

ORIGINAL



STATE OF INDIANA
INDIANA UTILITY REGULATORY COMMISSION

PETITION OF THE BOARD OF DIRECTORS FOR)
UTILITIES OF THE DEPARTMENT OF PUBLIC)
UTILITIES OF THE CITY OF INDIANAPOLIS, AS) CAUSE NO. 37399 GCA 116 S1
SUCCESSOR TRUSTEE OF A PUBLIC)
CHARITABLE TRUST, FOR APPROVAL OF GAS)
COST ADJUSTMENTS TO BE APPLICABLE IN) APPROVED:
THE MONTHS OF DECEMBER 2012, JANUARY) MAY 29 2013
AND FEBRUARY 2013)

ORDER OF THE COMMISSION

Presiding Officers:
Larry S. Landis, Commissioner
Aaron A. Schmoll, Senior Administrative Law Judge

In Finding No. 11 of our November 28, 2012 Order in Cause No. 37399 GCA 116, we stated the Indiana Office of Utility Consumer Counselor (“OUCC”) “questioned the structured purchase transaction (“Structured Product”) made by Petitioner for the gas subject to this GCA. While Petitioner did file supplemental testimony explaining the Structured Product, the Commission has additional questions regarding this issue that would be better addressed in a subdocket to this proceeding.” We then created this subdocket GCA 116 S1 to address the issues and our questions concerning the gas costs attributable to the Structured Product.

On December 11, 2012, the presiding Administrative Law Judge held an Attorneys’ Conference at which the Parties discussed the possibility of resolving their differences and considered a possible time frame for a potential procedural schedule for the GCA 116 S1 subdocket in the event the Parties could not resolve their differences.

On February 28, 2013 and March 1, 2013, the OUCC and the Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis, as trustee of a public charitable trust, d/b/a Citizens Gas (“Petitioner” or “Citizens”) (collectively, the “Parties”) filed their respective testimony in support of the Commission’s approval of a Stipulation and Settlement Agreement (the “Settlement”), which the Parties entered into for purposes of settling all issues regarding the determination of the gas cost adjustment charges in this Cause associated with a November 2011 Structured Product.

A public Evidentiary Hearing was held in this Cause on March 12, 2011, in Room 224 of the PNC Center, Indianapolis, Indiana. At this hearing, the Settlement was admitted into evidence, along with supporting testimony and exhibits of the Parties. Citizens witness Korlon L. Kilpatrick responded to the Commission’s March 6, 2013 Docket Entry. Those verified responses were made a part of the record. The Presiding Officers also asked Mr. Kilpatrick questions during the hearing, to which he responded on the record. No members of the general public appeared or sought to testify in this proceeding.

Based upon the applicable law and the evidence of record, the Commission now finds:

1. **Statutory Notice and Commission Jurisdiction.** Notice of the hearing in this Cause was given and published by the Commission as required by law. Petitioner operates a municipal gas utility, and as such, is subject to the jurisdiction of this Commission as provided in the Public Service Commission Act, as amended. Under Ind. Code § 8-1-2-42(g), the Commission has jurisdiction over changes to Petitioner's rates and charges related to adjustments in gas costs. The Commission therefore has jurisdiction over the Petitioner and the subject matter.

2. **Petitioner's Characteristics.** Petitioner is the Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis, as Trustee of a Public Charitable Trust, doing business as Citizens Gas. Petitioner has its principal office at 2020 North Meridian Street, Indianapolis, Indiana. Petitioner is engaged in rendering natural gas utility service to the public in and around Marion County in the State of Indiana; and owns, operates, manages, and controls plant and equipment used for the distribution and furnishing of such service.

3. **Background.** The Settlement set forth the following relevant history and background of the issues in this subdocket. On August 9, 2012, OUCC witness Pamela Sue Sargent Haase, CPA filed testimony and exhibits in Citizens' GCA 115. Ms. Haase took issue with the manner in which Citizens proposed to recover the gas costs associated with the Structured Product, which had two distinct parts—an 18.5 cent discount from index-priced gas in the Winter term, which was shared between customers (30%) and Citizens (70%) under the gas cost incentive mechanism ("GCIM"), and a fixed price component during the Summer term, during which Citizens treated the fixed price hedging transaction under the price volatility mitigation program ("PVMP"), with customers paying 100% of the gas costs. The OUCC disagreed with Citizens' calculation of the GCA 115 factors and argued the Commission should "require Petitioner to consistently treat the entire transaction's results according to the GCIM procedures."

On August 15, 2012, Citizens witness Kilpatrick filed Supplemental Testimony in GCA 115 and responded to the OUCC's position regarding the appropriate treatment of the gas costs from the Structured Product. Mr. Kilpatrick asserted this was the second Structured Product transaction for Citizens and the OUCC did not raise an issue in the prior GCA proceeding with respect to the treatment of gas costs associated with the first structured gas purchase transaction. Mr. Kilpatrick also responded to the other arguments Ms. Haase made. Accordingly, Mr. Kilpatrick's Supplemental Testimony recommended that the Commission approve the GCA factors originally proposed in Citizens' Direct Testimony and Exhibits in GCA 115.

Citizens and the OUCC entered into a stipulation in GCA 115, under which the OUCC agreed to Petitioner's use of the GCA 115 factors proposed in Citizens' case-in-chief, subject to potential refund and reconciliation in a subsequent GCA proceeding, in the event the Parties were not able to reach an agreement on the treatment of the gas costs associated with the Structured Product in GCA 116.

The Parties were not able to reach an agreement and the dispute was the subject of the OUCC's Direct Testimony and Citizens' Supplemental Testimony in GCA 116. At the conclusion of the GCA 116 hearing, the Commission directed Citizens to file revised GCA 116 factors using the approach advocated by the OUCC and indicated that the issue might be appropriate for resolution in a subdocket proceeding in GCA 116.

4. **Evidence in Support of Settlement Agreement.** On March 1, 2013, the Parties reached an agreement to resolve all of the issues with respect to the treatment of \$1,594,950 in gas costs in excess of the first of the month ("FOM") index associated with the Structured Product, as reflected in the Settlement. The Parties agreed that the foregoing amount would be split 50/50, with Citizens absorbing approximately \$797,475 of gas costs in excess of the FOM index in the GCA, spread over GCA 115, GCA 116, GCA 117 and GCA 118.

The spreadsheet marked as Joint Settlement Exhibit A, attached to the Settlement, indicates that in GCA 115 Citizens recovered \$613,250 of gas costs associated with the Structured Product in excess of the FOM index. However, in GCA 116, when Citizens recalculated the GCA, Exhibit A shows Citizens absorbed \$222,425 of the previously-stated \$613,250 by reversing the May accrual and inserting May actual costs. Joint Settlement Exhibit A further shows that Citizens absorbed \$405,930 in GCA 116 and \$281,260 in GCA 117, for a total of \$909,615. Therefore, the Parties agreed that Citizens should recover the difference between \$909,615 and \$797,475 (or \$112,140) through a one-time adjustment on Schedule 12B in GCA 118 in order to achieve the agreed upon 50/50 split of the total amount of \$1,594,950.

The Settlement provides that in order to avoid controversy over the recovery of gas costs in future GCA proceedings, Citizens and the OUCC agree that Citizens will not enter into Structured Products in the future. Pursuant to the Parties' March 11, 2013 Response to the Commission's March 6, 2013 Docket Entry, "Structured Product" means "a transaction confirmation or contract to purchase natural gas entered into by or on behalf of Citizens Gas that is comprised of multiple parts. . . . Each of the parts is 'structured' into a single product and executed as a single transaction." Citizens and the OUCC also agree that in the event a reasonable Structured Product from an independent third-party is presented to and approved by the Commission, Citizens may utilize a similar Structured Product in a future GCA proceeding.

Petitioner's witness Kilpatrick testified in support of approval of the Settlement. He noted that both sides believed strongly in their respective positions regarding treatment of gas costs related to the Structured Product, as reflected in their respective testimony filed in GCA 115 and 116. Mr. Kilpatrick stated GCA proceedings, however, are by their nature summary proceedings that are not designed to be adversarial in nature. Both sides also share the risk of an unfavorable outcome if this subdocket proceeding were to proceed to resolution by the Commission through litigation. As a result of the foregoing, the Parties mutually agreed that a 50/50 split of the gas costs at issue was an appropriate balance particularly given the fact that Citizens had committed in the Settlement not to enter into a similar Structured Product in the future.

OUCC witness Heather Poole confirmed in her testimony that Petitioner had already assumed a total of \$909,615 in gas costs associated with the Structured Product, which means that an additional \$112,140 should be collected from Petitioner's ratepayers as a one-time

adjustment to Schedule 12B in GCA 118 in order to arrive at the 50/50 split amount of \$797,475. Ms. Poole also testified that Citizens agreed not to enter into Structured Products in the future, unless a reasonable Structured Product from an independent third-party has been presented and approved by the Commission. The OUCC noted the terms of the Settlement demonstrate the give and take of settlement negotiations in resolving issues in a manner acceptable to all Parties. Accordingly, the OUCC recommended the Commission approve the Settlement as consistent with the public interest.

5. Discussion and Findings. In various Orders of the Commission in other proceedings, we have discussed our policy with respect to the consideration of settlements:

Indiana law strongly favors settlement as a means of resolving contested proceedings. *See, e.g., Manns v. State Department of Highways*, (1989), Ind., 541 N.E.2d 929, 932; *Klebes v. Forest Lake Corp.*, (1993), Ind. App. 607 N.E.2d 978, 982; *Harding v. State*, (1992), Ind. App., 603 N.E.2d 176, 179.

Indianapolis Power & Light Co., Cause No. 39936, p. 7 (IURC 9/24/95); *see also Commission Investigation of Northern Ind. Pub. Serv. Co.*, Cause No. 41746, p. 23 (IURC 9/23/02). This policy is consistent with expressions to the same effect by the Supreme Court of Indiana. *See, e.g., Mendenhall v. Skinner & Broadbent Co.*, 728 N.E.2d 140, 145 (Ind. 2000) (“The policy of the law generally is to discourage litigation and encourage negotiation and settlement of disputes”).

Nonetheless, settlements presented to the Commission are not ordinary contracts between private parties. *United States Gypsum, Inc. v. Indiana Gas Co.*, 735 N.E.2d 790, 803 (Ind. 2000). When the Commission approves a settlement, that settlement “loses its status as a strictly private contract and takes on a public interest gloss.” *Id.* (quoting *Citizens Action Coalition v. PSI Energy*, 664 N.E.2d 401, 406 (Ind. Ct. App. 1996)). Thus, the Commission “may not accept a settlement merely because the private parties are satisfied; rather [the Commission] must consider whether the public interest will be served by accepting the settlement.” *Citizens Action Coalition*, 664 N.E.2d at 406.

Furthermore, any Commission decision, ruling, or order—including the approval of a settlement—must be supported by specific findings of fact and sufficient evidence. *United States Gypsum*, 735 N.E.2d at 795 (citing *Citizens Action Coalition v. Public Service Co.*, 582 N.E.2d 330, 331 (Ind. 1991)). The Commission’s own procedural rules require that settlements be supported by probative evidence. 170 IAC 1-1.1-17(d). Therefore, before the Commission can approve the Settlement Agreement, it must determine whether the evidence in this Cause sufficiently supports the conclusions that the Settlement Agreement is reasonable, just, and consistent with the purpose of Ind. Code § 8-1-2, and that such agreement serves the public interest.

The Commission has continuously recognized that the “Commission’s determination, in each GCA, regarding the prudence and reasonableness of the costs . . . is not intended to be a hindsight review, but is one based on the facts and circumstances that exist at the time Petitioner’s decision is made.” *Indiana Gas Company, Inc.*, Cause No. 37394 GCA 98

(approved May 28, 2008); *see also*, *Citizens Gas*, Cause No. 37399 GCA 75 (approved March 17, 2004) (“The Parties further agree that review of Citizens’ gas procurement efforts, including price volatility mitigation efforts, shall not be based on ‘20/20 hindsight’ but shall be based on the information, facts and circumstances existing at the time its procurement decisions were made.”) While we do not conduct a hindsight review, we note that every GCA order contains the statutory provision that a gas utility must undertake: “Indiana Code § 8-1-2-42(g)(3)(A) requires [a gas utility] to make every reasonable effort to acquire long-term natural gas supplies in order to provide service to its customers at the lowest gas cost reasonably possible.”

Accordingly, in reviewing the Structured Product at issue in this proceeding, the Commission has carefully focused on whether the Structured Product provided a hedge at the time the transaction was entered, and not the effects this transaction had in relation to gas price. In this situation, a hedge, whether physical or financial, provides certainty to utility ratepayers against market volatility. Under this analysis, we do not find the Structured Product constituted a hedge in the fall of 2011 when the transaction was entered, due to the fact that the Summer Term portion of the transaction was conditional on a future event, i.e., either a fixed price purchase or an index purchase as elected by the supplier.

We also focus on whether the Structured Product could be considered a hedge at the times the supplier elected to supply, or “put,” the gas at the fixed “Summer Trigger Price,” or at the index price. While these elections occurred only two months before the gas was to be supplied, the fixed price for the Summer Term was the price that was negotiated in the fall of 2011. Further, at the time of election, the decision as to whether the sales price would be at fixed or index prices was the decision of the supplier, not Citizens. Together, these factors appear to be the antithesis of what the Commission would consider to be a strategy for minimizing volatility, and thus subject to Citizens PVMP. Accordingly, even at the times into which the summer purchases were entered, we do not find the Structured Product to be a hedge that should be treated under Citizens PVMP. Indeed, in responding to the bench questions, Mr. Kilpatrick acknowledged that under many circumstances, the transaction worked as a hedge for the supplier, rather than for Citizens or its ratepayers. Tr. at 20-24.

Because we do not find the Structured Product serves as a hedge subject to the PVMP, the transaction as a whole should be addressed under Citizens’ GCIM, which dictates a 70/30 split of the costs over the index price due to the differentials at issue in this Cause. This treatment was how the OUCC originally addressed the transaction in GCA 116. According to Joint Exhibit A, Citizens has returned \$909,615 of \$1,116,465 to ratepayers under the 70/30 split. Under the terms of the Settlement and the 50/50 split, Citizens would receive a credit of \$112,140, resulting in a total credit of \$797,475 returned to ratepayers.

Given our finding that the Structured Product should not be addressed under the PVMP, the Commission would be within its authority to order Citizens to refund the additional \$206,850 to ratepayers, pursuant to the terms of the GCIM and the 70/30 split.¹ However, in light of the Settlement with the OUCC and Citizens’ agreement with respect to seeking Commission

¹ In a contested case, the Commission would also review the 2010 Summer Purchases, during which the supplier elected the Summer Trigger price one time, resulting in savings to ratepayers under the PVMP of approximately \$28,500 (not based on the FOM index).

approval prior to entering into a similar Structured Product in the future, we modify the Settlement to strike the one-time adjustment of \$112,140 in GCA 118.

Finally, the Parties agree that the Settlement should not be used as precedent in any other proceeding or for any other purpose except to the extent necessary to implement or enforce its terms. Consequently, with regard to future citations of the Settlement, we find that our approval herein should be recognized in a manner consistent with our finding in *Richmond Power & Light*, Cause No. 40434 (IURC March 19, 1997).

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION THAT:

1. The Settlement filed in this Cause on March 1, 2013, is hereby approved as modified. A copy of the Settlement is attached to, and incorporated into, this Order.

2. In accordance with Ind. Code § 8-1-2-70, Petitioners shall pay the following itemized charges within twenty (20) days from the date of the Order to the Secretary of this Commission:

Commission charges	\$ 2,050.20
OUCG charges	\$ 860.88
Legal Advertising charges	\$ 34.10
TOTAL	\$ 2,945.18

3. This Order shall be effective on and after the date of its approval.

**LANDIS, MAYS AND ZIEGNER CONCUR; BENNETT NOT PARTICIPATING;
ATTERHOLT ABSENT:**

APPROVED: **MAY 29 2013**

I hereby certify that the above is a true and correct copy of the Order as approved.



Brenda A. Howe
Secretary to the Commission

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF THE BOARD OF DIRECTORS)
FOR UTILITIES OF THE DEPARTMENT OF)
PUBLIC UTILITIES OF THE CITY OF)
INDIANAPOLIS, AS SUCCESSOR TRUSTEE)
OF A PUBLIC CHARITABLE TRUST, FOR) CAUSE NO. 37399-GCA116S1
APPROVAL OF GAS COST ADJUSTMENT)
TO BE APPLICABLE IN THE MONTHS OF)
DECEMBER 2012, AND JANUARY AND)
FEBRUARY 2013)

STIPULATION AND SETTLEMENT AGREEMENT

This Stipulation and Settlement Agreement (the “Settlement”) is entered into by and between the Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis, as trustee of a public charitable trust, d/b/a Citizens Gas (“Citizens” or “Petitioner”) and the Indiana Office of Utility Consumer Counselor (the “OUCC”), who stipulate and agree for purposes of settling issues regarding the determination of the gas cost adjustment charges in this Cause that the terms and conditions set forth below represent a fair and reasonable resolution of the issues between the Parties with respect to the treatment of the gas costs associated with a structured purchase transaction (“Structured Product”) Citizens entered into in November 2011, subject to incorporation into a final Indiana Utility Regulatory Commission (“Commission”) order (the “Final Order”), without any modification or condition which is unacceptable to the Parties.

History and Background

A. The OUCC Raised an Issue in Cause No. 37399 GCA 115 Related to How Gas Costs from a Structured Product should be reflected in Citizens’ GCA

1. On August 9, 2012, OUCC witness Pamela Sue Sargent Haase, CPA filed testimony and exhibits in Citizens’ GCA 115. Ms. Haase took issue with the manner in which Citizens proposed to recover the gas costs associated with the Structured Product, which had two distinct

parts—an 18.5 cent discount from index-priced gas in the Winter term, which was shared between customers (30%) and Citizens (70%) under the gas cost incentive mechanism (“GCIM”), and a fixed price component during the Summer term, during which Citizens treated the fixed price hedging transaction under the price volatility mitigation program (“PVMP”), with customers paying 100% of the gas costs. Ms. Haase disagreed with Citizens’ calculation of the GCA 115 factors and argued the Commission should “require Petitioner to consistently treat the entire transaction’s results according to the GCIM procedures.”

2. On August 15, 2012, Citizens witness Korlon Kilpatrick filed Supplemental Testimony in GCA 115 and responded to the OUCC’s position regarding the appropriate treatment of the gas costs from the Structured Product. Mr. Kilpatrick asserted this was the second Structured Product transaction for Citizens and the OUCC did not raise an issue in the prior GCA proceeding with respect to the treatment of the first transaction. Mr. Kilpatrick also responded to the other arguments Ms. Haase made. Accordingly, Mr. Kilpatrick’s Supplemental Testimony recommended that the Commission approve the GCA factors originally proposed in Citizens’ Direct Testimony and Exhibits in GCA 115.

3. Citizens and the OUCC entered into a stipulation in GCA 115, which was set forth in Petitioner’s Late-Filed Exhibit 1. The OUCC agreed to Petitioner’s use of the GCA 115 factors proposed in Citizens’ case-in-chief, subject to potential refund and reconciliation in a subsequent GCA proceeding, in the event the Parties were not able to reach an agreement on the treatment of the gas costs associated with the Structured Product in GCA 116.

4. Citizens and the OUCC were not able to reach an agreement. The dispute related to the proper treatment of the gas costs from the Structured Product was the subject of OUCC Direct Testimony and Citizens’ Supplemental Testimony in GCA 116. At the conclusion of the GCA 116 hearing, the Commission directed Citizens to file revised GCA 116 factors using the approach advocated by the OUCC and indicated that the issue might be appropriate for resolution in a subdocket proceeding in GCA 116.

5. In Finding No. 11 of its November 28, 2012 Order in Cause No. 37399 GCA 116, the Commission stated the “OUCC questioned the structured purchase transaction (‘Structured Product’) made by Petitioner for the gas subject to this GCA. While Petitioner did file supplemental testimony explaining the Structured Product, the Commission has additional questions regarding this issue that would be better addressed in a subdocket to this proceeding.”

6. On December 11, 2012, the presiding Administrative Law Judge held an Attorneys’ Conference at which the Parties discussed the possibility of resolving their differences and considered a possible time frame for a potential procedural schedule for GCA 116S1 in the event the Parties could not resolve their differences.

7. On December 31, 2012, Citizens filed its Direct Testimony and Exhibits in GCA 117. Citizens followed the same approach that was used in GCA 116 with respect to treatment of gas costs associated with the Structured Product.

Stipulation and Settlement

B. Agreed Upon Adjustments to GCA Schedule

1. After several negotiation sessions, the OUCC and Citizens were able to reach an agreement to resolve all of the issues with respect to the treatment of gas costs in excess of the first of the month (“FOM”) index associated with the Structured Product, which amounted to a total of approximately \$1,594,950. The Parties have agreed in settlement of the disputed issues that the foregoing amount will be split 50/50, with Citizens absorbing approximately \$797,475 of gas costs in excess of the FOM index in the GCA, spread over GCA 115, GCA 116, GCA 117 and GCA 118.

2. As shown by the attached spreadsheet marked as Exhibit A, Citizens recovered \$613,250 of gas costs in excess of the FOM index in GCA 115 associated with the Structured Product. However, in GCA 116, when Citizens re-calculated the GCA, it absorbed \$222,425 of the previously-stated \$613,250 by reversing the May accrual and inserting May actual costs.

Exhibit A further shows that Citizens absorbed \$405,930 in GCA 116 and \$281,260 in GCA 117, for a total of \$909,615. Therefore, Citizens will need to recover the difference between \$909,615 and \$797,475 (or \$112,140) through a one-time adjustment on Schedule 12B in GCA 118 in order to achieve the agreed upon 50/50 split.

C. Proposed language regarding use of Structured Products

1. In recognition of the summary nature of GCA hearings and in order to avoid controversy over the recovery of gas costs in future GCA proceedings, Citizens and the OUCC agree that Citizens will not enter into Structured Products in the future.

2. However, Citizens and the OUCC agree that in the event a reasonable Structured Product from an independent third-party is presented to and approved by the Commission, Citizens may utilize a similar Structured Product in a future GCA proceeding.

D. Miscellaneous

1. This Settlement is solely the result of compromise of contested issues and shall not be deemed an admission by any Party in any other proceeding, except as necessary to enforce its terms before the Commission, or any court of competent jurisdiction.

2. If the Settlement in its entirety is not approved by the Commission, the Parties agree that the terms hereof shall be privileged and shall not be admissible in evidence or in any way discussed in any subsequent proceeding. Moreover, the concurrence of the Parties with the terms of the Settlement is expressly predicated upon the Commission's approval of the Settlement in its entirety without modification or further condition deemed unacceptable by any Party. If the Commission does not approve the Settlement in its entirety, the Settlement shall be null and void and deemed withdrawn, unless otherwise agreed in writing by the Parties.

3. The communications and discussions during the negotiations and conferences which

have produced this Settlement have been conducted on the explicit understanding that they are, or relate to offers of settlement and shall be privileged and confidential, shall be without prejudice to the position of any Party, and are not to be used in any manner in connection with any other proceeding or otherwise.

4. The Parties shall not appeal the agreed Final Order in the instant matter to the extent such order implements the provisions of this Settlement and the Parties shall not support any appeal of any such order by a person not a party to this Settlement.

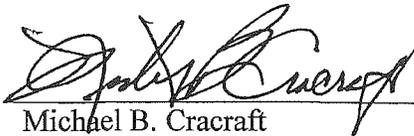
5. The provisions and effects of this Settlement shall be enforceable by any Party, in any tribunal of competent jurisdiction, including but not limited to the Commission.

6. Each of the undersigned represents and agrees that he/she is fully authorized to execute the Settlement on behalf of the Party identified above his/her respective signature.

Indiana Office of Utility Consumer
Counselor


Jeffrey M. Reed
Deputy Consumer Counselor

Citizens Gas


Michael B. Cracraft
Attorney for Citizens Gas

PNC Center
115 W. Washington Street, Suite 1500S
Indianapolis, Indiana 46204

Hackman Hulett & Cracraft, LLP
111 Monument Circle, Suite 3500
Indianapolis, Indiana 46204

Dated: March 1, 2013

Dated: March 1, 2013