IN THE
INDIANA SUPREME COURT

CAUSE NO. _____

IPL INDUSTRIAL GROUP, INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR, CITY OF INDIANAPOLIS, CITIZENS ACTION COALITION OF INDIANA,	)	**Indiana Court of Appeals Cause No. 20A-EX-00800**
Appellants (Intervenors & Statutory Party below),	)	**Appeal from Indiana Utility Regulatory Commission**
v.	)	**Cause No. 45264**
INDIANAPOLIS POWER & LIGHT COMPANY and INDIANA UTILITY REGULATORY COMMISSION,	)	**The Hon. James F. Huston, Chairman The Hon. Sara E. Freeman, The Hon. Stefanie N. Krevda, The Hon. David L. Ober, The Hon. David E. Ziegner, Commissioners**
Appellees (Petitioner & Administrative Agency Below).	)	**The Hon. Jennifer L. Schuster, Administrative Law Judge**

REPLY IN SUPPORT OF JOINT PETITION TO TRANSFER OF APPELLANTS

IPL Industrial Group
Indiana Office of Utility Consumer Counselor
City of Indianapolis
Citizens Action Coalition of Indiana, Inc.

Todd A. Richardson, Atty No. 16620-49
Joseph P. Rompala, Atty No. 25078-49
LEWIS & KAPPES, P.C.
One American Square, Suite 2500
Indianapolis, Indiana 46282
Telephone: (317) 639-1210
Facsimile: (317) 639-4882
Email: TRichardson@Lewis-Kappes.com
JRompala@Lewis-Kappes.com

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A. Erroneous Grant of Administrative Notice

The Commission contends it is not bound by the rules of evidence. See Commission Resp. at 17-18. The basic legal standards, however, exist for good reason and must be observed in consequential administrative proceedings. See Public Service Commission v. Indiana Bell Telephone Co., 235 Ind. 1, 27, 130 N.E.2d 467, 479 (1955). Here, the Commission admitted a massive volume of material evidence[1] at effectively the end of the hearing, without foundation, authentication or verification, denying the Consumer Parties opportunity to conduct cross-examination or submit responsive evidence. Agency rules cannot supersede fundamental requirements for fair process.

The error cannot be disregarded as harmless. The statute requires a showing of "best" estimates (Ind. Code §8-1-39-10(b)(1)), but without the workpapers IPL's evidence was a bare list of numbers. See Conf. Ex. vol. 1 at 4-25. IPL's witness and counsel admitted the "best estimates," "actual cost estimates" and "detailed cost estimates" were in the workpapers. See Tr. vol. 3 at 204-05; App. vol. II at 75-76. IPL belatedly sought admission of the workpapers because it recognized a vulnerability on appeal without them. See Tr. vol. 3 at 208. Undeniably, the Order repeatedly cited to the workpapers as support for essential findings. See App. vol. II at 10, 21, 28. The

[1] IPL asserts that 20,000 pages is an exaggeration. See IPL Resp. at 12. The number is uncontested, but IPL argues 15,000 pages do not count. Even 5,000 pages, however, account for 90% of the total direct and rebuttal evidence offered by IPL below.

Commission cannot erase that reliance now by mere disclaimer on appeal. See Commission Resp. at 18-19.

The error was seriously prejudicial. IPL misstates that its witnesses identified the workpapers. See IPL Resp. at 13. They only indicated workpapers existed, without identifying or authenticating the mass of materials later admitted by notice. When offered, the only foundation was by unsworn assertion of counsel. See Tr. vol. 3 at 205-09. IPL misstates that the workpapers "came up" in cross-examination. See IPL Resp. at 14. The Consumer Parties did not ask any questions about workpapers because they were not offered in evidence until after cross-examination of the knowledgeable witnesses had been completed. The parties went to hearing on the evidence IPL chose to present, only to face a mass supplementation as the record was being closed. That denial of substantial justice cannot be excused as an exercise of agency discretion.

B. Misinterpretation of Statutory Requirements

IPL and the Commission admit to relying on "risk reduction" to satisfy the statutory "incremental benefits" standard, and assert it is enough merely to maintain existing reliability without any demonstrated improvement. See IPL Resp. at 6-9; Commission Resp. at 13-14. As IPL concedes (Resp. at 8), however, the definition of "incremental" calls for something to be "gained or added." It is a fallacy to argue simply retaining the existing status "when it would otherwise degrade" is an

incremental benefit (id. at 7), where the record demonstrates IPL has successfully maintained the same high standard of reliability for at least 17 years, without TDSIC funding. See Ex. vol. 4 at 117, 141-48. With a consistent history of highly reliable service, IPL was unable to identify any incremental improvement to its established system performance. Id. at 115-19.

The cost-justification conclusion in the Order relied primarily on IPL's risk reduction and monetization evidence. See App. vol. II at 30. That determination cannot be validated by reference to subsidiary qualitative considerations. See IPL Resp. at 8; Commission Resp. at 13-15. The value of those factors was unquantified, with no showing of independent sufficiency to justify the enormous $1.2 billion Plan. The Consumer Parties need not prove the Plan involved no benefits at all. Rather, it is reversible error to rely substantially on invalid theories for an essential statutory finding, by substituting "risk reduction" for the required "incremental benefits."

C. Lack of Specific Findings

IPL and the Commission contend findings are not required on every argument (see IPL Resp. at 15, 17-18; Commission Resp. at 16-17), as if specific findings are not needed at all. Contra Northern Indiana Public Service Co. v. United States Steel Co., 907 N.E.2d 1012, 1016 (Ind. 2009); Indiana Bell, 235 Ind. at 27, 130 N.E.2d at 479. The dispute here involved vigorous litigation on a pivotal statutory requirement, yet the

Commission declares it gave "no weight" to the Consumer Parties' objections and "by implication" rejected their arguments. See Commission Resp. at 8-9, 16. In short, the Commission made no express findings on the substantial issues raised below.

Regarding the monetization analysis, the Commission confirms it accepted IPL's position on every point (Resp. at 16) and relied on IPL's computation (id. at 8). The Order reflects no critical scrutiny of the serious defects identified by the Consumer Parties. Despite the lack of findings, IPL's attempts at rebuttal (see IPL Resp. at 18-21) fail to rehabilitate the conclusion adopted by the Commission:

- IPL compared 20 years of computed benefits to 7 years of spending, and can only say the benefits will not end after 7 years. The point is that the *costs* will not end in 7 years, either, and in 20 years will nearly triple in magnitude. See Ex. vol. 4 at 120-22.
- IPL cannot deny it calculated benefits against a "do nothing" assumption, which differs materially from IPL's actual practice of proactive system maintenance. Id. at 121-22; App. vol. II at 21-22.
- IPL failed to account for $772 million in added costs to ratepayers over 20 years and failed to adjust to present value. See Ex. vol. 4 at 121; vol. 5 at 117-18. IPL admits those two points alone drop the net benefit to $43 million (Resp. at 21), a small fraction of the figure assumed by the Commission.

Taken together, the deficiencies unaddressed in the Order thoroughly undermine the computed benefits that were accepted without comment by the Commission.

D. Conclusion

Transfer should be granted and the Order should be reversed.

Respectfully submitted,[2]

LEWIS & KAPPES, P.C.

/s/ Todd A. Richardson

Todd A. Richardson, Atty No. 16620-49
Joseph P. Rompala, Atty No. 25078-49
LEWIS & KAPPES, P.C.
One American Square, Suite 2500
Indianapolis, Indiana 46282-0003
Telephone: (317) 639-1210
Facsimile: (317) 639-4882
E-mail: TRichardson@Lewis-Kappes.com
JRompala@Lewis-Kappes.com

Counsel for IPL Industrial Group

[2] Counsel for the Industrial Group has been authorized by counsel for the other Consumer Parties to file this Joint Petition to Transfer on behalf of all the Consumer Parties.

WORD COUNT CERTIFICATE

The undersigned counsel hereby verifies, in accordance with Ind. Appellate Rules 44 and 46, that except for those portions from the word count, the foregoing *Reply in Support of Joint Petition to Transfer of Appellants: IPL Industrial Group, Indiana Office of Utility Consumer Counselor, City of Indianapolis, and Citizens Action Coalition of Indiana, Inc.* contains 990 words as calculated by the word count function of the word processing software used to prepare the Reply in Support of Joint Petition to Transfer.

/s/ Todd A. Richardson
Todd A. Richardson, Atty No. 16620-49
Joseph P. Rompala, Atty No. 25078-49

LEWIS & KAPPES, P.C.
One American Square, Suite 2500
Indianapolis, Indiana 46282-0003
Telephone: (317) 639-1210
Facsimile: (317) 639-4882
Email: TRichardson@Lewis-Kappes.com
JRompala@Lewis-Kappes.com

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on January 19, 2021 copies of the foregoing *Reply in Support of Joint Petition to Transfer of Appellants: IPL Industrial Group, Indiana Office of Utility Consumer Counselor, City of Indianapolis, and Citizens Action Coalition of Indiana, Inc.* were served on the following Public Service Contacts through E-Service using the IEFS:

Peter J. Rusthoven
Teresa Morton Nyhart
Jeffrey M. Peabody
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, IN 46204
Peter.rusthoven@btlaw.com
tnyhart@btlaw.com
jpeabody@btlaw.com

Anne E. Becker
Bette J. Dodd
LEWIS & KAPPES, P.C.
One American Square, Suite 2500
Indianapolis, IN 46282-0003
ABecker@Lewis-Kappes.com
BDodd@Lewis-Kappes.com

Jennifer A. Washburn
CITIZENS ACTION COALITION OF INDIANA
195 West 18th Street, Suite C
Indianapolis, IN 46202
jwashburn@citact.org

William I. Fine
Abby R. Gray
Randall C. Helmen
Jeffrey M. Reed
OFFICE OF UTILITY CONSUMER COUNSELOR
115 W. Washington St, Suite 1500 South
Indianapolis, IN 46204
wfine@oucc.in.gov
agray@oucc.in.gov
rhelmen@oucc.in.gov
jreed@oucc.in.gov
infomgt@oucc.in.gov

Beth E. Heline
Jeremy Comeau
Steve Davies
INDIANA UTILITY REGULATORY COMMISSION
PNC Center
101 W. Washington St, Suite 1500 East
Indianapolis, IN 46204
bheline@urc.in.gov
jcomeau@urc.in.gov
sdavies@urc.in.gov

Aaron Craft
OFFICE OF THE ATTORNEY GENERAL
IGCS, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2794
Aaron.Craft@atg.in.gov

/s/ Todd A. Richardson
Todd A. Richardson

LEWIS & KAPPES, P.C.
One American Square, Suite 2500
Indianapolis, Indiana 46282-0003
Telephone: (317) 639-1210
Facsimile: (317) 639-4882