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*Internal Audit of Duke Energy Cases*  
*Presided over by Former*  
*Administrative Law Judge Storms*

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October 14, 2010  
Prepared By: DeAnna L. Poon, Administrative Law Judge



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**Overview:** On October 5, 2010, David Pippen, General Counsel to the Governor, sent an ethics memo in which he outlined steps the Commission should take to determine whether any impropriety occurred: “Administrative opinions over which an ALJ presided while pursuing employment opportunities with the regulated entity will be reopened and reviewed to ensure no undue influence was exerted in the decision.” More specifically, “The administrative opinions over which the ALJ presided regarding Duke will be reopened and reviewed to ensure no undue influence was exerted in the decisions.”

Pursuant to the Governor’s directive, this report includes information regarding the legal and technical audit of cases on which former Administrative Law Judge (“ALJ”) Scott Storms presided involving Duke Energy Indiana, Inc. (“Duke”). This audit spans from January 1, 2010 through September 30, 2010. In addition, because the foundation for the current Edwardsport Integrated Gasification Combined Cycle (“IGCC”) proceedings is related to prior Commission orders regarding the IGCC plant, six additional Duke cases will be reviewed. By including these cases, the Commission’s review will encompass the inception of Edwardsport. The Commission estimates completing the following process and issuing a formal report on or before year-end.

**Auditor Information:** The auditor reviewing these cases is current Administrative Law Judge DeAnna Poon. Ms. Poon’s entire legal career has been spent in service to State government. First a law clerk, she was promoted to Deputy Attorney General working directly under then-section chief Greg Zoeller in 2004. After three years, she transitioned to the Indiana State Department of Agriculture as Chief Counsel before coming to the Commission. Ms. Poon’s role at the Commission mostly consists of rulemakings, advising the Consumer Affairs Division, and some casework. Ms. Poon was never previously assigned to any Duke proceedings.

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## **Audit Process**

The audit process will consist of reviewing both decisions that were autonomous (such as bench rulings) and group decisions (such as final orders). Specifically, the following process will be followed to determine if any activity by ALJ Storms did not follow normal processes or failed to be supported by evidence or another legal basis.

1. Transcripts of each hearing will be read to determine when ALJ Storms ruled from the bench. Ruling will be evaluated as described above.
2. All rulings on motions will be evaluated.
3. Staff reports,<sup>1</sup> which are drafted after prefiled testimony, but prior to the evidentiary hearing with cross examination and redirect, will be compared to Orders. If there are differences, the following process will occur:
  - a. Transcripts will be reviewed to determine if evidence was filed after the staff report that led to conclusions in the Order that differed from the staff report.
  - b. Staff will discuss whether there were other reasons the staff report differed from the Order.
4. Staff report questions will be compared with docket entries<sup>2</sup> and hearing testimony to see if staff questions were answered. If questions were not answered, a determination will be made to see if there were other reasons the questions were not asked.

## **Internal Case Review Process**

To understand what is audited, it is important to understand the process staff uses to review cases. Below is the procedure used for Commission hearings.<sup>3</sup> In addition, please see the Appendix following this document to review the following procedural guidelines previously issued to staff:

- Case Management Meetings (issued 12-09-09)
- Staff Report Guidelines (issued 03-24-10)
- Order Review Procedures for Technical Staff (issued 04-09-10)

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<sup>1</sup> See “Staff Report Guidelines” in the Appendix for a comprehensive explanation of what is included in a staff report.

<sup>2</sup> A docket entry is issued by the Presiding Officer(s) of a case either to inform the parties of information (such as continuing a case) or requesting one of the parties file information (such as their response to a Commission question).

<sup>3</sup> This information can also be found in the 2010 Indiana Utility Regulatory Commission Annual Report, p 5.

## **Commission Hearing Procedure**

1. A formal proceeding before the Commission begins with the filing of a Petition or Complaint with the Commission. The Commission also has the authority to open a Formal Investigation into matters as may be necessary. A Petition, Complaint, or notice of Formal Investigation is given a five-digit cause number and assigned to an Administrative Law Judge and staff members within the appropriate technical division. A single Commissioner may also be assigned to the proceeding.
2. Following the assignment of a proceeding, the matter is scheduled for a Prehearing Conference to establish a procedural schedule that includes dates for the prefiling of testimony and the date for the Evidentiary Hearing. In some instances, a public Field Hearing may be held in the utility's largest service territory. Field Hearings are generally scheduled in the evening to provide customers of the utility with an opportunity to express their opinions about the utility's case directly to the Commission.
3. Once the utility files its case-in-chief testimony, intervening parties to the proceeding and the Office of Utility Consumer Counselor ("OUCC") may file their case-in-chief testimony, which contains evidence in support of their positions. The utility then has an opportunity to prefile rebuttal testimony in response to the testimony presented by intervening parties and the OUCC.
4. After all parties have prefiled their testimony and exhibits, an Evidentiary Hearing is conducted by the Commission on the date and time scheduled in the Prehearing Conference Order. The assigned Administrative Law Judge presides over the Evidentiary Hearing along with the assigned Commissioner. Assigned staff attends the Evidentiary Hearing and additional Commissioners may also attend the Evidentiary Hearing. During the Evidentiary Hearing, the parties present their direct and rebuttal testimony and witnesses are cross-examined. All testimony presented at the Evidentiary Hearing becomes part of the record in that proceeding. In every proceeding, the Commission must issue its decision based on matters that are part of the record.
5. Following the close of the Evidentiary Hearing, the Commission issues an Order in the proceeding. Determinations made by the Commission in its Orders may be appealed to the Indiana Court of Appeals.

## **Case Audits**

The following cases are those in which former Administrative Law Judge Scott Storms presided over a Duke matter. As stated above, most causes span from January 1, 2010 through September 30, 2010. In addition, prior Edwardsport IGCC cases were added for continuity.

1. *Cause Numbers 42693 and 42693 S1*, In the Matter of the Commission's Investigation, Pursuant to I.C. § 8-1-2-58, into the Effectiveness of Demand Side Management ("DSM") Programs Currently Utilized in the State of Indiana, Including an Examination of Issues that Could Improve the Effectiveness of Demand Side Management Programs in the State, Including Consideration of the Establishment of an Independent DSM Administrator Model on a State-Wide Basis; Respondents: All Jurisdictional Electric and Gas Utilities in the State of Indiana

2. *Cause Number 42736 RTO 21*, Application of Duke Energy Indiana, Inc. for Approval of a Change in its Midwest Independent System Operator Management Cost and Revenue Adjustment Factor Under Its Standard Contract Rider No. 68
3. *Cause Number 43501*, Verified Petition of Duke Energy Indiana, Inc. Requesting the Indiana Utility Regulatory Commission to Approve an Alternative Regulatory Plan Pursuant to I.C. 8-1-2.5-1, et seq., for the Implementation of an Electric Distribution System “Smartgrid” and Advanced Metering Infrastructure, Distribution Automation Investments, and a Distributed Renewable Generation Demonstration Project, for Approval of New Depreciation Rates for Electric Distribution Plant, for a Waiver of the Provisions of 170 I.A.C. 4-1, et seq., and for Associated Accounting and Rate Recovery Mechanisms, Including a Ratemaking Proposal to Update Distribution Rates Annually and a “Lost Revenue” Recovery Mechanism, in Accordance with I.C. 8-1-2-42(a) and I.C. 8-1-2.5-1 et seq., and Preliminary Approval of the Estimated Costs and Scheduled Deployment of the Company’s Smartgrid Initiative
4. *Cause Number 43653*, Verified Petition of Duke Energy Indiana, Inc. Requesting the Indiana Utility Regulatory Commission to Approve an Alternative Regulatory Plan Pursuant to I.C. 8-1-2.5-1, et seq., to the Extent Required, for the Approval of and Cost Recovery Associated with the Study of Carbon Storage for the Edwardsport Integrated Gasification Combined Cycle Generating Facility (“IGCC Project”)
5. *Cause Number 43743*, Petition of Duke Energy Indiana, Inc. for Approval of Authority for Deferred Accounting Treatment for Operating Expenses Associated with the Restoration of Extensive System Damage Resulting from the January 27, 2009 Ice Storm
6. *Cause Numbers 42894, 43114, 43114 S1, 43114 IGCC 1, 43114 IGCC 2, 43114 IGCC 3, 43114 IGCC 4, 43114 IGCC 4 S1, and 43114 IGCC 5*, the Edwardsport IGCC Cases

## Appendix

Following please find documents that outline Commission procedures:

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Staff Report Guidelines (issued 03-24-10).....	Page 10
Order Review Procedures for Technical Staff (issued 04-09-10).....	Page 12

## Case Management Meetings

1. What is the purpose?

The purpose of the case management meeting is to have a focused discussion with a larger group within the Commission, outside the team assigned, of issues in pending cases that contain either complex or challenging policy issues. It is intended for Commissioners, but includes ALJs, external affairs and other technical team members. The direction of the meeting is to present the issues and facts of the case with staff recommending various resolutions to issues.

The discussion will be led by the assigned case team and should:

- a. Present the facts of the case clearly and distinctly (keep it brief)
- b. Identify the team's plan, and
- c. Clarify any concerns raised by the larger group.

2. Who is the intended audience?

The intended audience should be staff not directly assigned with a concentration toward Commissioners and ALJs. The meetings should include the Public Information Officer, Consumer Affairs Director, Executive Directors and General Counsel.

3. How should the meeting be scheduled?

Use Outlook meeting notice invites, and require RSVPs. The Commissioners can work out among themselves who will attend any given meeting. Two meeting may be required if more than two Commissioners are interested in attending.

4. What cases should be covered?

Typically, the cases to be covered in a case management meeting are rate cases; however, any case with unique circumstances or with policy implications should also be discussed. Also, include any rulemaking or special projects that have policy implications or may be of interest. The focus of the meeting should concentrate on just three or four cases to limit the discussion and keep the meeting to approximately 1.5 hours.

5. What other items should be addressed?

Other items that should be addressed in a case management meeting include issues of consistency in regard to previously issued orders and those issues that stretch across all industries (i.e. acquisition adjustment, benchmarking, etc.).

6. How should the meeting be conducted?

The meeting should allow for assigned staff to present the issues and facts of the case, but the division director should guide the meeting and keep the discussion and the meeting on track. It remains important for staff development to have team leaders and assigned staff present information. Staff should be encouraged to offer for discussion potential resolutions/proposals to issues.



7. How often should the meeting occur?

The frequency of a case management meeting is difficult to determine given the timing of cases, filings and the establishment of the procedural schedule. A case discussed prior to an evidentiary hearing should not be precluded from being discussed in another case management meeting before writing the order. This allows staff to adequately research the issues especially after discussions with other staff and after listening to the testimony in the evidentiary hearing. The scheduling may best be at the director's discretion.

8. Meeting notes?

Following the meeting, written notes should be created and circulated to those who were not able to attend the meeting. The notes should be circulated within a few days following the meeting. If they include deliberative (i.e. decision making) or attorney-client privileged information, this should be stated across the top of the document.

## Staff Report Guidelines

1. Technical staff is required to prepare a staff report for all docketed cases. The staff report should include the following:
  - a. An executive summary describing the key issues in the case.
  - b. Brief case history including a list of Petitioner's prior docketed case(s) with the cause number(s), date order was issued, and a brief description of the relief granted (e.g., 10% rate increase).
  - c. In some instances, a description of Petitioner's characteristics regarding the type(s) of service provided, the number of customers served, and a general description of the service area and the utility's infrastructure.
  - d. Brief summaries of each witnesses' testimony that identifies the issues.
  - e. Independent staff analysis identifying staff's concerns/issues that may need further clarification/discussion during the hearing process. Include "compare and contrast" of parties' positions to help with the resolution of the issues in the case.
  - f. Provide background information that might impact/influence the current case such as other similar Commission cases that may assist Commissioner's understanding of the impacts.
  - g. Develop recommendations on all prevalent issues with sufficient cites/references to support analysis including but not limited to additional research.
  - h. If adopting a party's position, include specific reasons and rationale for supporting the position.
  - i. Develop questions and list questions by witness in the staff report to be addressed in the hearing process or in preparation of a docket entry. Work with assigned Commissioner and ALJ on questions and to obtain additional information for clarification of relevant issues. [*Request that information be provided in the format necessary to make your analysis more productive and efficient*]
  - j. If new rates are proposed, prepare a table that compares the typical monthly bills and percentage increase based on each of the parties' position.
  - k. For lengthy staff reports, include a table of contents after the executive summary. Present the brief case history and Petitioner's characteristics before the case summaries. If new rates are proposed, include a rate comparison table in the report.
2. All staff reports should include the following statement on each page in either the header or the footer:

*Intra-agency Advisory or Deliberative Material  
Not Subject to Public Disclosure under I.C. § 5-14-3-4(b)(6)*
3. An email providing a link to the staff report is required for notification of a completed staff report. Notification should be directed to the industry staff report distribution list.

The email should identify ***all*** assigned staff including Commissioner(s) and ALJ(s). If a hearing is scheduled, the email should list the day, date, time, and room number.

*For example: Please find the link to view the staff report for Cause No. 45000, Indiana Energy Utility at S:/industry division/case. The hearing is scheduled for Wednesday, August 18, 2010 at 9:30 a.m. in JCR 222. The assigned team members are ALJ Seyfried, Commissioner Atterholt, Michael Gallagher (team leader), and Jerry Webb.*

4. Staff is required to provide a brief written summary for compliance filings within 10 business days of the filing, distributed via email using the industry staff report distribution list.

## **Order Review Procedures for Technical Staff**

Generally, for most cases, the technical staff needs at least five (5) business days to provide comments and edits to draft orders prior to general circulation for Conference. In the event of a complex case or a case with policy implications, the technical staff needs at least ten (10) business days prior to general circulation for technical staff to review and provide comments and edits prior to general circulation. Additional time may be necessary and assessment should be made on a case-by-case basis. The technical staff, through the assigned team leader, should review the draft order for technical analysis, references to testimony, accuracy of calculations or financial information, as well as spelling/grammar. In addition, the technical division director(s) should be included in the review process, if not assigned to the case.

The team leader is responsible to provide the ALJ a consolidated review of the draft order reflecting all suggested edits and any comments from the assigned technical staff and the technical director(s).

### **Order Review Procedural Process & Responsibilities:**

1. Assigned Technical Staff—Provide review of draft order to ALJ and assigned Commissioner, if any, prior to general circulation within  $\leq 5$  business days for general cases or  $\leq 10$  business days for complex cases. Review should include:
  - ✓ Technical analysis
  - ✓ References to testimony
  - ✓ Accuracy of calculations or financial information
  - ✓ Policy implications
  - ✓ Spelling/grammar

After a draft order is circulated and on the agenda for Conference, assigned technical staff should perform a second review of the draft order, as found on the Conference folder, prior to Conference. Assigned staff and the Division Director shall be prepared to review any substantive changes made to the draft order during the circulation process.

2. Executive Session—Executive sessions are meetings of the full Commission that may take place once all evidence on the matter has been received by the Commission. In the event that the Commission conducts an executive session, assigned technical staff should plan on attending the session and be prepared to address issues related to staff analysis of the issue(s) presented. Only assigned technical staff may attend an executive session.