STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF COMMUNITY UTILITIES OF INDIANA, INC. FOR: AUTHORITY TO INCREASE ITS RATES AND CHARGES FOR WATER AND WASTEWATER UTILITY SERVICE; APPROVAL OF NEW SCHEDULES OF RATES AND CHARGES APPLICABLE THERETO; AUTHORITY TO RECOVER CERTAIN COSTS INCURRED IN CONNECTION WITH CAUSE NOS. 44724, 45342 AND 45389; AUTHORITY TO RECOVER COSTS INCURRED AND DEFERRED IN CONNECTION WITH THE COVID-19 PANDEMIC; APPROVAL OF A NEW RESIDENTIAL LOW-INCOME RATE FOR WATER AND WASTEWATER SERVICE; AND OTHER APPROPRIATE RELIEF	**CAUSE NO. 45651**

JOINT RESPONSE TO COMMUNITY UTILITIES OF INDIANA, INC.'S PETITION FOR RECONSIDERATION

The Indiana Office of Utility Consumer Counselor ("OUCC") and the Lakes of the Four Seasons Property Owners' Association ("LOFS") (together, the "Consumer Parties") respond to Community Utilities of Indiana, Inc.'s ("CUII's" or "Petitioner's") Petition for Reconsideration ("Petition"). CUII bore the burden of proof to show that its proposals were fair, reasonable, and prudent. The evidentiary record is replete with evidence to support the Commission's Final Order denying the relief requested by Petitioner.

I. Summary of Argument

The Commission's decision is supported by sufficient findings of fact, conclusions of law, and substantial evidence, and did not result in an unconstitutional taking or other administrative error. The Commission was entitled to either credit or discredit CUII's evidence and assign it

whatever weight the Commission deemed appropriate. The Commission was also entitled to draw a range of permissible and reasonable inferences from this evidence, including the reasonable inference that engineering and legal expenses and advanced meter infrastructure ("AMI") replacement funding should be disallowed. The Commission's findings contain sufficient detail and are within the broad discretion of the Commission to weigh and judge the credibility of competing evidence, and support the reasonableness of the Order, as required by law. The Commission's Order is based on ample evidence of record and its specific findings are clear and well-reasoned.

II. Standard of Review

It is important to review CUII's Petition with the lens of the standard of review that will be applied by a reviewing appellate court. The standard of review is set forth by Ind. Code § 8-1-3-1, has two-tiers:

> In the first level of review, the statutory standard requires that the Commission's decision contain specific findings on all the factual determinations material to its ultimate conclusions. The requirement that an administrative agency illuminate its decision-making process with specific findings of the basic facts upon which its decision is based has been extensively discussed in recent opinions of this Court. The policies underlying the "basic findings" requirement apply with special force to Commission rate orders. The legislative scheme which delegates to the Commission its rate-making authority merely requires that the rates and charges established be "reasonable and just." Since the Commission operates without the benefit of legislative guidance, it must attempt to formulate general standards of rate-making policy on an *ad hoc* case-by-case basis. Moreover, the rate-making function involves innumerable technical determinations which are peculiarly within the Commission's competence and expertise. When the Commission provides the reviewing court with basic findings of fact on all issues material to its decision, its expert reasoning process and subtle policy judgments provide an intelligible framework for the judicial non-expert. Since "basic findings" afford a rational and informed basis for review, the danger of judicial substitution of judgment on complex evidentiary issues and policy determinations is substantially reduced. The process of formulating basic findings on all material issues can also serve to aid the Commission in avoiding arbitrary or ill-considered action. . .

> The second level of factual review prescribed by IC 1971, 8-1-3-1 (Burns Code Ed.) requires a reviewing court to inquire whether there is substantial evidence in light of the whole record to support the Commission findings of basic fact. While IC 8-1-3-1 contains no specific reference to the "substantial evidence" test, the statute has been consistently interpreted to authorize reviewing courts to set aside Commission findings of fact which are unsupported, on the whole record, by substantial evidence.

City of Evansville v. S. Ind. Gas & Elec. Co., 339 N.E.2d 562, 571-73 (Ind. Ct. App. 1975) (internal citations omitted).

Within this legal framework, the IURC has the expertise to analyze and weigh the complex competing evidence in cases, provided there is substantial evidence supporting its decision. *Citizens Action Coal. of Ind., Inc. v. Indianapolis Power & Light Co.*, 74 N.E.3d 554, 565-66 (Ind. Ct. App. 2017). "On matters within its jurisdiction, the Commission enjoys wide discretion. The Commission's findings and decision will not be lightly overridden just because [the Court] might reach a contrary opinion on the same evidence." *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 31 N.E.3d 1, 5-6 (Ind. Ct. App. 2015) (internal citation omitted.) Challengers have the burden of showing there is insufficient evidence in the record to support the findings of the Commission; they cannot merely cite to other evidence of record which would support a determination more favorable to their position. *Bethlehem Steel Corp. v. N. Ind. Pub. Serv. Co.*, 397 N.E.2d 623, 628 (Ind. Ct. App. 1979).

III. SIP and Preapproval Issues

CUII's Petition asserts that the Commission's denial of recovery of its legal fees and engineering costs from a rejected project constitute a "taking." CUII charges that the Commission "arbitrarily" denied cost recovery of CUII's "prudently incurred external engineering and legal expenditures," and argues that it is entitled to recovery of the costs at issue because it is doing so pursuant to prior authorization in Cause Nos. 44724 and 45389. Petition at 3-4.

However, as the Commission held in Cause No. 45389, CUII's proposed plan did *not* comply with the order in Cause No. 44724, because it did not address the specific issue that the Commission found needed to be remediated: inflow and infiltration ("I&I"). In its Order on Reconsideration, the Commission found:

> As stated in our Final Order, we considered all the evidence of record presented by CUII, the OUCC, and LOFS in this matter. Upon weighing the evidence, for the reasons explained in the Final Order, we found that the totality of evidence supported our conclusion that CUII's request for preapproval to spend approximately $23.8 million on a new wastewater treatment plant and collection system improvement projects was not justified. We did not find, as suggested by CUII, that CUII has done *nothing* to address I&I. Rather, we found that CUII has not addressed its problems with I&I to the point where preapproval of its multi-million-dollar proposals was justified under Ind. Code § 8-1-2-23.
> The OUCC and LOFS provided credible evidence in this Cause that suggested ways that CUII could further reduce or eliminate the need for the Proposed Improvements, and we found that evidence to be persuasive. In addition, we found that there was no evidence that CUII cannot provide reasonable and adequate service at this time. For these reasons, we denied CUII's request for preapproval. CUII's arguments on reconsideration do not provide any reason for us to change this result. CUII has not satisfied the requirements of Ind. Code § 8-1-2-23 by showing that "an expenditure of any amount is reasonably necessary to assure reasonable and adequate service." *American Suburban Utilities, Inc.*, Cause No. 41254, at 14 (April 14, 1999).

Petition of Community Utils., Cause No. 45389, Order on Reconsideration, p. 2 (Ind. Util. Regul. Comm'n Jul. 14, 2021).

As argued by the OUCC and LOFS in this case, CUII's request for recovery of engineering costs for a project that the Commission denied was neither reasonable nor supported by precedent. It has long been the case that there is no guarantee that every expense incurred by a utility will be recoverable through rates. "While the utility may incur any amount of operating expense it chooses, the Commission is invested with broad discretion to disallow for rate-making purposes any excessive or imprudent expenditures." *City of Evansville*, 339 N.E.2d at 569.

Having found that the Cause No. 45389 projects were inconsistent with the requirements of Cause No. 44724, the Commission denied CUII's request for approval. When the Commission

issued its order in this case, it reviewed the same evidence as it had before, and found it wanting.

> Nothing in the 44724 Order can be reasonably construed as a specific request that CUII undertake the WWTP improvements and CSIP proposed in Cause No. 45389. For example, the 44724 Order never mentions increasing the size of the WWTP, upgrading lift stations, or installing new force mains. The 44724 Order instructed CUII to implement a comprehensive program to significantly reduce its I&I, which could potentially reduce or eliminate the need for increased capacity at the WWTP. Therefore, we conclude that the $1,100,289 in engineering was not prudently incurred as the sizing requirements of needed WWTP improvements (if any are, in fact, needed) are *still* unknown due to CUII's continued failure to work toward the abatement of I&I. Thus, we deny CUII's request to recover its engineering expenses from Cause No. 45389.

Final Order at 66.

The Commission's decision to disallow CUII's previously-incurred engineering costs falls squarely within its technical expertise, which requires deference to the Commission's findings. There is no statutory right to collect previously-denied project costs, nor is a utility guaranteed recovery of every cost it incurs. See, *City of Evansville, supra*. The Commission's decision was supported by significant evidence and analysis, and there is no reason to reconsider its decision.

Further, as the Indiana Supreme Court recently re-emphasized, a utility's rates are prospective in nature, and a utility cannot recover past losses. *Ind. Off. of Util. Consumer Couns. v. Duke Energy Ind., LLC*, 183 N.E.3d 266 (Ind. 2022), *reh'g den.* (hereafter "*OUCC v. DEI I*"[1]), *citing Pub. Serv. Comm'n v. City of Indianapolis*, 235 Ind. 70, 131 N.E.2d 308 (Ind. 1956), *see also* I.C. § 8-1-2-68. CUII's request for reconsideration is to cover past losses, an outcome both *City of Indianapolis* and *OUCC v. DEI I* held was forbidden.

> Past losses of a utility cannot be recovered from consumers nor can consumers claim a return of profits and earnings which may appear excessive. The chances of a loss or profit from operations is one of the risks a business enterprise must take. The Company must bear the loss and is entitled to the gain depending upon the efficiency of its management and the economic uncertainties of the future after a

[11] The designation "I" is to differentiate between the Supreme Court's decision and another case captioned *Ind. Off. of Util. Consumer Couns. v. Duke Energy Ind., LLC,* ---N.E.3d---, 2023 WL 2127358 (Ind. Ct. App. Feb. 21, 2023) ("OUCC v. DEI II").

rate is fixed.

City of Indianapolis, 131 N.E.2d at 315.

The Commission's determination was reasonable, supported by significant evidence, and wholly consistent with long-standing and recent precedent. The Commission should find no reason to reconsider it now.

CUII's Petition also alleges that the Commission's decision to reduce legal expenses is "inconsistent with prior Commission decisions—which have authorized recovery of legal costs supported by much *less* evidence than that presented here." Petition at 4. In CUII's view, the Commission's decision also constitutes "confiscatory action that deprives the Company of a fair return on its investment…and constitutes a government taking of private property[.]" *Id.*

The Commission laid a substantial factual basis for its decision, exercising its technical expertise, for which it is due deference. In its detailed explanation for rejection of legal expense for Cause No. 45389, the Commission pointed out the multiple infirmities of CUII's case.

> CUII's legal invoices related to Cause No. 45389 submitted in response to the Presiding Officers' docket entry suffer from the same defects as those submitted for Cause No. 45342: vague, redacted diary entries; duplicate invoices; invoices not organized in any logical way, such as chronologically; and seemingly duplicative work among attorneys on the same tasks. Also like CUII's request to recover legal expenses from Cause No. 45342, the number Mr. Lubertozzi cites as the total amount requested to be recovered from Cause No. 45389 in his workpaper k, $258,319, does not match the Commission's calculated total of what appear to be invoices related to Cause No. 45389 submitted in response to the docket entry, $255,287.58.

Final Order at 66.

Notably, CUII's request for legal expense for Cause No. 45389 was for a project the Commission had denied. Legal expenses for proceedings other than rate cases is the exception, not the rule, in utility cases; rate cases are considered the exception to the general American Rule that the party seeking relief bears its own costs, based on the precept that

utilities must bring rate cases. Even in rate cases, however, the Commission is well within its rights to reduce an expense it considers excessive or imprudent. *See, In re Switzerland Co. Nat. Gas*, Cause No. 45117, Final Order pp. 18-20 (Ind. Util. Regul. Comm'n Apr. 17, 2019). The Commission's reduction of rate case expense here was supported by detailed findings, and cited the aggravating factors supporting its decision:

> After considering the evidence of record, the Commission finds that the un-itemized $50,000 "consulting expense" added by CUII on rebuttal should be disallowed. In addition, we find that the $32,500 for expenses related to the MSFRs should also be disallowed. Regardless of whether the expenses were incurred in drafting CUII's deficient initial MSFR submission or its heavily amended second pass at the MSFRs, we are not convinced that such expenses were necessary when CUII's staff should have been able to compile this information without such heavy involvement from an outside consultant.

Id. at 68.

The infirmity of CUII's MSFRs was raised by the OUCC in a *Notice of Non-Compliance*, citing *thirty-two* different MSFR provisions that did not comply with the rule. *See,* OUCC *Notice of Non-Compliance*, December 22, 2021. As a consequence, the Presiding Officers modified the 300-day schedule set forth under Ind. Code § 8-1-2-42.7, finding that CUII's case was not complete until January 14, 2022, over a month after CUII's initial filing. *See,* docket entry of February 10, 2022. Thus, there was significant record evidence to support the Commission's reduction in rate case expense.

To make a successful claim that the Commission's decision constitutes a "taking", more is required than just a disagreement with the outcome. "[M]erely asserting in general language that rates are confiscatory is not sufficient .... [I]n order to invoke constitutional protection, the facts relied on must be specifically set forth and from them it must clearly appear that the rates would *necessarily* deny to plaintiff just compensation and deprive it of its property without due process

of law." *Pub. Serv. Comm'n of Montana v. Gt. N. Utils. Co*., 289 U.S. 130, 136-37, 53 S.Ct. 546, 77 L.Ed. 1080 (1939) (emphasis added); *accord Ponderosa Tele. Co. v. Calif. Pub. Utils. Comm'n*, 36 Cal.App.5th 999 (2019). Further,

> Rates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so called 'fair value' rate base'.

Duquesne Light Co. v. Barasch, 488 U.S. 299, 310, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989), citing *Fed. Power Comm'n v. Hope Nat. Gas Co.,* 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944).

In sum, the Commission's decision to reduce rate case expense was fully supported by the record, and well within the parameters of existing law. CUII is free to present any expense it wants for recovery, but it is subject to the pre-existing rules of prudence and precedent. Simply because CUII did not get all of what it asked for does not make the Commission's Order a taking; if that were true, the Commission would be prohibited from disallowing any costs that had an impact on rates. CUII is not entitled to every dollar it requests, nor was it error for the Commission to deny or limit CUII's requests.

IV. The Order Properly Denied Recovery of Imprudently Incurred Engineering and Legal Expenses and AMI Costs.

CUII was not "caught unawares" by the Consumer Parties' concerns with its plans, which the Consumer Parties' shared long before this case was filed. Petitioner had the duty to think through the implication of its decision not to take advantage of the opportunity to address the Consumer Parties' concerns or change course. Thus, CUII was on notice that the prudency of its decisions and *expenses related thereto* were going to be challenged and subject to regulatory review, as all utility expenses are. The Commission appropriately reviewed CUII's engineering, legal and AMI expenses for purposes of determining whether those costs should be disallowed,

pursuant to its authority under I.C. § 8-1-2-48:

> The commission shall inquire into the management of the business of all public utilities, and shall keep itself informed as to the manner and method in which the same is conducted and shall have the right to obtain from any public utility all necessary information to enable the commission to perform its duties. If, in its inquiry into the management of any public utility, the commission finds that . . . any other item of expense is being incurred by the utility which is either unnecessary or excessive, the commission shall designate such item or items, and such item or items so designated, or such parts thereof as the commission may deem unnecessary or excessive, shall not be taken into consideration in determining and fixing the rates which such utility is permitted to charge for the service which it renders.

Simply because CUII believes that the Commission should have permitted these costs does not mean that the Commission's determination to exclude them is unlawful. Ratepayers are not the ultimate insurer of all negative utility events, particularly those whose business risks were previously known and where the utility failed to take reasonably available risk mitigating steps. The Commission considered competing evidence on the appropriate recovery of costs, and disallowed those costs based on substantial evidence.

The Commission's authority to disallow costs from rates is foundational to its duty to set just and reasonable rates under I.C. § 8-1-2-68. This authority is rendered meaningless if the Commission cannot disallow a utility's engineering, legal and AMI costs. CUII's management may disagree with the Commission's decision, but that does not invalidate the Commission's determination that those costs were unreasonable and imprudent. As noted above, "[w]hile the utility may incur any amount of operating expense it chooses, the Commission is invested with broad discretion to disallow for rate-making purposes any excessive or imprudent expenditures." *Evansville*, 339 N.E.2d at 569; *see also* I.C. § 8-1-2-48.

V. Conclusion

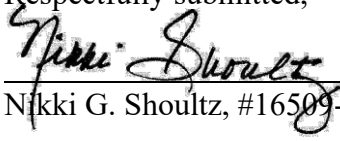
The Commission reasonably determined, based on the content and quality of the evidence presented, that Petitioner failed to meet its burden of proof to support its proposed recovery of legal, engineering and AMI costs. The Commission properly analyzed and applied the plain language of Indiana statutes and the Commission's own precedent, duly rejected Petitioner's proposed expenses because CUII failed to credibly demonstrate the prudency and reasonableness of its management decisions and operating plans. The resultant Order is correct and lawful in all respects. The Commission should therefore summarily and promptly deny the Petition, and grant any and all other just and proper relief.

Respectfully submitted,

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR

Lorraine Hitz, Attorney No. 18006-29
Deputy Consumer Counselor
Daniel M. Le Vay, Attorney No. 22184-49
Deputy Consumer Counselor
OFFICE OF UTILITY CONSUMER COUNSELOR
115 W. Washington St. Suite 1500 South
Indianapolis, IN 46204
lhitz@oucc.in.gov
dlevay@oucc.in.gov
infomgt@oucc.in.gov

Respectfully submitted,



Nikki G. Shoultz, #16509-41

Nikki G. Shoultz
Bose McKinney & Evans LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
(317) 684-5000
(317) 223-0242 (telefax)
nshoultz@boselaw.com

Counsel for Lakes of the Four Seasons
Property Owners' Association

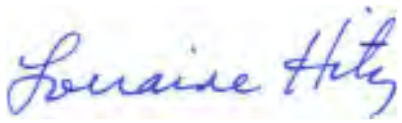
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Joint Response to CUII's Petition for Reconsideration has been served upon the following counsel of record in the above-captioned proceeding by electronic service on March 3, 2023.

Kay E. Pashos
Steven W. Krohne
Mark R. Alson
ICE MILLER LLP
One American Square, Suite 2900
Indianapolis, IN 46282-0200
Email: kay.pashos@icemiller.com
steve.krohne@icemiller.com
mark.alson@icemiller.com

Lee Lane
GENETOS LANE & BUITENDORP LLP
7900 Broadway
Merrillville, Indiana 46410
Email: lee@glblegal.com

Jeffrey M. Peabody
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Email: jpeabody@btlaw.com



Lorraine Hitz
Deputy Consumer Counselor

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR
115 West Washington Street
Suite 1500 South
Indianapolis, IN 46204
infomgt@oucc.in.gov
317/232-2494 – Phone

4530890_1