytical framework and specific considerations provided collateral support for its decision. (App.Vol.II:67.) Accordingly, for purposes of this appeal, the Federal Mandate Statute is irrelevant, making the Court's review of this argument one of "reasonableness, the deference of which is based on the amount of expertise exercised by the" Commission. *IPL Indus. Group*, 2020 WL 6479600, at *3.

The Public Service Commission Act imbues the Commission with broad general ratemaking and accounting authority, particularly in the context of a base rate case. *See, e.g.,* Ind. Code §§ 8-1-2-10, -12, -14, -48, and -61. Indeed, pursuant to the principles established in *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679 (1923), and *Fed. Power Comm'n v. Hope Nat. Gas*

Co., 320 U.S. 591 (1944), the Commission is empowered to assure a utility has a reasonable opportunity to recover its prudently incurred costs of providing service. In this case, the Commission properly considered Duke's request to recover its Coal Ash costs in rates over time in the context of its general accounting and ratemaking authority, and appropriately concluded recovery of these mandated closure-related costs should be allowed. Although the Federal Mandate Statute offers another, separate avenue for recovery of federally mandated costs such as Duke's Coal Ash costs, that Statute in no way eliminates or constrains the Commission's general ratemaking authority in the context of a rate case.

The OUCC takes issue with the fact that the Order notes the Federal Mandate Statute provided "collateral" support for the Commission's decision to allow recovery of the Coal Ash costs under traditional ratemaking. In doing so, the OUCC ignores that the General Assembly created a statute that makes recovery of federally mandated costs easier, by allowing cost recovery between rate cases, rather than setting up obstacles to recovery of such costs. *See* Ind. Code ch. 8-1-8.4. Despite the OUCC's protestations to the contrary, the Legislature's recognition of the special nature of costs imposed on utilities by federal mandates does provide logical support for recovery of such costs in a base rate case.

The OUCC also argues Duke was unable to rely on the Federal Mandate Statute because Duke incurred the costs at issue prior to petitioning for relief. (OUCC Br. at 23.) Notwithstanding the irrelevance of the Federal Mandate Statute to this appeal, the OUCC fails to tell the complete story of the Commission's treatment of

this issue. In September 2019, after Duke filed its rate case petition and case-in-chief in this case, the Commission held for the first time, in a case involving federally-mandated vegetation management costs, that the Federal Mandate Statute was not available for recovery of costs incurred prior to the time the utility filed its petition. *In re Duke Energy Ind., LLC*, No. 44367, 2019 WL 4600201 (Ind. U.R.C. Sept. 18, 2019), *aff'd on recon.*, 2019 WL 6683737 (Dec. 4, 2019).

Duke sought rehearing of this decision, arguing, among other things, that the Commission had previously allowed recovery of costs under the Federal Mandate Statute in situations where costs were incurred prior to the utility seeking relief. (Ex.Vol.35:193-194) (collecting authority). Significantly, in its order on rehearing in the vegetation management case cited by the OUCC, the Commission clarified its "decision in this Cause is limited to … the facts and circumstances of this Cause," and as such, "it cannot have retroactive application to any other case or utility." *Id.*[6]

B. Duke's deferral of its Coal Ash costs was proper, and Commission preapproval was not required.

The term "deferral of costs" (also referred to as "creation of a regulatory asset") refers to an accounting practice used by regulated entities, such as utilities, to defer costs from its income statement to its balance sheet, resulting in removing such costs from current period expenses for accounting and financial reporting purposes.[7]

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[6] In Cause No. 44367, the Commission also recognized it "fully expect[s] a utility will incur costs related to its compliance with a federal mandate *before* it determines what compliance project should be undertaken." 2019 WL 6683737, at *3 (emphasis added).

[7] *See, e.g.,* Leonard Saul Goodman, *The Process of Ratemaking*, (Public Util. Rep. 1998), at 744.

Indiana law allows the utility to present those costs to the Commission in a subsequent proceeding for possible recovery through rates. Certain statutes specifically authorize recovery of certain deferred costs, while in other cases, the Commission has used its general authority over a utility's accounts and rates to allow recovery of a utility's deferred costs. *See* Ind. Code § 8-1-39-12*; see also In re South Haven Sewer Works, Inc.*, No. 41903, 2002 WL 31107491 (Ind. U.R.C. June 5, 2002) ("The deferred debit accounting system can be viewed as a method of preserving for Commission consideration non-test-year expenses that would otherwise not be reflected on a test year ledger.").

Here, the OUCC and Industrial Group argue, wrongly, that to create a regulatory asset and thus defer costs, the utility must first seek and obtain a Commission order authorizing such. Contrary to these arguments, a utility *does not* need prior Commission approval to defer costs on its accounting books. Rather, the accounting rules merely require that a utility determine recovery is probable in order to defer costs on the books, and while a Commission order authorizing deferral is one way to conclude that recovery is probable, it is not the only way. Previous orders from regulators allowing recovery of similar costs is another way of determining probability of recovery, as is reliance on opinions from counsel.

Duke witness Abernathy testified applicable accounting rules[8] provide a utility should capitalize a cost as a regulatory asset if it is probable that, through the

[8] Accounting Standards Codification ("ASC") 980, formerly known as Statement of Financial Accounting Standards ("SFAS") 71.

ratemaking process, there will be a corresponding increase in future revenues. (App.Vol.II:54.) She explained the determination of whether recovery is probable is a matter of professional judgment, based upon specific facts and circumstances, but the following evidence can support a conclusion that recovery is probable: (1) a rate order from regulators specifically authorizing recovery; (2) previous rate orders from regulators allowing recovery for substantially similar costs; (3) written approval from the regulators approving recovery; and (4) analysis of recoverability from internal or external legal counsel. (*Id.*) She further explained Duke's "determination that recovery [of coal ash remediation costs] was probable, [allowing for the creation of a regulatory asset], was based upon the cost recovery framework in place in Indiana, and the history of authorizing recovery for environmental remediation costs as well as for federally-mandated costs." (*Id.* at 55.)[9]

Commission precedent also demonstrates (1) the relevant accounting rules control a utility's deferral of costs, and (2) a Commission order authorizing deferral is not a prerequisite to either deferring or recovering reasonable costs. For example, the Commission has recognized that SFAS 71 "provides rules that address when certain regulated entities are permitted to defer costs that would otherwise be charged to expense in the period incurred." *Verified Joint Pet. of Duke Energy Ind., Inc., et al.*, No. 43426, 2008 WL 9832696, at *24 (Ind. U.R.C. Aug. 13, 2008). The Commission has also recognized a utility may defer costs for subsequent recovery

[9] This is consistent with authoritative accounting treatises. *See* Robert L. Hahne & Gregory E. Aliff, *Accounting for Public Utilities*, §12.02 (Matthew Bender).

without a Commission deferred accounting order. In *South Haven*, at issue were a multitude of cost deferrals the utility had made (45 separate regulatory assets) and later sought to recover in rates. 2002 WL 31107491. While the Commission did not approve rate recovery of the various cost deferrals, it did consider recovery under traditional ratemaking principles, ultimately rejecting cost recovery for reasons such as immateriality and failure to provide evidence to support the reasonableness of the expenses. *Id.* Notably, the Commission did not cite the utility's failure to seek prior approval to defer the costs as a reason for its decision, thereby recognizing preapproval was not required for either a cost deferral or later recovery of such costs in rates. *Id. See also In re PSI Energy, Inc.*, Nos. 39584 and 39584-S2, 1995 WL 298119 (Ind. U.R.C. Feb. 17, 1995) (PSI (now Duke), the OUCC, and the Industrial Group entered into a settlement agreement whereby PSI/Duke agreed to suspend the practice of deferral without Commission approval for a period of time, demonstrating the common industry practice of such a deferral).

Importantly, in *South Haven* the Commission also expressed the traditional ratemaking criteria it uses to determine whether previously deferred costs should be recovered in rates—when the costs are infrequently incurred, involve assets with significant and long-lasting benefits, and involve significant cost. 2002 WL 31107491. Here, Duke's Coal Ash costs meet these criteria. The costs are infrequently incurred. They involve long-lasting assets (generating stations) and will produce long-lasting benefits (the continued ability to use the generating stations and/or the ability to

avoid environmental contamination, penalties, etc.). And the costs (over $200 million) are quite significant.

Notably, neither the OUCC nor the Industrial Group presented any evidence to the Commission that the applicable accounting rules cited by Duke do not allow costs to be deferred in a regulatory asset as Duke did. Nor do they cite any authority holding that Commission preapproval is required for a utility to defer costs consistent with such accounting principles. There is no such evidence or law.

Quite simply, "the Commission has long recognized the distinction between accounting treatment and rate recovery, and has approved the deferral of costs for possible future recovery that were incurred prior to a grant of deferral." *Amended Pet. of N. Ind. Pub. Serv. Co.,* No. 43396-S1, 2009 WL 9509000, at *7 (Ind. U.R.C. Feb. 18, 2009). Accordingly, the Commission's decision to allow recovery of the deferred Coal Ash costs is reasonable and should be affirmed.

C. Retroactive Ratemaking

The principle against retroactive ratemaking stems from Ind. Code § 8-1-2-68, which states:

> Whenever, upon an investigation, the commission shall find any rates, tolls, charges, schedules, or joint rate or rates to be unjust, unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of this chapter, the commission shall determine and by order fix just and reasonable rates, tolls, charges, schedules, or joint rates to be imposed, observed, and followed *in the future* in lieu of those found to be unjust, unreasonable, insufficient, or unjustly discriminatory or preferential or otherwise in violation of any of the provisions of this chapter.

(emphasis added). Interpreting this statute, this Court has held:

> We find nothing in the statute giving the Commission the power to cancel, or to fix, rates retroactively. The statute provides the Commission with the power to fix rates *for the future* if it finds the rates in effect to be unreasonable or unjust; but we look in vain to find statutory authority for the Commission to fix rates *for the past*. The Commission has no powers except those conferred by statute.

Ind. Tel. Corp. v. Pub. Serv. Comm'n of Ind., 171 N.E.2d 111, 124 (Ind. Ct. App. 1960). Put another way, "[p]ast losses of a utility cannot be recovered from consumers nor can consumers claim a return of profits and earnings which may appear excessive." *Ind. Bell Tel. Co., Inc. v. Office of Util. Consumer Counselor*, 717 N.E.2d 613, 625 (Ind. Ct. App. 1999), *modified on reh'g on other grounds*, 725 N.E.2d 432 (Ind. Ct. App. 2000).

The OUCC and Industrial Group argue allowing recovery of Duke's previously incurred Coal Ash costs violates the principle prohibiting "retroactive ratemaking." (Industrial Group Br. at 41; OUCC Br. at 18.) This is not the case. Recovery of previously deferred costs does not constitute retroactive ratemaking, for two reasons.

First, previously incurred costs may be considered for reflection in current rates if such costs have been appropriately deferred, as these costs have been. Appropriately deferred costs have not been booked as a loss in previous periods, and thus, there is no recovery of past losses. Indeed, if the principle of retroactive ratemaking precluded consideration and recovery of previously incurred and properly deferred costs, innumerable Commission orders would be violative of that principle. Accordingly, the principle against retroactive ratemaking has no application in this context.

The Commission's order in *South Haven*, discussed above, is consistent with this position. There, the Commission made clear deferral of expenses is a method of preserving for Commission consideration non-test-year expenses that would otherwise not be reflected in a test period. *See also In re Duke Energy Ind., Inc.*, No. 43743, 2011 WL 5088653 (Ind. U.R.C. Oct. 19, 2011); *see also Verified Joint Pet. of Duke Energy Ind., et al.*, 2008 WL 9832696 (approving deferral of MISO costs on an interim basis, pending a decision in Phase II). Other states have reached this same conclusion. *See In re Consumers Energy Co.*, No. 338592, 2018 WL 5304913, at *7 (Mich. Ct. App. Oct. 25, 2018) ("[o]nce these expenses were deferred, they became expenses incurred in the year to which they were deferred, and, thus, are prospective in nature and not retroactive"); *Pub. Advocate v. Pub. Util. Comm'n*, 718 A.2d 201, 208 (Me. 1998).

Second, there are exceptions to the prohibition against retroactive ratemaking, including costs deferred pursuant to accounting rules. Specifically, the Commission has recognized an exception under SFAS 71,[10] which provides rules addressing when certain regulated entities are permitted to defer costs that would otherwise be charged to expense in the period incurred. *See Verified Joint Pet. of Duke Energy Ind., et al*, 2008 WL 9832696 (approving deferral of MISO costs on an interim basis). Indeed, the Commission has established certain criteria whereby a utility may receive approval for deferral of such an extraordinary request:

> In considering such requests, it is necessary to consider the balance struck between the utility and its ratepayers by approving such a

[10] Now ASC 980.

> request. For example, the gravity of the financial event involved and its impact upon the utility is appropriate to consider, as well as the impact such accounting and/or ratemaking treatment will have upon the utility's ratepayers. Further, it is necessary for the utility requesting such extraordinary treatment to be able to demonstrate with convincing evidence that the financial event is in fact occurring, and that such financial impact is fixed, known and measurable. If all of these elements are established, a utility might receive approval for such an extraordinary request.

In re Ind. Mich. Power Co., No. 40980, 1998 WL 970172 (Ind. U.R.C. Nov. 12, 1998).

Duke's deferral and recovery of Coal Ash costs meets the criteria under either theory, supporting the Commission's determination that such deferral and recovery does not violate the prohibition against retroactive ratemaking. As the Commission found, Duke properly deferred and preserved the Coal Ash costs for recovery consideration in this rate case. Once the Coal Ash costs were properly deferred, they became expenses incurred in the year to which they were deferred, and thus, are prospective in nature, not retroactive.

Additionally, the Coal Ash costs meet the Commission's criteria for an exception to the prohibition against retroactive ratemaking. Based upon the mandated nature of the costs and the extensive evidence Duke presented supporting the prudence and reasonableness of its Coal Ash activities, the Commission correctly concluded recovery of the Coal Ash costs was appropriate. The Coal Ash costs are significant, precisely fixed, known and measurable; at the same time, due to the amortization (ratable recovery) of the Coal Ash costs over 18 years, the impact on ratepayers will not be substantial.

D. Sufficiency of Findings

Finally, the OUCC argues the Commission's stated reasons for granting rate recovery for Duke's Coal Ash costs were "vague and unsupported by facts or precedent and should not be granted deference." (OUCC Br. at 25.) Specifically, the OUCC contends the Commission did not specify the applicable standard, statutes, or precedent that support recovery, and criticizes the Commission's finding that the costs at issue are significant and infrequent, arguing size or frequency does not compel recovery. (*Id.* at 25-26.)

The OUCC's argument is without merit. This Court recently articulated the parameters of its analysis when reviewing a claim that an order lacks specific findings:

> [A]n Order must contain specific findings on all the factual determinations material to its ultimate conclusions. *N. Ind. Pub. Serv. Co.,* 907 N.E.2d at 1016. Specific findings are not required on particular arguments by the parties. *Citizens Action Coalition of Ind., Inc. v. Indianapolis Power & Light Co.,* 74 N.E.3d 554, 564-65 (Ind. Ct. App. 2017) (specific findings not required on claims that "one component" of rate order had "deleterious effect on energy conservation and energy efficiency," or that "structure disproportionally harms" some consumers). Findings "need to be only specific enough to permit us to intelligently review the [agency] decision." *J.M. v. Review Bd. of Ind. Dep't of Workforce Dev.,* 975 N.E.2d 1283, 1287 (Ind. 2012). "Agency findings are specific enough when they are given with sufficient particularity and specificity such that the reviewing court can adequately and competently review the agency's decision." *Id.* "An appeal based on an alleged lack of specific findings presents a mixed question of law and fact." *NIPSCO Indus. Grp.,* 125 N.E.3d at 627. "In these situations, we review the Commission's conclusions for reasonableness, deferring to the Commission based on the amount of expertise exercised by [it]." *Id.*

IPL Indus. Group, 2020 WL 6479600, at *7.

Here, the Commission explained its reasons for granting recovery of Duke's Coal Ash costs. After a detailed review of the evidence, including specifics about the relevant accounting rules and Commission precedent, the Commission reasonably concluded Duke's Coal Ash costs were properly deferred and preserved for recovery consideration in this rate case. (App.Vol.II:67.) Additionally, the Commission articulated the standard under traditional ratemaking for recovery of properly deferred costs: "the costs at issue are significant and infrequent (stemming from federal and state mandated requirements) and will provide longstanding benefits, in terms of compliance with such federal and state mandates, improved environmental footprints, and the ability to continue to use utility properties." (*Id.*) The Commission noted it has "consistently allowed recovery of environmental compliance costs generally and coal ash-related compliance costs in particular. See for example, our Orders in Cause Nos. 44765, 44794, 45052, and 44872." (*Id.*) It also emphasized because "these costs have been deemed to be AROs, such costs would be reflected in costs of removal and depreciation rates and recoverable in that manner. In other words, in the absence of required ARO accounting, both a 'return on' and a 'return of' these costs would have been built into rate base." (*Id.*) Finally, the Commission observed Duke had presented detailed testimony supporting the reasonableness of its actions to date, and no party disputed the reasonableness or prudence of Duke's activities and costs incurred to date, with respect to the Coal Ash costs. (*Id.*)

The Commission's summary of the evidence and its resulting findings span approximately 17 pages, including specific findings on all the factual determinations

material to its ultimate conclusions, and was prefaced by an extensive review of the evidence presented by the parties. (*Id.* at 50-67.) A review of the Order demonstrates the Commission's findings are sufficiently particular to allow this Court to adequately and intelligently review the Commission's decision allowing recovery of Coal Ash costs. The OUCC's argument to the contrary should be rejected.

IV. The Commission correctly concluded Duke could recover the O&M costs for operating Edwardsport as an IGCC coal-fired plant.

The Industrial Group misstates the appropriate standard of review as to this issue: unlike *NIPSCO 2018*, cited by the Industrial Group, the Commission did not interpret a statute when considering whether to allow Duke's claimed O&M costs for its Edwardsport Plant, and therefore, there is no de novo review. Rather, the Industrial Group's challenge is to the Commission's factual findings, which are reviewed "for their reasonableness, with greater deference to matters within the [Commission's] expertise and jurisdiction." *Mullett*, 103 N.E.3d at 664. In fact, "[o]n matters within its jurisdiction, the [Commission] enjoys wide discretion[,] and its findings and decision will not be lightly overridden simply because we might reach a different decision on the same evidence." *Citizens Action Coal. of Ind., Inc. v. S. Ind. Gas & Elec. Co.*, 70 N.E.3d 429, 439 (Ind. Ct. App. 2017). The Court will "neither reweigh[] the evidence nor assess[] the credibility of witnesses and [will] consider[] only the evidence most favorable to the Commission's findings." *IPL Indus. Group*, 2020 WL 6479600, at *2.

Here, instead of "recogniz[ing] an agency has expertise in its field and the public relies on its authority to govern in that area," *Ind. Alcohol & Tobacco Comm'n*

v. Spirited Sales, LLC, 79 N.E.3d 371, 375 (Ind. 2017), the Industrial Group asks this Court to disregard the Commission's expertise in ratemaking, alleging the Commission's factual findings made and relied upon were qualitative, supposedly making them deficient, and criticizing Duke for allegedly failing to present an economic analysis in support of Edwardsport's O&M costs. (Industrial Group Br. at 51-59.) Further, the Industrial Group claims the Order does not contain sufficient findings to support its determination. (*Id.* at 59-61.) The Industrial Group's arguments are without merit.

A. Duke presented evidence of Edwardsport's O&M costs, and the Commission's expertise should not be disregarded.

The Record contains substantial evidence in support of the Commission's determination that a level of O&M in base rates based on Edwardsport's continued operation as a (primarily) coal-fired IGCC plant is reasonable. Much of this evidence was supported by the testimony of Duke witness Gurganus, who testified in depth regarding Edwardsport's costs and expenses of generating electricity. Through Mr. Gurganus, Duke presented evidence that Edwardsport provides important reliability and diversity to the Duke system, benefitting its customers. (Ex.Vol.32:79-80.) Specifically, Edwardsport has a unique ability to run on both coal-based synthetic gas and natural gas. It remains a young plant in terms of useful life, having been placed in service in June 2013, and has already improved in reliability and output and seen recent reductions in operating expenses. (*Id.* at 79-81.) The diversity of generation supply Edwardsport offers is in customers' best interest because the risks of single-fuel-source energy reliance are increasing. (*Id.* at 81.) The Record reflects there is

value in Duke maintaining Edwardsport, which is both its youngest coal-fired unit and one equipped with advanced emissions controls, as is, so coal can continue to be a meaningful contributor to diversity for customers' benefit as Duke moves to retire its older coal-fired units. (*Id.*)

Mr. Gurganus also explained the benefits of being able to rely on coal as a fuel. Not only was Edwardsport designed to generate its maximum performance when operating on 100% syngas produced from coal, but the price of coal has been less volatile than that of natural gas in recent years. (*Id.* at 82.) Moreover, Edwardsport's coal supply comes from a local Indiana mine, which limits the impact of natural disasters and other political events on the price and availability of coal. (*Id.*) Edwardsport maintains a supply of fuel on the station's coal pile, which strengthens reliability and resiliency. (*Id.* at 83.) Finally, Edwardsport's ability to use natural gas as a secondary fuel source is a benefit, as it allows continued operation of its combustion turbines when the gasifiers are undergoing maintenance or outages. (*Id.*) While the Industrial Group downplays these facts, they all support the Commission's decision.

The Industrial Group also claims Duke provided no analysis or consideration of operating alternatives. To be clear, Edwardsport was preapproved and certificated as a coal-fired IGCC facility. Duke has always operated Edwardsport as a coal-fired ICGG plant and plans to continue to do so. For these reasons, Duke presented evidence supporting the projected O&M costs of operating Edwardsport as a primarily coal-fired IGCC plant. Notably, the Industrial Group does not take issue

with the reasonableness of Duke's claimed O&M costs themselves. Rather, the Industrial Group proposed that Duke abandon operation as a coal-fired IGCC plant and operate Edwardsport solely on natural gas.

Contrary to the Industrial Group's claims, Duke provided thorough evidence opposing the Industrial Group's proposal to place the gasification equipment in cold storage and treat Edwardsport, for ratemaking purposes, as if it were a hypothetical natural gas combined cycle plant. For example, Duke provided evidence that it would be very difficult to regularly switch primary fuels at Edwardsport, as doing so would necessitate shutting down the gasifiers and their supporting systems, or else placing them in standby where use of auxiliary power would decrease output and increase the inefficiency of the unit on natural gas. (*Id*. at 82.) Further, Duke explained that turning on a unit that has been shut down is operationally difficult, time consuming, and costly. (*Id*. at 85; *see also* Tr.Vol.2:158 (addressing the difficulty of conducting a "cold start" at Edwardsport).) Additionally, doing so could present logistical challenges, such as the potential for Edwardsport to be oversupplied with coal. (*Id*. at 85.)

Duke also rebutted the Industrial Group's evidence regarding the purported benefits of switching the primary fuel source at Edwardsport to natural gas. Duke testified it would have to reduce staffing levels to only those needed to run the natural gas systems. (*Id*. at 86.) This drastic action would have long-term effects, such as the difficulty in replacing these skilled gasification employees. In this respect, forcing Duke to shift Edwardsport to a natural gas operation is akin to retiring the

gasification systems altogether. (*Id.*) Similarly, placing the gasifiers in "cold storage" or "mothballing" them, as the Industrial Group suggested, would be difficult, requiring substantial preservation efforts, ongoing auxiliary power consumption, and a strategy for managing coal inventory on site. (*Id.* at 87.) Such actions could implicate Title V air permit and National Pollutant Discharge Elimination System permit implications. (*Id.*) Moreover, Duke's President testified the economics of Edwardsport are on a positive trend and explained why mothballing the gasifiers and running the Plant solely on natural gas was an overly simplistic thought. (Tr.Vol.1:118-19.)

The Industrial Group not only downplays the efficacy of this ample evidence, but goes so far as to say that *no evidence* was presented.[11] (Industrial Group Br. at 8 ("no evidence of cost-justification"); at 51 ("a complete failure of proof by Duke"); and at 59 ("without any record to support a conclusion"). The above evidence, as well as the entire Record, belies these claims and supports the Commission's findings of basic fact, to which it applied its expertise in evaluating and weighing, as evidenced by the Order's extensive discussion of much of this evidence.

[11] No Record evidence supports the Industrial Group's contention that Duke conducted a study on Edwardsport O&M, but "destroyed" it before filing the rate case. (*See* Industrial Group Br. at 53.) Rather, when recalling a study conducted years before the rate case, Mr. Davey stated: "The document does not exist because, as I recall, the—you know, when—we retain things when they are used for a regulatory filing or a business decision or contract negotiations, inspections, but if something is developed and it's not used and there's no perceived future value, then it's not retained." (Tr.Vol.2:160.) It is also noteworthy that the study in question was created at the request of Duke's counsel, (*id.* at 121), and there is no evidence the study at issue would have changed or provided relevant evidence in this proceeding.

Because the Commission exercised its discretion reasonably, this Court should defer to the Commission's expertise and affirm the Order.

B. The Order contained specific findings supporting Edwardsport's O&M costs.

The Industrial Group's final challenge claims the Order should be reversed because the Commission failed to support its findings on Edwardsport's O&M costs. (Industrial Group Br. at 59-61.) Similar to its ineffective argument that Duke failed to provide evidence supporting Edwardsport's O&M costs, this claim is without merit.

The Commission's Order easily surpasses the reasonableness threshold discussed in detail in *IPL Indus. Group*, 2020 WL 6479600, at *7, and applied in Section III(D) above. The Order contained detailed findings and scrutiny on the Edwardsport issue, citing extensively to the testimony of Mr. Gurganus regarding the young life of the Edwardsport Plant, concluding it would be "premature to make a decision to retire Edwardsport when the asset is relatively early in its life cycle." (App.Vol.II:115.) The Commission then outlined the evidence supporting Duke's position that Edwardsport will provide diversity in the future as Duke moves to retire older coal-fired units. Applying its expertise, the Commission stated "[w]e must consider that, as [Duke] and other Indiana utilities retire thousands of megawatts of coal-fired baseload generation, the remaining baseload units—such as Edwardsport—may become critical from a grid reliability perspective." (*Id.*) After concluding "Edwardsport will remain in a position to be a meaningful contributor to maintaining a diverse generation portfolio that will benefit customers and the grid as a reliable and non-intermittent energy source," the Commission cited a number of

its prior decisions recognizing the importance of generation resource diversity. (*Id.*)

The Order also contained specific findings which rejected the Industrial Group's proposal to effectively convert Edwardsport to a gas plant. After finding such a decision would have permanent repercussions and put the future use of the Plant at risk, the Commission specifically found "persuasive Mr. Gurganus' testimony that it would be operationally difficult, time consuming, and costly to switch fuels in response to short-term natural gas price signals in an attempt to capture benefits for customers." (*Id.*) The Commission agreed Duke would lose its highly trained and qualified workforce, and that Duke would be oversupplied with coal if it were to switch to natural gas-only. (*Id.*)

All these specific findings were prefaced by the Order's detailed summary of evidence on this topic in Duke's case in chief, the Industrial Group's opposition case, and Duke's rebuttal. (*See generally* App.Vol.II:110-114.) As this Court recently found, Commission findings of this type "are sufficiently particular that we can 'adequately and competently review' the Commission's decision." *IPL Indus. Group*, 2020 WL 6479600, at *8 (quoting *J.M.*, 975 N.E.2d at 1287).

The Industrial Group complains the Order did not address every single argument it made in the proceeding below. (Industrial Group Br. at 59-60.) But "specific findings are not required on particular argument by the parties." *IPL Indus. Group*, 2020 WL 6479600, at *8. The Order indicates competing evidence was offered by the parties, the Commission specifically credited and gave weight to Duke's witness and evidence, and the Commission exercised its careful discretion on a

complex issue. This Court should affirm the Commission's quintessential exercise of its discretion.

C. The Industrial Group's position ignores public policy of the State encouraging both the construction and operation of IGCC facilities and clean coal technology.

Noticeably absent from the Industrial Group's Brief is any recognition of the State's public policy encouraging not only the construction, but also the operation, of IGCC facilities and clean coal technology such as Edwardsport. For example, the General Assembly has expressed the following:

> The development of a robust and diverse portfolio of energy production or generating capacity, *including coal gasificati*on and the use of renewable energy resources, is needed if Indiana is to continue to be successful in attracting new businesses and jobs.
>
> Indiana has considerable natural resources that are currently underutilized and could support development of new energy production or generating facilities, *including coal gasification facilities*, at an affordable price.
>
> Certain regions of the state, such as southern Indiana, could benefit greatly from new employment opportunities created by development of new energy production or *generating facilities utilizing the plentiful supply of coal* from the geological formation known as the Illinois Basin.
>
> Technology can be deployed that allows high sulfur coal from the geological formation known as the Illinois Basin to be burned *or gasified* efficiently while meeting strict state and federal air quality limitations. *Specifically, the state should encourage the use of advanced clean coal technology, such as coal gasification.*

Ind. Code § 8-1-8.8-1(a) (emphasis added). Indeed, Ind. Code §§ 8-1-8.8-11 and -12 both authorize the Commission to provide financial incentives for the recovery of IGCC operating costs for approved projects, such as the Edwardsport Plant.

Additionally, Edwardsport was preapproved and certificated as "clean coal technology" under Ind. Code ch. 8-1-8.7 (in addition to being preapproved and certificated under Ind. Code ch. 8-1-8.5). (*See* Ex.Vol.32:9-10 (discussing the Commission's November 20, 2007 Orders in Cause Nos. 43114 and 43114-S1).) Among other things, Ind. Code § 8-1-8.7-5 provides that if the Commission concludes the need for clean coal technology has changed, it may modify or revoke the clean coal technology certificate if the public convenience and necessity so requires. This provision suggests Duke may need to obtain permission from the Commission prior to abandoning the IGCC attributes of the Edwardsport Plant.

Duke does not contend these State policies compel approval of Edwardsport operating costs in all situations. But, the State policy encouraging IGCC facilities, such as Edwardsport, should be taken into account in any decision affecting Edwardsport's continued operation on coal. And Ind. Code ch. 8-1-8.7 should be taken into account as well, such that ratemaking treatment for Edwardsport's operating costs should follow, not precede, a careful review by the Commission of the continued need for the Plant's operation as an IGCC facility.

CONCLUSION

For the foregoing reasons, the Commission's Order should be affirmed.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 14,000 words.

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CERTIFICATE OF SERVICE

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