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In the Indiana Court of Appeals

No. 23A-EX-00458

COMMUNITY UTILITIES OF INDIANA, INC.,
Appellant (Petitioner Below),

v.

INDIANA UTILITY REGULATORY COMMISSION, INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR, and LAKES OF THE FOUR SEASONS PROPERTY OWNERS' ASSOCIATION,
Appellees (Administrative Agency, Statutory Party and Intervenor Below).

Appeal from the Indiana Utility Regulatory Commission, Cause No. 45651

The Hon. Jim Huston, Chairman
The Hon. Sarah Freeman,
The Hon. Stefanie Krevda,
The Hon. David Veleta,
The Hon. David E. Ziegner,
Commissioners

The Hon. Jennifer L. Schuster, Sr. Administrative Law Judge

BRIEF OF APPELLEES INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR AND LAKE OF THE FOUR SEASONS PROPERTY OWNERS' ASSOCIATION

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Appellees, the Indiana Office of Utility Consumer Counselor ("OUCC") and Lakes of the Four Seasons Property Owners' Association ("LOFS") (together, the "Consumer Parties"), by their respective counsel, respectfully submit this response brief to the Brief of Appellant filed by Community Utilities of Indiana, Inc. ("CUII").

STATEMENT OF ISSUES

CUII chose not to address decades of IURC admonishments to focus on remedying inflow and infiltration ("I&I")[1] that causes sewage overflows into homes, recreational lakes and manholes. Instead, CUII decided to build a bigger plant to treat the clear water that would have been removed if CUII had first focused on removing I&I as ordered by the IURC. Noting its repeated instructions and the real possibility that an expanded plant may not be necessary if CUII first focused on removing I&I, the IURC properly denied rate recovery of CUII's plant expansion related costs. The IURC never suggested or required that CUII expand its plant or promised cost recovery for any of the iterations of the plant CUII proposed. The IURC's decision relies on its technical and ratemaking expertise and is supported by substantial evidence, including expert witness testimony.

Therefore, the following issues are dispositive of this appeal:

I. Is the IURC's decision entitled to deference where it denied CUII rate recovery using the IURC's technical expertise to determine that CUII's costs were not reasonably incurred?

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[1] "Inflow is storm water that enters the sewer collection system through manholes or other openings in the system, or through downspouts, sump pumps and foundation drains that are connected to the sanitary sewer….[O]nce this water enters the system, it is treated just like waste water and must be processed through the system. Infiltration is groundwater that seeps into the system more gradually, through cracks or holes in the collection system." Emergency Petition of S. County Utils., Cause No. 39999, 1995 WL 17997331, at *26 (Ind. Util. Regul. Comm'n Jan. 18, 1995).

II. Is the IURC's decision reasonable and supported by substantial evidence?

STATEMENT OF THE CASE

Pursuant to Appellate Rule 46(B)(1), the Consumer Parties agree with CUII's Statement of the Case, with the following important supplementation. Since 1991, CUII has been repeatedly admonished to reduce or eliminate the I&I in its system that causes sewage to backup into homes and overflow into LOFS's recreational lakes, streets and grasses.[2] CUII overlooks this history and omits the critical fact that as of at least October

[2] CUII's predecessor was Twin Lakes Utilities ("TLUI"), and the IURC issued multiple orders addressing TLUI's service quality problems.

> Based upon the evidence presented, we find that inspecting and cleaning 10 percent of the sewer mains annually, as proposed by [TLUI], is not adequate. The November, 1990 Pitometer smoke testing report identified deficiencies which should be immediately corrected. A preventive maintenance program is needed to check periodically the entire sewer system for damage, water infiltration, cracks, leaks and settling of pipes. Within six months, [TLUI] should file such a preventive maintenance program with the Commission and the UCC.

In re Twin Lakes Utils., Inc., Cause No. 39050, 1991 WL 11811764, at ¶10(C) (Ind. Util. Regul. Comm'n Apr. 17, 1991); "Of greatest concern to the Commission and the Intervenor, as well as to Twin Lakes and the OUCC, have been past instances of sewer discharges within the [LOFS] subdivision." In re Twin Lakes Utils., Inc., Cause No. 42488, 2004 WL 1196669 at ¶5 (Ind. Util. Regul. Comm'n Mar. 31, 2004); In re Twin Lakes Utils., Inc., Cause No. 43128, 2008 WL 294523 at *12-13, *20-*22 (Ind. Util. Regul. Comm'n Jan. 16, 2008); In the Matter of the Commission's Investigation into Twin Lakes Utilities, Inc.'s Sewer System Inflow and Infiltration, Cause No. 43128 S1, 2009 WL 3865681 at *4-*8 (Ind. Util. Regul. Comm'n Nov. 12, 2009); IURC referencing TLUI's duty to provide adequate service - "As we noted in Cause No. 43128, this message has been repeated for more than a decade, with limited improvements noted." In re Twin Lakes Utils., Inc., Cause No. 43957, 2012 WL 641631, ¶7B (Ind. Util. Regul. Comm'n Feb. 22, 2012); In re Twin Lakes Utils., Inc., Cause No. 44646, 2015 WL 5920879 at *2-*3, *8-*9 (Ind. Util.

2019, the Consumer Parties expressed grave concerns with CUII's plan to expand its treatment plant before it focused on I&I remediation. (Vol.II.App.102: IURC Recons. Order Cause No. 45651, issued May 3, 2023, at p.5.)[3] Undeterred by these concerns, which were backed by the Consumer Parties' engineers, CUII pressed forward and sought preapproval of the plant expansion. The IURC declined to preapprove CUII's plant expansion and reiterated its directive that CUII first focus on I&I remediation. CUII pushed on with several revisions of the plant expansion project and requested rate case approval in Cause 45651. The IURC denied CUII's request on the merits and on reconsideration, based on the well-known fact that CUII's plant expansion would not remediate I&I as the IURC directed.

STATEMENT OF FACTS

A. CUII and its History of Sewage Backups and Overflows

CUII is not a small utility. CUII is a wholly owned subsidiary of Corix, (Vol.III. Appellee's.App.182), a privately owned water and wastewater company with operations in 19 states serving close to 1 million customers. See Corix Group of Companies (US),

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Regul. Comm'n Oct. 7, 2015); In re Twin Lakes Utils., Inc., Cause No. 44724, 2018 WL 655183 at *68-*75 (Ind. Util. Regul. Comm'n Jan. 24, 2018).

[3] The citation conventions to the Record on Appeal in this brief are: **I.** for "(Appellant's Appendix Volume II page 102)" = "(Vol.II.App.102)" and for **II.** "(Appellees' Appendix Volume II page 102)" = "(Vol.II.Appellee's.App.102)." Also, CUII's Appendix includes "Materials from Related Administrative Proceedings Subject to Judicial Notice." (Vol.I.App.2.) Our Appellate Rules direct that the "purpose of an Appendix in civil appeals and appeals from Administrative Agencies is to present the Court with copies of only those parts of the Record on Appeal that are necessary for the Court to decide the issues presented." App.R.50(A)(1). The "Record on Appeal" is not defined to include judicially noticed materials that, by definition, are outside this record. App.R.2(L).

available at https://www.corix.com/corix-companies/corix-group-united-states) (last visited on October 26, 2023). CUII has a 30+ year history of unremedied sewer backups and overflows into the homes and recreational lakes of LOFS, which has been memorialized in at least six IURC orders dating back to 1991. (Vol.II.Appellee's.App.48, 50-51, 54-58); (supra n.2). Sewage backups into homes and lakes are still present, yet CUII has been authorized to increase rates multiple times. Id. In its 2018 Order, the IURC required CUII to develop a comprehensive I&I program to decrease total instances of backups and overflows, noting that "[t]he I&I program shall also … decrease infiltration of groundwater into the wastewater system through leaky joints, cracked pipelines, and deteriorated manholes." (Vol.VII.Appellee's.App.201.) Nothing about expanding a treatment plant's capacity decreases infiltration as envisioned by the IURC.

B. The Technical Conferences

In its 2018 Order, the IURC required CUII to participate in "technical conferences" where CUII would present its System Improvement Plan ("SIP") and receive feedback from the Consumer Parties and IURC Staff. CUII controlled the submission of technical conference agendas, shared voluminous documents shortly before the commencement of each conference, and filed minutes of the conferences that were unilaterally drafted by CUII with no opportunity for review or input by others. The technical conferences were not on the record, there was no cross-examination of CUII's personnel, and the IURC never approved or issued any order giving CUII authority to proceed with any of the plans presented in the technical conferences. In short, the technical conferences were status updates held to keep CUII accountable for improving its system and to provide

clarifications responsive to questions from IURC staff and the Consumer Parties. CUII did not emerge from the technical conferences with any IURC Order or directive to expand its treatment plant or to delay rigorous efforts to reduce I&I. By October 2019, the Consumer Parties expressed concerns with CUII's plant expansion, but CUII refused to pause the plant expansion to first focus on I&I remediation.

C. Pre-Approval of Treatment Plant Expansion Denied

In 2020, CUII sought preapproval of the plant expansion costs in Cause 45389. The Consumer Parties offered evidence from two engineers recommending the IURC deny CUII's request for preapproval of the plant expansion because there were opportunities to further reduce I&I that could render a plant expansion unnecessary or less expensive than CUII planned. Ultimately, the IURC found the evidence did not support CUII's request for preapproval because hundreds of thousands of gallons of I&I per day could potentially be removed if CUII addressed inflow in several specific locations identified by credible evidence presented by the OUCC and LOFS. The IURC noted it would be premature to approve CUII's plan when CUII had not yet attempted to remediate, at a minimum, the inflow locations identified by Mr. Holden and Mr. Parks. (Vol.VI.Appellee's.App.108.) In denying CUII's reconsideration request, the IURC noted that rather than expand its treatment plant, the IURC's directives in Cause 44724 were to implement a comprehensive I&I reduction program – meaning CUII should search its system for cracks where outside water could enter, and repair those cracks to significantly decrease flow to the treatment plant. (Vol.II.App.101.)

D. Recovery of Treatment Plant Expansion Costs Denied in Rate Case

In December 2021, CUII filed its request for rate recovery of, among other things, the plant expansion costs that had been slightly revised into a third iteration. (Vol.II.Appellee's.App.9). CUII made no measurable progress remediating I&I between the May, 2021 Order in Cause 45389 and December, 2021. (Vol.II.App.24); see also (Vol.II.Appellee's.App.40-41). The Consumer Parties again offered evidence from two engineers recommending the IURC deny CUII's request for rate recovery of the plant expansion because there were opportunities to further reduce I&I that could render a plant expansion unnecessary or less expensive than CUII planned. (Vol.II.Appellee's.App.190-191; 25-28.)

On rebuttal, CUII presented another iteration of the plant expansion that CUII put together the day after the Consumer Parties filed testimony. (Vol.VI.Appellee's.App.10.) CUII testified that this iteration could be built quickly and in service by the end of the test year, which was required for inclusion in rates. (Vol.II.Tr.178-179.)[4] CUII's last iteration used a costly design-build approach rather than soliciting competitive bids for the project. (Vol.II.Tr.178-180.) The IURC weighed the conflicting expert testimony and evidence and concluded that it was imprudent for CUII to collect from ratepayers the costs associated with expanding the treatment plant, which the IURC found had no direct impact on the reduction of I&I. The IURC denied CUII's request for reconsideration, noting, "[t]o

[4] The citation convention to the Transcript in this brief is: "(Transcript Volume II, pages 178 – 179)" = "(Vol.II.Tr.178-179.)."

approve CUII's plant expansion costs would have been to endorse CUII's continued failure to make significant progress in addressing I&I, something that would have decreased the need for grossly oversized proposals made in Cause No. 45389." (Vol.II.App.102.)

SUMMARY OF ARGUMENT

The IURC exercised its ratemaking and engineering expertise in determining whether CUII's plant expansion costs were prudent, reasonable, and necessary. This ratemaking exercise is the province of the IURC and is entitled to deference. The IURC's findings and conclusions are supported by substantial engineering evidence establishing that CUII's planned treatment plant expansion was not related to the reduction of I&I, which was a long-established key outcome. Denial of CUII's plant expansion costs was also appropriate because the treatment plant was never built and is not used and useful. Ind. Code § 8-1-2-6. Ratepayers should not pay for imprudent utility investments that produce no service-impacting benefits.

Long before CUII requested pre-approval and rate recovery of the plant expansion costs, CUII had ample notice of the flaws with its plant expansion plans. Nonetheless, CUII pressed forward with its requests. The IURC's technical conferences following the 2018 Order in Cause 44724 never authorized or encouraged CUII to proceed with a treatment plant expansion in lieu of first remediating I&I, nor were those conferences evidentiary proceedings where the Consumer Parties submitted evidence, cross-examined CUII's witnesses, or resulted in IURC findings, conclusions or orders.

Substantial evidence supports the IURC's finding that CUII's plant expansion would put the cart before the horse, resulting in an oversized treatment plant that might

not be necessary if CUII first removed additional I&I. Engineering evidence establishes CUII had identifiable opportunities to measurably reduce I&I, which could limit or eliminate the need for an expanded treatment plant. This evidence forms a solid foundation for the IURC's finding that plant expansion costs should not be recovered in rates.

STANDARD OF REVIEW

Judicial review of the IURC's decisions is two-tiered. "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." Citizens Action Coal. of Ind., Inc. v. Indianapolis Power & Light Co., 74 N.E.3d 554, 562-563 (Ind. Ct. App. 2017) (citations and internal quotations omitted). In a substantial evidence review, "an appellate court neither reweighs the evidence, nor assesses the credibility of witnesses and considers only the evidence most favorable to the board's findings." Id. at 563. 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 not substantial evidence supporting the findings of the Commission; (5) the order of the Commission is fraudulent, unreasonable, or arbitrary.

Id. Finally, this "list of exceptions is not exclusive." Id.

"At the second level, the order must contain specific findings on all the factual determinations material to its ultimate conclusions." Citizens Action Coal. of Ind., Inc.,

74 N.E.3d at 563. The judicial task on this score is described "as reviewing conclusions of ultimate facts for reasonableness, the deference of which is based on the amount of expertise exercised by the agency." Id. Insofar as the order "involves a subject within the Commission's special competence, courts should give it greater deference." Id. "If the subject is outside the Commission's expertise, courts give it less deference. In either case courts may examine the logic of inferences drawn and any rule of law that may drive the result." Id. "Additionally, an agency action is always subject to review as contrary to law, but this constitutionally preserved review is limited to whether the Commission stayed within its jurisdiction and conformed to the statutory standard and legal principles involved in producing its decision, ruling, or order." Id.

ARGUMENT

I. The IURC's Decision is Entitled to Deference Because it is Based on the IURC's Technical Expertise to Limit Rate Recovery to Prudently Incurred Costs for Used and Useful Facilities.

CUII asks this Court to disregard the well-established principle that Courts should afford great deference to IURC decisions on matters within the IURC's special competence. (Appellant's.Br.30-31: CUII's "Third" point.) Deference to the IURC's decision here is appropriate because the IURC's decision was based on its review of evidence using the agency's expertise in utility issues. *De novo* review, essentially what CUII proposes, would be appropriate if this appeal turned on the IURC interpreting "a contract entered by the parties and [now being] disputed," N. Ind. Pub. Serv. Co. v. U.S. Steel Corp., 907 N.E.2d 1012, 1018 (Ind. 2009) or if the IURC's decision was based on statutory interpretation, but neither is the case here. Instead, using its expertise, the IURC weighed the

evidence and found that it was imprudent for CUII to collect from ratepayers the costs associated with expanding the treatment plant, which the IURC found had no direct impact on the reduction of I&I.

A. Since CUII does not assert the IURC acted outside its jurisdiction or violated any statute or legal principle governing ratemaking, the IURC Order is entitled to deference.

CUII does not claim the IURC acted outside its jurisdiction or violated a statute or legal principle governing ratemaking. As such, CUII's dispute does not raise a legal question entitled to *de novo* review. While "an agency action is always subject to review as contrary to law, this constitutionally preserved review is limited to whether the Commission stayed within its jurisdiction and conformed to the statutory standard and legal principles involved in producing its decision, ruling, or order." N. Ind. Pub. Serv. Co., 907 N.E.2d at 1016 (internal quotations omitted). Here, the IURC evaluated substantial evidence on the need and prudence of CUII's plant expansion costs and determined that they were inconsistent with the IURC's directive that CUII should first focus on I&I remediation before expanding its treatment plant. CUII argues that it should recover the plant expansion costs because it was just doing what the IURC ordered, but that is untrue. The record is replete with evidence that repeated IURC orders and the Consumer Parties' expert testimony told CUII that it was imprudent to expand CUII's plant before undertaking focused efforts to remediate I&I.

B. The IURC used its technical expertise to determine the prudence and reasonableness of CUII's costs.

In conducting its review of the prudence and need for CUII's proposed plant expansion, the IURC relied heavily on its technical expertise – both in terms of ratemaking and in terms of the most effective engineering solutions for collecting and treating sewage without producing sewage backups and overflows. For example, the IURC evaluated conflicting testimony presented by four separate engineers who evaluated CUII's system on behalf of the OUCC, LOFS, and CUII. (Vol.II.Appellee's.App.190-191); (Vol.IV.Appellee's.App.138-140, 174-178); (Vol.VI.Appellee's.App.16-18). The IURC also evaluated additional reports from three engineering firms (Strand, Commonweath and RHMG). (Vol.II.Appellee's.App.180-250.) CUII's engineer, Streicher, admitted that CUII changed its plant expansion plan four times, with the last revision made in response to the Consumer Parties' testimony criticism and revealed 11 days before the evidentiary hearing. (Vol.III.Tr.133-134.) CUII admitted that its last iteration omitted the competitive bidding process, which could have resulted in cost savings. (Vol.III.Tr.151.) Engineers for the OUCC and LOFS testified that the plant expansion was premature and unnecessary until CUII first focused on remediating I&I. (Vol.II.Appellee's.App.185); (Vol.II.Appellee's.App.25-28). After weighing the voluminous and conflicting expert testimony on the prudence of CUII's plant expansion plan, the IURC found that CUII failed to implement a comprehensive program to significantly reduce I&I, which could considerably reduce or eliminate the need for more capacity at the plant. (Vol.II.App.74.) Given CUII's history of being told to comprehensively reduce I&I and the evidence, its decision to engineer a plant expansion in lieu of a comprehensive I&I reduction program was not prudent. The

Court should reject CUII's improper invitation to reweigh the evidence because the IURC's decision is entitled to great deference.

CUII explains its rationale for proposing the treatment plant expansion, including IDEM's early warning letter indicating CUII's plant was reaching capacity. (Vol.II.Tr. 178-180.) However, the IURC considered conflicting engineering evidence on this point and concluded the early warning letter did not justify the plant expansion since there was not yet any IDEM enforcement action or the more restrictive sewer ban. (Appellant's.Br.20.) Reweighing the evidence and second-guessing the IURC's decision is improper here because this decision was based on the IURC's ratemaking and engineering expertise, which are "'matters within its jurisdiction.'" Citizens Action Coal. of Ind., Inc. v. N. Ind. Pub. Serv. Co., 76 N.E.3d 144, 151 (Ind. Ct. App. 2017) (quoting Citizens Action Coal. of Ind., Inc. v. S. Ind. Gas and Elec. Co., 70 N.E.3d 429, 439 (Ind. Ct. App. 2017)). And on those types of matters, "'the IURC enjoys wide discretion and its findings and decision will not be lightly overridden simply because [this Court] might reach a different decision on the same evidence." Id. As this Court has observed,

> Essentially, so long as there is any substantial evidence to support the rates as fixed by the Commission as reasonable, the judicial branch of the government will not interfere with such legislative functions and has no power or authority to substitute its personal judgment for what it might think is fair or reasonable in lieu of [the Commission's] administrative judgment.

Citizens Action Coal. of Ind., Inc. v. S. Ind. Gas & Elec. Co., 120 N.E.3d 198, 207 (Ind. Ct. App. 2019) (original brackets) (internal quotations omitted).

C. The IURC properly denied recovery of CUII's plant expansion costs because they were neither used and useful nor reasonably necessary to the provision of CUII's service.

CUII argues the IURC denied recovery of all CUII's CSIP and WWTP upgrades. (Appellant's.Br.31.) To be clear, the IURC authorized CUII to collect from ratepayers over $1.8 million for reasonable costs incurred, which will increase CUII's revenues by over 24%. (Vol.II.App.94.) The IURC properly denied recovery of CUII's unnecessary and imprudent plant expansion costs.

CUII sought rate recovery of the engineering, designing and planning costs for a plant expansion that was never placed into service.[5] "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 v. S. Ind. Gas & Elec. Co., 339 N.E.2d 562, 569 (Ind. Ct. App. 1975). The IURC is also empowered to disallow recovery of a utility's expenses the IURC deems unnecessary or excessive. See I.C. § 8-1-2-48(a). To be included in rate base, a utility plant must be both "used and useful" and "reasonably necessary" to the provision of utility service during the test year. City of Evansville, 339 N.E.2d at 590. And to determine necessity in this context, the used and useful property needs to be employed to produce the product or accommodation that rate payers receive. See Ind. Gas Co., Inc. v. Off.

[5] CUII claims the IURC disallowed $1.6 million in engineering costs incurred in complying with the IURC's 2018 Order, (Appellant's.Br.6, 8, 23), but the IURC denied $1,358,608.00, comprised of $1,100,289.00 in CUII's requested improvements proposed and subsequently engineered, plus CUII's requested $258,318.00 in legal expenses related to Cause No. 45389. (Vol.II.App.74.)

of Util. Consumer Couns., 675 N.E.2d 739, 743 (Ind. Ct. App. 1997), trans. den., 675 N.E.2d 739.

The IURC acted within its discretion to deny recovery of engineering costs of a plant that was never built, especially given the complexity and history of CUII's subpar service and multiple admonishments that CUII should not proceed with the plant until it first focused on further I&I remediation. Denying recovery was further supported by evidence that CUII's cost estimates were incomplete, overstated and excessive. (Vol.II.App. 101); (Vol.II.Appellee's.App.185, 197-198). Because the record provides ample evidence that CUII's costs were excessive, unnecessary, and imprudent, the IURC's decision – based on its technical expertise – is entitled to deference and should not be disturbed.

In arguing that its plant expansion costs were used and useful, CUII claims the IURC's 2021 ruling relied on the results of CUII's engineering studies, so the engineering study costs should be recoverable. (Appellant's.Br.6.) This is not true. CUII's engineering studies were to expand the treatment plant, not remediate the collection system's I&I. Relative to removing I&I, the only portion of CUII's engineering studies was a blanket conclusion – which LOFS engineer Holden refuted – that, at most, CUII would be able to remove 30% I&I. (Vol.VI.Appellee's.App.101,104,107-108.) The rest of CUII's engineering studies related to plant expansion, which were not in keeping with the IURC's directive to focus on removing I&I.

CUII also claims its decision to pursue sewer plant expansion was somehow "parallel" with the IURC's analysis of its preapproved water projects, (Appellant's.Br.18, 20), but no such parallel exists. The IURC approved CUII's water projects in Cause 45342,

and denied CUII's sewer projects in Cause 45389. No issues or engineering analysis overlapped, and the IURC didn't reference CUII's sewer treatment plant expansion in Cause 45342. CUII's tortured logic collapses under its own weight, failing to provide evidence that the water preapproval case implied authorization of CUII's sewer plant expansion.

II. CUII Ignored Repeated Admonishments to Focus on I&I Remediation Before Expanding its Plant

Notwithstanding its claim to the contrary, CUII was not caught unaware by the Consumer Parties' concerns with its plant expansion plans, (Appellant's.Br.33-34), which they shared with CUII long before the rate case was filed. (Appellant's.Br.16;Vol.VI.Appellee's.App.119.) Despite being aware of these concerns, CUII pressed forward with the expansion project and sought preapproval in Cause 45389 in 2020 – which the IURC denied. (Vol.VI.Appellee's.App.96-111.) The IURC's technical conferences that followed the 2018 Order in Cause 44724 never authorized or encouraged CUII to proceed with a treatment plant expansion in lieu of first remediating I&I, nor were they evidentiary proceedings where the Consumer Parties submitted evidence, cross-examined CUII's witnesses, or resulted in IURC findings, conclusions or orders. To the contrary, the technical conferences were largely controlled by CUII and served as status reports and updates, involving constantly changing plans and reams of documents heaped on the Consumer Parties and the IURC shortly before each technical conference.

A. CUII was ordered to attend technical conferences to address long-standing failures to cure its system's problems

CUII asserts that it is entitled to rate recovery because it participated in IURC-mandated technical conferences in Cause No. 44724. (Vol.II.App.71); (supra pp.10-11).

CUII testified that "while it was CUII's decision to present the rejected…projects in a preapproval case, the 44724 Order *required* that the projects be proposed to the Commission in some type of proceeding for its approval, accompanied by engineering studies and competitive bids." (Vol.II.App.71) (original emphasis). The IURC's authorizing statute contains a section that mandates the following:

> Unless a public utility shall obtain the approval by the commission of any expenditure exceeding ten thousand dollars ($10,000) for an extension, construction, addition or improvement of its plant and equipment, the commission shall not, in any proceeding involving the rates of such utility, consider the property acquired by such expenditures as a part of the rate base, unless in such proceeding the utility shall show that such property is in fact used and useful in the public service; Provided, That the commission in its discretion may authorize the expenditure for such purpose of a less amount than shown in such estimate.

I.C. § 8-1-2-23. Thus, CUII was required to file a case to obtain approval for costs, and participation in technical conferences alone would not provide cost recovery relief.

Further, CUII's required participation in the tech conferences was caused by its historical failure to address system infirmities.[6] As noted by OUCC witness James Parks, the concern about CUII's I&I has been "a contentious issue in [CUII]'s rate cases going back 30 years." (Vol.II.App.22.) CUII had "faced service challenges with its utilities for many years, particularly in regard to sewage backups, manhole overflows, and drinking water discoloration." (Appellant's Addend., page 16 or "Addend.16.") The IURC found in Cause No. 44724 that CUII needed to:

[6] "[CUII] has repeatedly failed to resolve surcharges in its sewer system." In the Matter of the Commission's Investigation into Twin Lakes Utilities, Inc.'s Sewer System Inflow and Infiltration, Cause 43128 S1, 2009 WL 3865681 at *12 (Ind. Util. Regul. Comm'n Nov. 12, 2009).

> create a master plan to decrease total incidences of wastewater backups in homes and manhole overflows and to decrease total complaints about discoloration of drinking water. That master plan, the [system improvement plan], should be well documented and include feedback from the OUCC and LOFS, and then, most importantly, must be implemented and progress measured and reported. The [IURC] finds the following process reasonably addresses our desire to see continued cooperation among the parties and the development and implementation of a comprehensive and thoughtful strategy by [CUII] to create lasting improvements in wastewater and water service quality, value, and accountability[.]

(Id. at 17.)

The IURC specifically tasked CUII with creating a system improvement plan "(a) to decrease total incidences of wastewater backups in homes, (b) to decrease total incidences of manhole overflows, and (c) to decrease total complaints of discoloration of drinking water[.]" (Id.)

In CUII's subsequent pre-approval case, Cause 45342, the IURC noted that its "Order in Cause No. 44724 adequately identified and admonished CUII's lack of operational competence and lack of knowledge of its system and laid out a pathway for CUII to make substantial improvements." (Addend.30.) As such, the IURC's Order in Cause 44724 directed CUII to remedy problems it should already have been addressing as a part of its provision of utility service.

CUII's participation in the technical conferences provided no guarantee of cost recovery for any subsequent case. As noted above, the IURC ordered CUII into the technical conferences as a way to bring its utility service up to par. The IURC did not grant approval of any of CUII's projects submitted through CUII's participation in the technical conferences, and there was no IURC order issued in Cause No. 44724 after the technical

conferences commenced.[7] At no point did the IURC indicate that its acceptance of the filing of CUII's presentations constituted approval of the projects, or the costs incurred. "It is well-settled in Indiana that boards and commissions speak or act officially only through the minutes and records made at duly organized meetings." City of Indianapolis v. Duffitt, 929 N.E.2d 231, 240 (Ind. Ct. App. 2010). In the absence of an IURC Order, CUII cannot have reasonably inferred that it had IURC approval to recover costs incurred to comply with the Cause No. 44724 order.

CUII mischaracterizes the IURC staff's written recommendations that CUII should "continue to evolve its capital planning efforts as better information becomes available through [CUII]'s asset management program." (Vol.III.App.62); see (Appellant's.Br.14). The staff's comment to "implement [CUII]'s proposed metrics" was referencing the Cause 44724 Order at page 77 that CUII shall develop a proposed plan to measure performance on the Key Aspects, and where IURC staff recommended that CUII continue measuring progress via the metrics. (Vol.VII.Appellee's.App.201.) This was not a staff recommendation that CUII implement the plant expansion. The IURC's August 2018 Docket Entry made this abundantly clear: "[t]his Docket Entry is not pre-approval by the [IURC] of Petitioner's proposed capital investments." (Vol.III.App.61.)

CUII also mischaracterizes the IURC's statements as suggesting that CUII proceed with the plant expansion. (Appellant's.Br.16-17, 38.) To the contrary, references to repairs/replacements versus spot repairs referenced the collection system's asbestos pipes,

[7] CUII's subsequent preapproval proceedings (Cause Nos. 45342 and 45389) met with mixed results – the IURC approved the former and denied the latter.

and not a replacement of the plant. No references to prioritizing projects in any way suggested that CUII should proceed with plant expansion before a focused I&I removal effort. As a sophisticated utility with decades of Indiana regulatory history, CUII knew that a project's cost recovery is not certain absent an IURC pre-approval or rate case order.

B. The IURC's technical conferences didn't guarantee rate recovery and were not evidentiary proceedings

Technical conferences[8] are authorized in the IURC's procedural rules as part of preliminary hearings, and are not designed for the filing of responsive testimony by the parties.

> To: (1) make possible the more effective use of hearing time in formal proceedings on the merits of a petition or a complaint;
>
> (2) otherwise expedite the orderly conduct and disposition of those proceedings; and
> (3) serve the public interest;
>
> the commission may require *preliminary* hearings, which include prehearing, technical, and attorney conferences, among parties to the proceeding *prior to the commencement of an evidentiary hearing on the merits of the petition or complaint*.

170 Ind. Admin. Code 1-1.1-15(a) (emphasis added).

The IURC has noted the purpose of tech conferences and their educational, not evidentiary, purpose:

> Technical conferences have the potential to be of great value to both the parties and the [IURC]. Technical conferences present an opportunity for the [IURC] to frame the issues on which the parties will be prefiling testimony and can narrow the number of contested issues by fostering consensus on particular matters. Technical conferences also present an opportunity to

[8] The IURC has used the terms "technical workshops" interchangeably with "technical conferences." There is not a separate IURC rule regarding "workshops."

> clarify the issues and fully outline the [IURC]'s expectations. Finally, technical conferences help ensure that all necessary issues are considered by the [IURC].

In the Matter of the Investigation into Rate Design Alternatives, Cause No. 43180, 2006 WL 7345376 at ¶4 (unpaginated) (Ind. Util. Regul. Comm'n Dec. 1, 2006).

Technical conferences are intended to "educat[e] the Commission, its staff and any other party" regarding complex matters. In re the Investigation into Ameritech's Rates, Cause No. 40611, 1997 WL 34880871 at *2 (Ind. Util. Regul. Comm'n Mar. 5, 1997). CUII's argument that participation in a technical conference conferred approval of the projects and costs presented is an effort to read language into the IURC's rules where none exists. It is a "fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts," and this principle "applies not only to adding terms not found in the statute, but also to imposing limits on an agency's discretion that are not supported by the text." Little Sisters of the Poor Saints Peter & Paul v. Pennsylvania, 591 U.S. --, 140 S.Ct. 2367, 2381, 207 L.Ed.2d 819 (2020) (cleaned up).

Indeed, the IURC has made it clear that technical conferences are *not* the forum for presentation of contested evidence.

> Substantive disputes should be considered in the appropriate forum to examine witnesses or present argument and not in these technical conferences. The technical conference should attempt to adhere to an educational type environment so as to limit both the extent of discovery for the parties and therefore, ultimately the evidentiary hearing time necessary for the processing of the disputed matters in this Cause.

In re the Investigation into Ameritech's Rates, Cause No. 40611, 1997 WL 34880871, at *2 (Ind. Util. Regul. Comm'n Mar. 5, 1997).

Tech conferences are also intended to allow the *parties* to develop issues:

> [P]rior to the submission of prefiled testimony the parties should participate in Technical Workshop conferences…in order to discuss and develop an issues list ("Issues List"). The development of an Issues List, through the use of Technical Workshops, is intended to allow the Parties to discuss and define the issues to be addressed in this matter prior to the submission of prefiled testimony…. [I]n order to ensure that the time allotted for the Technical Workshop may be used effectively, the [Petitioners] should file a preliminary Issues List to serve as an agenda of the issues to be discussed at the initial Technical Workshop.

Verified Joint Petition of PSI Energy, et al., Cause No. 42685, 2004 WL 6389157, at *2 (Ind. Util. Regul. Comm'n Sep. 8, 2004) (paragraph structure altered).

When the IURC issued its order in Cause No. 44724, it mandated that CUII:

> create a master plan to decrease total incidences of wastewater backups in homes and manhole overflows and to decrease total complaints about discoloration of drinking water. That master plan, the SIP, should be well documented and include feedback from the OUCC and LOFS, and then, most importantly, must be implemented and progress measured and reported. The Commission finds the following process reasonably addresses our desire to see…the development and implementation of a comprehensive and thoughtful strategy by [CUII] to create lasting improvements in wastewater and water service quality, value, and accountability[.]

(Addend.17.)

The technical conferences were designed to be an accountability tool to ensure CUII was doing what the IURC had ordered. The IURC is empowered by statute to oversee the business of public utilities and to disallow recovery of a utility's expenses it deems "unnecessary or excessive." I.C. § 8-1-2-48.[9] "While the utility may incur any amount of

[9] See I.C. § 8-1-2-48(a) ("If, in its inquiry into the management of any public utility, the commission finds that the amount paid…is excessive, or 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

operating expense it chooses, the Commission is invested with broad discretion to disallow for rate-making purposes any excessive or imprudent expenditures." L.S. Ayres & Co. v. Indianapolis Power & Light Co., 351 N.E.2d 814, 819-820 (Ind. Ct. App. 1976). In this case, the IURC ordered CUII to participate in technical conferences because of a long-standing failure by CUII to address system infirmities. The IURC used the technical conferences as a compliance measure, and it was part of the IURC's ongoing inquiry into CUII's utility service. CUII was never granted or guaranteed cost recovery for participating in technical conferences.

Through the non-evidentiary technical conferences, CUII provided the IURC, OUCC and LOFS with information, but the IURC did not pass judgment on the costs expended until CUII filed a petition and evidence was submitted. In Cause No. 45342, CUII received approval. However, in Cause No. 45389, the IURC rejected CUII's request.

> We will not preapprove the projects CUII proposed in this Cause because we find that CUII has made no meaningful attempt to date to achieve I&I removal as set forth in the 44742[sic[[10]] Order. A robust I&I removal program is long overdue and could alter and help better determine the identity and scale of the improvements needed, according to [OUCC and LOFS] testimony.

(Addend.44.)

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into consideration in determining and fixing the rates which such utility is permitted to charge for the service which it renders.").

[10] This reference should be to Cause 44724. IURC Cause 44742 does not involve CUII.

As technical conferences are preliminary and not evidentiary, the OUCC and LOFS did not have the opportunity to present information to the IURC during the process. For example, as shown by the tech conference agenda and materials in the Appellant's App. Vol. III p. 2, the agenda was filed on August 10, 2018, a Friday,[11] for a technical conference to be held on the following Wednesday, August 15, 2018. The OUCC and LOFS therefore only had two working days to review the material, and no opportunity to file responsive pleadings or testimony. Thus, the OUCC's and LOFS's objection to CUII's plan, (Appellant's.Br.16), was made outside the process and only to CUII, not the IURC.

Given the IURC's explicit rule that technical conferences are held before the submission of evidence, without the opportunity for all parties to present contested evidence, it is not reasonable for CUII to rely on the occurrence of the technical conferences as cost recovery authorization and approval.

During the technical conferences, the IURC did not issue an order either approving or denying CUII's proffered projects. Approval of projects occurred when CUII later filed Cause No. 45342, and the IURC approved a project then because it was "based on a fully defined scope of work and was derived from actual bids received[.]" (Addend.29.) The IURC also stated that CUII's requested recovery of regulatory costs "*may* be reasonable and *may* be included for consideration as O&M expenses in CUII's next rate case." (Id. at 31) (emphases added).

[11] What Day of the Week, *available at* https://www.dayoftheweek.org/?m=August&d=10&y=2018&go=Go (last visited on October 26, 2023).

However, the IURC did not grant CUII the absolute right to recover those costs. "An administrative order 'is not final if the rights of a party involved remain undetermined or if the matter is retained for further action.'" Dennis v. Bd. of Pub. Safety of Ft. Wayne, 944 N.E.2d 54, 59 (Ind. Ct. App. 2011) (quoting Downing v. Bd. of Zoning Appeals of Whitley Cnty., 274 N.E.2d 542, 544 (Ind. Ct. App. 1971)). The IURC's guarded language and decision not to grant outright approval of those regulatory costs thus meant that the matter was undecided. "Judicial review of administrative actions will generally be denied where there is no final decision or order determining the rights of the parties. This court will not attempt to control an agency's valid exercise of its discretionary powers nor will it interfere with interim acts of the agency which only contemplate a final decision." Ind. State Highway Comm'n v. Zehner, 366 N.E.2d 697, 700 (Ind. Ct. App. 1977) (citation omitted). Importantly, "[a]bsent constitutional restraints or extremely compelling circumstances the administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" United Elec. Mech. United Elec., Radio and Mach. Workers of America v. U.S., 669 F.Supp. 467, 470 (U.S. Ct. Int'l Trade 1987) (internal quotations omitted).

C. The IURC denied pre-approval of CUII's imprudent plant expansion

Perhaps the most compelling signal that CUII's proposed plant expansion was imprudent was the IURC's May, 2021 Order in Cause 45389. The IURC stated:

> We find the evidence of record does not support CUII's request for preapproval of the CSIP. The evidence of record demonstrates that hundreds of thousands of gallons of I&I per day could potentially be removed if CUII addressed inflow in specific locations identified by credible evidence presented by the OUCC and LOFS. It would be premature for the Commission to approve any CSIP when

> CUII has not attempted to remediate, at a minimum, the inflow locations identified by Mr. Holden and Mr. Parks.

(Vol.VI.Appellee's.App.108.)

Yet, CUII pressed on and requested recovery of the costs in the rate case, although the evidence showed CUII had made no measurable progress remediating I&I since the 2021 Order. (Vol.II.App.84); (Vol.II.Appellee's.App.40-41).

III. The IURC Order is Supported by Substantial Evidence that the Court Should Not Reweigh

In determining whether the IURC Order is supported by substantial evidence review, the Court neither reweighs the evidence, nor assesses the credibility of witnesses and considers only the evidence most favorable to the IURC's findings. The 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 not substantial evidence supporting the findings of the Commission; (5) the order of the Commission is fraudulent, unreasonable, or arbitrary." Citizens Action Coal. of Ind., 74 N.E.3d at 563. CUII makes no argument that the evidence was devoid of probative value, that the quantum of the evidence was too meager to support the IURC's Order, that there were improper considerations, or that the Order was fraudulent. While CUII claims the Order was not supported by substantial evidence and was unreasonable and arbitrary, the record proves otherwise.

A. The Consumer Parties provided expert evidence refuting the need for CUII's proposed expansion

CUII claims its engineering and legal costs for the plant expansion should have been approved because CUII was simply following the IURC's 2018 Order to address key wastewater issues. (Appellant's.Br.25.) Record evidence demonstrates this was not the case. The IURC's 2018 Order did not suggest or require that CUII build a bigger plant to treat I&I. Rather, the 2018 Order required CUII to focus on remediating I&I. (Vol.VII. Appellee's.App.201.) There was ample evidence that CUII's plant expansion would put the cart before the horse, resulting in an oversized treatment plant that might not be necessary if CUII first removed additional I&I.

LOFS's engineer Holden testified that in 2018, the Commission ordered CUII to develop and implement a comprehensive I&I program, but CUII repeatedly ignored past IURC Orders and marched ahead with its own predetermined plans, including the plant expansion that would significantly increase customer rates while never successfully addressing underlying systemic problems. (Vol.II.Appellee's.App.25.) Mr. Holden testified based on his 2020 inspection of CUII's system that the most prudent course of action would be for CUII to first focus on its I&I removal program and collection system improvement projects for at least 36 months and then take steps to remove as much I&I as reasonably possible before revisiting the plant expansion. (Id.) Mr. Holden testified that it is incongruous for CUII to recover rates to fund projects that the IURC noted may not be needed and for engineering costs until the plant is in service, used and useful. (Vol.II.Appellee's.App.26-27.) CUII admitted it had not quantified any I&I reduction since May 2021, which supported evidence of CUII's 30+ year history of studying – but

not fixing – I&I problems. (Vol.II.Appellee's.App.28.) The OUCC's engineer Parks also presented testimony establishing that CUII had no comprehensive I&I removal program as ordered by the IURC. (Vol.II.Appellee's.App.232, 236, 239-240.)

In the preapproval case, CUII presented engineering evidence that it could remove no more than 30% of the system's I&I. The IURC disagreed, and concluded that Mr. Holden presented credible, unrefuted testimony identifying several areas with significant inflow that presented an opportunity for successful removal of more than 30% of the clear-water I&I. (Vol.VI.Appellee's.App.107-108.) In the IURC Order denying inclusion of the plant expansion costs in CUII's rates, the IURC again referenced this finding from its Reconsideration Order in Cause 45389. (Vol.II.App.73.) Ultimately, there was ample evidence supporting the IURC's decision to deny CUII's plant expansion cost recovery.

CUII suggests the IURC order lacks substantial evidence, (Appellant's.Br.31), citing as guidance Ind. Off. Util. Consumer Couns. v. Lincoln Utils., 784 N.E.2d 1072 (Ind. Ct. App. 2003). But the evidentiary record here is very different from Lincoln, where the IURC improperly relied on evidence not admitted into the record, leaving paltry support for its conclusion. Id. at 1077. Here, plentiful evidence establishes CUII's plant expansion was imprudent, costs were not well defined, and the plant was not used and useful. (Vol.II.Appellee's.App.25-28; 190-198, 232, 236, 239-240); (Vol.VI.Appellee's.App.107-108.)

B. CUII refused to implement a comprehensive program to significantly reduce I&I, which could reduce or eliminate the need for an expanded plant

The IURC did not "switch gears" to CUII's detriment, (Appellant's.Br.34), and there was no IURC endorsement of CUII's plant expansion on which CUII could have

reasonably relied. In support of its argument, CUII wrongly relies on Hamilton S.E. Utils., Inc. v. Ind. Util. Regul. Comm'n, 115 N.E.3d 512 (Ind. Ct. App. 2018). In Hamilton, the IURC previously issued final orders adopting affiliate guidelines and then unexpectedly pivoted to new guidelines. See id. at 515. Here, the IURC never issued any order authorizing CUII's plant expansion. To the contrary, the IURC staff noted in its May 2018 comments that CUII had not complied with the Order to develop a comprehensive I&I program. (Vol.III.App.197.) The IURC made it crystal clear that its staff's recommendations during the technical conferences were not pre-approval of CUII's capital plans, (Vol.III.App.169), and the only IURC order that CUII can point to is the pre-approval order that confirmed CUII's plant expansion was unnecessary and unreasonable until it first focused on I&I. (Vol.III.App.169); (Vol.VI.Appellee's.App.96).

Citing Baliga v. Ind. Horse Racing Comm'n, 112 N.E.3d 731 (Ind. Ct. App. 2018), trans. denied, 123 N.E.3d 140. CUII implies the IURC created a "distinct impression" that CUII's plant expansion costs would be recovered as reasonable. (Appellant's.Br.37.) Aside from the fact that the IURC and Consumer Parties repeatedly gave CUII the distinct impression that its plant expansion efforts were premature and unreasonable, CUII neglects to mention that one of the keys to Baliga's rationale for finding the agency erred in defaulting Baliga was that there was no evidence the agency would have suffered any prejudice if the ALJ had declined to find Baliga in default. See Baliga, 112 N.E.3d at 736.

Here, *ratepayers* would have been profoundly prejudiced had the IURC allowed CUII to recover its unreasonable and unnecessary plant expansion costs. CUII's reliance on Comm'r of the Ind. Dep't of Ins. v. Schumaker, 118 N.E.3d 11, 13, 22 (Ind. Ct. App.

2018) is equally inapposite. (Appellant's.Br.37-38.) Unlike the circumstances here, Schumaker assumed one agency would share information with another, and as soon as Schumaker realized he was mistaken, he provided an explanation. See Schumaker, 118 N.E.3d at 22. CUII has no credible basis for any assumption that the IURC would approve its plant expansion costs.

CUII knew at least as of October 2019 that the Consumer Parties had grave concerns with CUII's plan to expand its plant before focusing on I&I reduction. Yet, CUII forged ahead without any meaningful attempts to first focus on I&I remediation. (Vol.II.App.102.) CUII's claims that the plant expansion costs were part of the IURC's directive are baseless.

To underscore the absurdity of CUII's claims, the IURC noted that rather than expand its treatment plant, the IURC's directives in Cause 44724 were to implement a comprehensive I&I reduction program – meaning CUII should search its system for cracks where outside water could enter, and repair those cracks to significantly decrease flow to the treatment plant. (Vol.II.App.101.) CUII's plant expansion costs were in no way related to any such efforts. As the IURC correctly noted, "[t]o approve CUII's plant expansion costs would have been to endorse CUII's continued failure to make significant progress in addressing I&I, something that would have decreased the need for grossly oversized proposals made in Cause No. 45389." (Vol.II.App.102.) The IURC went on to note that "[t]o approve the plant expansion projects would be to completely obviate the 44724 Order's directive to reduce I&I in order to minimize the need for construction of new capacity or other capital investments." (Id.) In denying recovery of the plant expansion

costs, the IURC used its technical and ratemaking expertise to deny recovery of costs the evidence revealed were unreasonable and imprudent, and properly found that ratepayers should not pay for CUII's willful, imprudent conduct.

CONCLUSION

The Consumer Parties respectfully request that this Court affirm the IURC's Order.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I certify that this brief does not exceed 14,000 words as required by Appellate Rule 44(E).

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CERTIFICATE OF SERVICE

I certify that on October 30, 2023, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on that same date the foregoing document was served upon the following person(s) via IEFS:

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