

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF INDIANA MICHIGAN POWER )  
COMPANY, AN INDIANA CORPORATION, )  
FOR AUTHORITY TO INCREASE ITS RATES )  
AND CHARGES FOR ELECTRIC UTILITY )  
SERVICE THROUGH A PHASE IN RATE )  
ADJUSTMENT; AND FOR APPROVAL OF )  
RELATED RELIEF INCLUDING: (1) REVISED )  
DEPRECIATION RATES; (2) ACCOUNTING )  
RELIEF; (3) INCLUSION IN RATE BASE OF ) CAUSE NO. 45235  
QUALIFIED POLLUTION CONTROL )  
PROPERTY AND CLEAN ENERGY )  
PROJECT; (4) ENHANCEMENTS TO THE )  
DRY SORBENT INJECTION SYSTEM; (5) )  
ADVANCED METERING INFRASTRUCTURE; )  
(6) RATE ADJUSTMENT MECHANISM )  
PROPOSALS; AND (7) NEW SCHEDULES )  
OF RATES, RULES AND REGULATIONS. )

**CONSUMER PARTIES' JOINT BRIEF ON RATEMAKING PRINCIPLES AND  
THEIR APPLICATION TO I&M'S REQUESTED RELIEF**

In this proceeding, I&M is seeking Commission approval to increase its base rates and charges to produce an additional \$172 Million in annual revenue. This request, obviously, contains numerous adjustments to I&M's operating revenues and capital expenditures, an increase to its authorized return on equity and resulting net operating income, and a sizable re-allocation of costs, previously incurred to serve wholesale customers, to Indiana retail customers who, simply put, have no need for the excess generation. Further, among other requests, I&M seeks approval of changes to its existing RTO Rider that will allow it to recover, on an annual basis, hundreds of millions dollars in PJM NITS expenses.

In the presentation of its case, I&M has attempted to create a perception that the Commission has no choice but to approve I&M's requests. For example, I&M insists, in the name of fairness, that because the Commission has previously treated an issue in one manner, it

must do so now. Such is not the case as the Commission clearly has the authority to depart from past practice provided it explains its rationale for doing so. *See, e.g., Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Commission*, 810 N.E.2d 1179, 1186 (Ind. Ct. App. 2004) *trans. denied* (“We note that an agency may change its course and is not bound forever by prior policy or past precedent. That is, where a policy or precedent is flawed and needs to be changed, the agency may change the course so long as it explains the reasons for doing so.”) Most troubling, however, is another theme pervading I&M’s theory of its case. Specifically, the proposition that if I&M asks for recovery of a cost or expense, the Commission must authorize recovery at the requested level apparently without any other considerations. I&M’s view of the ratemaking process on this point, especially, is both deeply flawed and ignores the basic standards of what constitutes “just and reasonable rates”. I&M’s position rests on an overly restrictive view of the Commission’s authority and disregards the Commission’s purpose as the regulator of a monopoly enterprise that, as a public utility, is impressed with the public interest.

Concerned with the view of the regulatory process that I&M is asking the Commission to endorse, the Office of Utility Consumer Counselor, I&M Industrial Group, Citizens Action Coalition of Indiana, Indiana Community Action Association, the City of Fort Wayne, the City of Marion, and Marion Municipal Utilities, Walmart, Inc., and 39 North Conservancy District (“Consumer Parties”) join in this brief.

The brief does not intend to address individual components of I&M’s requested relief, except to the extent the treatment of an individual issue is illustrative of the flaws in I&M’s view as a whole. Rather the brief will more generally address the role of the Commission as regulator, the meaning of “just and reasonable rates”, the requisite standards under various statutory provisions, and application of the regulatory framework to a proceeding using a future test year.

Although individual Consumer Parties will apply and adapt the more general discussion of these issues contained in the brief to the specific issues in contention, the brief serves a higher purpose. More specifically, the brief aims to provide the Commission with a legal framework to assist it in preparing its own findings and conclusions addressing I&M's requested relief.

#### The Commission's Role and Establishing "Just and Reasonable" Rates

Indiana Code §8-1-2-4 declares in relevant part that utility charges "shall be reasonable and just, and that every unjust or unreasonable charge" is "prohibited and unlawful." Indiana Code § 8-1-2-68 invests the Commission with the authority to establish new "just and reasonable rates" and charges when it finds that a utility's existing rates are unjust, unreasonable, insufficient, unjustly discriminatory or otherwise unlawful. On this point, there should be no dispute. A divergence of opinion between I&M and the Consumer Parties does appear to arise over the questions of what constitutes "just and reasonable rates" and what is the Commission's role in setting such rates in this proceeding.

I&M's apparent view of what constitutes "just and reasonable rates" rests on the belief it is entitled to recovery of its costs and expenses provided that it makes the request. This view, however, is one-sided, restrictive of the Commission's authority, and seems predicated on the assumption that a complete and accurate statement of the Commission's duty ". . . in every rate proceeding is to establish a level of rates and charges sufficient to permit the utility to meet its operating expenses plus a return on investment which will compensate its investors." *L. S. Ayers & Co. v. Indianapolis Power & Light Co.*, 169 Ind. App. 652, 657, 351 N.E.2d 814, 819 (1976). Indeed, when asked if rates need to be just and reasonable not only from the utility's perspective, but also that of the consumer, I&M's own witness stated "that the determination of just and reasonable rates should be dependent on what I&M's cost of providing service to its customers

is.” Tr. at I-78. That witness went on to indicate his belief that the rates requested in this case meet that standard “from both the company’s perspective as well as from our customers’.” *Id.* at I-80.

The Commission is certainly obligated to follow the standards established in *Bluefield Water Works & Improvement Co. v. Public Serv. Comm’n*, 262 U.S. 679 (1923) and *Federal Power Commission v. Hope Natural Gas, Co.*, 320 U.S. 591 (1944) and to otherwise approve rates that permit the utility to provide safe, adequate and reliable service. But I&M’s lopsided approach, emphasizing only the utility’s recovery of costs and expenses through rates invites the Commission to skip careful review of the utility’s requested relief and is flawed and inconsistent with Indiana law. At a minimum, I&M’s position ignores that the ratemaking process is a balanced, two-way street. In that street utilities like I&M are “regulated in order to protect the consumers from the abuses of monopoly, i.e. artificially high prices . . . .” *Citizens Action Coalition of Indiana, Inc. v. Northern Indiana Public Service Co.*, 485 N.E.2d 610, 614 (Ind. 1985). That protection is achieved because the “[t]he statutes which govern the regulation of utilities and which grant the [Commission] its authority and power provide a surrogate for competition.” *Id.* See also, *Northern Indiana Public Service Co. v. Citizens Action Coalition of Indiana, Inc.*, 548 N.E.2d 153, 159-60 (Ind. 1989). The role of the Commission in protecting not only the business interest of the utility and its investors, but also the utility’s customers from excessive rates, is a principle long recognized in Indiana and elsewhere. See, e.g., *Foltz v. City of Indianapolis*, 234 Ind. 656, 668, 130 N.E.2d 650, 656 (1955) (outlining generally the history of regulation of businesses with a “public calling” and noting that the “common law from time immemorial has granted relief from extortionate practices by a business classified as public calling or ‘affected with a public interest.’” *internal citations omitted*); *Public Service*

*Commission v. City of Indianapolis*, 235 Ind. 70, 96, 131 N.E.2d 308, 318 (1956) (“On the one side, the rates may not be so low as to confiscate the investor’s interest or property; on the other side the rates may not be so high as to injure the consumer by charging an exorbitant price and at the same time giving the utility owner an unreasonable or excessive profit.”); 235 Ind. at 106-107, 131 N.E.2d at 324 (Emmert, concurring). Indiana Courts continue to recognize this basic formulation and emphasize the integral role the Commission plays in balancing the interests of the utility with those of consumers.<sup>1</sup>

One of the tools at the Commission’s disposal to achieve that balance and establish just and reasonable rates is its authority to prevent recovery of certain costs. As Indiana courts have stated “[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.” *City of Evansville v. Southern Indiana Gas & Elec. Co.*, 167 Ind. App. 472, 479, 339 N.E.2d 562, 569 (1975).<sup>2</sup> The Commission’s power stems directly from Indiana Code § 8-1-2-48 which requires the Commission to “inquire into the management of the business of all public utilities . . . .” Moreover, the process of a general rate case, such as this, is a “‘comprehensive’ process, requiring the Commission to ‘examine every aspect of the utility’s operations and the economic environment in which the utility functions to ensure that the data [the Commission] has received are representative of operating conditions that will, or

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<sup>1</sup> See, e.g., *Indianapolis Water Co. v. Public Service Commission*, 484 N.E.2d 635, 639-40 (Ind. Ct. App. 1985); *Office of Utility Consumer Counselor v. Lincoln Utilities, Inc.*, 834 N.E.2d 137, 144 n.2 (Ind. Ct. App. 2005) *trans. denied* (both cases quoting *Public Service Commission*, 235 Ind. at 96, 131 N.E.2d at 318).

<sup>2</sup> Another tool the Commission has is to “employ the rate or return component as ‘a balance wheel’ to provide a limited margin for error for the resolution of other issues” with the ultimate goal remaining “to reach an overall result that is equitable and that will permit continuity of utility services on a sound financial basis.” *L. S. Ayers*, 169 Ind. at 660, 351 N.E.2d at 821. (internal citations omitted)

should, prevail in future years.” *NIPSCO Industrial Group v. Northern Indiana Public Service Co.*, 100 N.E.3d 234, 238 (Ind. 2018) (quoting *United States Gypsum*, 735 N.E.2d 790, 798 (Ind. 2000)).

Thus, while a degree of deference may be owed to the “business judgment” of the utility, that deference is not limitless. In fact, the Commission has reviewed managerial decisions of a utility and disallowed expenses as being unnecessary and excessive. *See, e.g., Indiana-American Water Co., Inc. v. Office of Utility Consumer Counselor*, 844 N.E.2d 106 (Ind. Ct. App. 2006). The theory, then, that the Commission must simply accept I&M’s claimed level of expense or investment without further investigation is inaccurate. Rather, the Commission clearly has the authority and the duty to undertake such investigation. Indeed, such investigation is necessary, because the Commission’s decisions must not only conform to the law, but also be supported by findings of fact based on the evidentiary record. *See generally, Northern Indiana Public Service Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1015-16 (Ind. 2009). In the absence of such an investigation and the weighing of the evidence, one may reasonably ask how the Commission could fulfill its role in administering the “regulatory scheme devised by the legislature” to “insure that public utilities provide constant, reliable, and efficient service to the citizens of Indiana.” *Id.* at 1015 (internal citations omitted).

In sum, then, “just and reasonable rates” cannot be viewed solely from the utility’s frame of reference as rates that produce sufficient revenue to recover costs and provide an opportunity to earn a reasonable return. That is, to be sure, part of the Commission’s role. But the Commission is also obligated to establish rates that are just and reasonable from the consumers’ perspective as well, ensuring that they are not exorbitant and provide recovery only for prudent and non-excessive expenditures. In exercising that role, the Commission should not blindly

defer to the utility's position, but instead must conduct its own investigation of the facts and evidence presented to reach a conclusion that is fair to both the utility and the consumers.

Parallel with this principle is the 2016 Indiana General Assembly's declaration set forth in Indiana Code § 8-1-2-0.5 that it is a continuing policy of the state to create and maintain conditions that allow utilities to plan for and invest in necessary infrastructure while protecting the affordability of utility services for present and future generations of Indiana citizens. Thus, the General Assembly has recently recognized that while undertaking these investments, protecting affordability must also be considered.

#### The Proper Scope of Review of Capital Investment

The Commission must certainly conduct such diligence and exercise its investigative prerogative in reviewing I&M's requests to approve major capital investments that will have significant impacts on I&M's retail customers. By way of example, in this case, I&M seeks to include significant rate base additions through investment in its distribution system and the deployment of automatic metering infrastructure ("AMI").<sup>3</sup>

In its proposed order, I&M argues that to the extent these investments are to be undertaken in the future, they should be approved pursuant to Indiana Code § 8-1-2-23. *I&M Proposed Order* at 11-12 (AMI), 14-15 (distribution infrastructure). In setting out the standard the Commission should apply under Section 23, I&M notes that the Commission has historically applied a two-step analysis. That analysis requires the Commission to first determine "whether an expenditure of any amount is reasonably necessary to assure reasonable and adequate service", and then, only if that first question is answered in the affirmative, the reasonable

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<sup>3</sup> I&M also seeks approval of a new tracking mechanism to recover the "full costs associated" with the planned AMI deployment. (*See Williamson Direct* at 37; *I&M Proposed Order* at 73-74).

amount of investment to be approved. *I&M Proposed Order* at 14 citing *American Suburban Utilities*, IURC Cause No. 41254 (April 14, 1999).

A significant question in this case with respect to both I&M's AMI and distribution system investment proposals is whether sufficient evidence has, in fact, been presented to justify the investments in the first place. Although I&M acknowledges the evidentiary disputes in its Proposed Order, it also seeks to have the Commission reject evidentiary standards put forth by various parties that would enable reasonable investigation of the reasonableness of the proposed investment. *I&M Proposed Order* at 11 (rejecting use of quantified cost-benefit analysis to assess AMI investment), 13-15 (arguing I&M's MSFRs materials, case-in-chief, and discovery provide sufficient data to assess distribution investments). I&M's Proposed Order goes so far as to invite the Commission to approve I&M's distribution investments based in part on the assertions that the utility's "data and sworn testimony" need not be independently verified and that the Commission should not substitute its judgment for the business judgment of I&M's leadership. *Id.* at 15.

But the fact is that the utility, as the party requesting relief under Indiana Code § 8-1-2-73, ultimately has the burden to prove the need for and reasonableness of the investment it seeks to make. The presentation of evidence that is inadequate to demonstrate the need for investment, and the appropriateness of the requested level of investment, clearly does not meet that burden. A simple standard that asks a utility to "describe" how it arrived at a cost projection or why an investment is needed<sup>4</sup> do not meet that burden. This is so precisely because such a standard

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<sup>4</sup> See *I&M Proposed Order* at 14.

denies both consumer parties and the Commission adequate information to establish that the investments are indeed prudent and the costs non-excessive.<sup>5</sup>

Thus, simply accepting I&M's case and proposed evidentiary standards, without taking into account the valid objections raised by the consumer parties, would be erroneous. Doing so would set an untenable standard that may require the Commission to authorize the recovery of substantial investments without having an adequate record to assess the reasonableness and necessity of those investments. Instead, the Commission must closely investigate and review the record evidence and, if finding it wanting, deny the recovery. It is incumbent on the Commission to first conduct the inquiry and consider the need for the investment and appropriate level and means of cost recovery instead of simply relying on the bald assertions of I&M that its case is sufficient.

#### Defining the Limits of "Utility Service"

Under Indiana Code § 8-1-2-4, a public utility like I&M is required to provide "reasonable adequate service and facilities" and requires that charges "made by any public utility for any service rendered or to be rendered either directly or in connection therewith shall be reasonable and just. . . ." Indiana's appellate courts have, in interpreting the definition of "service" designated three categories of "service":

- (1) The use or accommodation afforded consumers or patrons;
- (2) Any product or commodity furnished by the utility; or
- (3) The plant, equipment, apparatus, appliances and facility employed by the utility
  - (a) in performing any service; or
  - (b) in furnishing any product or commodity and devoted
    - (a) to the purposes in which such utility is engaged and
    - (b) to the use and accommodation of the public.

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<sup>5</sup> See, e.g., *Indiana-American Water*, 844 N.E.2d at 117-19 (affirming disallowance of audit expenses when utility, in exclusive control of requested information, failed to provide adequate record evidence to support recovery).

*Indiana Cable Television Ass'n, Inc. v. Public Service Commission*, 427 N.E.2d 1100, 1109 (Ind. Ct. App. 1981).

In this case, I&M has sought to offer and or include within its revenue requirement the expenses associated with various programs it intends to offer. Some of these programs, like I&M's EZ Bill Program, can relatively easily be fit within one of the three categories identified above. Others, however, less demonstratively fall within the definition of "service" and illustrate, again, the care the Commission must apply in reviewing I&M's requested relief.

Indiana courts held it is appropriate to deny a utility recovery of expenses when there is no showing of a connection between the expense and the service rendered. *See, e.g., Indiana Gas Co., Inc. v. Office of Utility Consumer Counselor*, 675 N.E.2d 739 (Ind. Ct. App. 1997) (affirming Commission denial of costs related to environmental cleanup when facilities were never used by gas company to serve customers and holding that use of the property for other uses such as parking lots was "too tenuous" to meet applicable standard). Some of the programs proposed by I&M are not a use of facilities or accommodation to customers, are not a commodity, and are not demonstrably plant or equipment employed by I&M. At best, they are "products" I&M wishes to offer. But even if so defined or rationalized, the proposed programs must still have a connection to I&M's provision of electric service to qualify as a "utility service" for which the Commission may authorize cost recovery through rates.

As part of its role of ensuring that customer rates are just and reasonable, the Commission must give careful consideration before endorsing such programs. The deployment of innovative means to more efficiently serve customers and meet their needs are important and should be encouraged. But, in reviewing such proposals, the Commission should not abandon the definition of "service" and should, rationally, question whether the offerings proposed by

utilities, including I&M, are truly providing utility services to customers. Unless the programs have a demonstrable connection to such service, their costs should not be passed onto customers. To do otherwise would not only be contrary to law, but also undermine the critical role of the Commission in protecting customers.

#### Application of Regulatory Principles in the Use of a Future Test Year

The Consumer Parties finally note that although this case involves a future test year, there is nothing to suggest that any of the standards that have been discussed, or which otherwise apply to the ratemaking process, are in any way altered by that fact. Indeed, as the Commission itself has already reached that basic conclusion in Cause No. 44450, the first case involving a fully forecasted test year. *See Indiana-American Water*, IURC Cause No. 44450 (Jan. 28, 2015) at 5-6 (interpreting Indiana Code § 8-1-2-42.7 in harmony with other provisions of Title 8, particularly the used and useful standard). Indiana’s appellate courts too have recognized that the basic process of rate-making is not altered by the choice of a test year. As stated in *L. S. Ayers*, the “theory underlying the use of *any* test-year and adjustment method in the rate-making process demands that the data used provide an accurate picture of the utility’s operations during the period in which the proposed rates will be in effect.” 169 Ind. App. at 673, 351 N.E.2d at 828 *emphasis added*. This is important because only “when the rate base, expense and revenue components are examined in phase” can the Commission observe a “complete picture of the[] dynamic interrelationships” among those components. *Id.*

It is, accordingly, appropriate to note that the same basic principles guiding the Commission in any other case, should guide it here too. Projections of expenses and revenues must be reasonable in order to be relied upon; so too must projections of expected capital investment. And, importantly, the Commission’s overall function in establishing just and

reasonable rates remains the same. There is, simply put, nothing in Indiana Code § 8-1-2-42.7 that suggests the remainder of Title 8, or long-standing and long-adhered to principles are to be ignored.

If there is any change, it is in the benefits a future test year affords the utility. In particular, the selection of a future test year alleviates some of I&M's concerns with respect to regulatory lag. By selecting a future test year, and building in recovery of forecasted expenses, I&M is able to offset the danger that recovery of such expenses will be delayed. It is especially important to recognize this fact as it relates to the utilization of tracking mechanisms. In this case, I&M is seeking to track numerous capital expenses, such as PJM NITS without any of the previously approved conditions such as caps and sunsets, and the cost of AMI deployment. I&M has even proposed establishing a tracking mechanism related to the return of EADFIT. Historically, the use of tracking mechanisms has been limited by the Commission to circumstances when the costs pose a threat to the utility's financial well-being if timely recovery is delayed, if the costs are unpredictable, and if the costs are outside the control of the utility. With the utilization of a future test year, a utility has the ability to project its expected costs and to manage its anticipated expenditures. In such a situation, the adoption of a tracking mechanism is unnecessary if the reasonably forecasted costs are built into base rates for recovery.

In short, the use of a future test year does not fundamentally alter the regulatory paradigm in which it remains the Commission's role to ensure rates are just and reasonable over the course of time during which they are expected to be in effect. Further, as with the benefits any regulatory mechanism provides, the benefits to the utility of using a future test year should be considered by the Commission as it reviews all of I&M's requested recovery, but most

particularly in assessing the utility's risk profile and in the need for tracking mechanisms to recover forecasted expenses.

### Conclusion

The Commission's role is to serve as an impartial fact-finder to establish just and reasonable rates for public utilities. The Indiana General Assembly has declared affordability must be protected. Those rates recover from customers the utility's cost of operations and investments as well as a reasonable return on its capital investments dedicated to the service of the public. The Commission's role is also to protect consumers, by ensuring that the costs incurred by a utility and recovered through rates are reasonable and necessary and that imprudent and excessive expenditures are excluded from rates. The Commission thus protects both the utility and its customers.

There are, as there should be, reasonable disagreements between and among the parties on a variety of issues in this case. But there should be no disagreement on these basic principles. The Consumer Parties thus urge the Commission to apply them as it analyzes the evidentiary record and prepares its final order.

Respectfully submitted,

LEWIS & KAPPES, P.C.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was served via electronic mail, this 3<sup>rd</sup> day of December, 2019, upon the following:

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