

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE COMMISSION'S)
 INVESTIGATION, PURSUANT TO IC § 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)

CAUSE NO. 42693 S1

 ORDER ON COST DEFERRAL

 APPROVED: JAN 26 2011

BY THE COMMISSION:
David E. Ziegner, Commissioner
Loraine L. Seyfried, Administrative Law Judge

This subdocket was established by the Indiana Utility Regulatory Commission ("Commission") to address issues concerning the implementation of the Commission's Order dated December 9, 2009 in Phase II of Cause No. 42693 ("Phase II Order"). In pertinent part, the Phase II Order provided that jurisdictional utilities shall contract with a single independent third party entity for the purpose of jointly administering and implementing the Core Programs required by the Phase II Order. Phase II Order at 38. The Commission found that the independent statewide Third-Party Administrator ("TPA") would oversee the Core Programs mandated by the Phase II Order and the utilities would oversee any additional programs needed to achieve the energy savings goals established in the Phase II Order. *Id.* at 41.

In the Phase II Order (at 42-43, 52), the Commission created the DSM Coordination Committee ("DSMCC")¹ and directed it to undertake efforts for the preparation and submission of two joint requests for proposals ("RFPs") on behalf of, or issued by, the jurisdictional utilities. The Phase II Order explained that the first RFP was to be issued for the selection of the TPA. The second RFP required by the Phase II Order was to be issued for the selection and utilization of a statewide evaluation, measurement and verification Administrator ("EM&V") for the five

¹ The DMSCC members are: Indiana Office of Utility Consumer Counselor ("OUCC"); Citizens Action Coalition of Indiana, Inc. ("CAC"); Duke Energy Indiana, Inc. ("Duke"); Hoosier Energy; Indiana Industrial Group ("Industrial Group"); Indiana Michigan Power Company ("I&M"); Indiana Municipal Power Agency; Indianapolis Power & Light Company ("IPL"); Northern Indiana Public Service Company ("NIPSCO"); Southern Indiana Gas and Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc. ("Vectren South"); and Wabash Valley Power Association.

demand side management (“DSM”) programs to be delivered through the TPA (the “Core Programs”). The Phase II Order required the proposed RFPs to be filed in this subdocket for approval by March 2, 2010. *Id.* at 43. The Phase II Order contemplated that the TPA and Core Programs should be in place by the end of 2010. *Id.* at 51-52.² The docket entry dated March 22, 2010 approved the RFPs and directed the DSMCC to submit its recommended candidates to the Commission. The Commission’s docket entry dated April 22, 2010 established a schedule for the issuance of the RFPs, review of responses, negotiation of contracts, and implementation of Core Programs by the TPA.

Throughout 2010, the DSMCC and the jurisdictional utilities undertook the significant work to timely comply with the Phase II Order. On July 1, 2010, the jurisdictional utilities filed their initial compliance reports regarding their proposals to achieve the annual energy savings targets established by the Phase II Order and the estimated cost of the first three years of compliance. On August 9, 2010, the DSMCC filed a report to update the Commission on the RFP process. On September 17, 2010, the Industrial Group filed an objection wherein it requested the Commission require the DSMCC to negotiate with the lowest-cost bidder to administer the Core Programs. The DSMCC responded to this objection on September 29, 2010 and filed a further update regarding its progress in selecting the TPA and EM&V with the Commission on October 4, 2010. The Industrial Group filed its reply in support of its objection to the DSMCC negotiations with the non-least cost bidder on October 6, 2010. By docket entry dated October 19, 2010, the presiding officers found that the mere claim that another bidder had a lower contract price does not *per se* establish that that bidder offered the reasonable least-cost alternative. This docket entry denied the Industrial Group’s request that the DSMCC be required to engage in negotiations with the lowest cost bidder and directed the DSMCC to tender a contract to the Commission by October 22, 2010.

On October 19, 2010, Duke, I&M, IPL, and Vectren South (collectively the “Movants”) filed a motion for accounting authority to defer TPA and EM&V costs. The Movants filed supporting testimony in the form of Joint Exhibit 1 supported by the testimonies of Diana L. Douglas, Jeffrey L. Brubaker, James L. Cutshaw and M. Susan Hardwick.

On October 22, 2010, the DSMCC submitted the TPA and EM&V contracts to the Commission for approval (“Majority Report”). The TPA contract will govern the provision of the Core Programs through 2013. On November 1, 2010, the Industrial Group filed its redacted minority report opposing approval of the TPA contract (“Minority Report”). By docket entry dated November 4, 2010, a lengthy email communication concerning pending issues that was received by the presiding Commissioner was tendered to the parties in accordance with 170 IAC 1-1.5-6.

The Movants filed a Request for Approval of Agreed Upon Procedural Schedule on Motion for Accounting Authority to Defer TPA and EM&V Costs on November 8, 2010 proposing a procedural schedule, agreed upon with the OUCC, Industrial Group and CAC, for consideration of the deferred accounting authority. On November 12, 2010, an Attorneys’ Conference was conducted in this Cause for the purpose of discussing a procedural schedule to

² By docket entry dated November 18, 2010, the presiding officers suspended the dates for approval of the TPA and EM&V contracts as well as implementation of the Core Programs by the TPA “pending further direction by the Commission upon a ruling concerning the legal issues to be considered in addressing the TPA contract.”

address the numerous pending issues. At this time, and in order to afford the Commission the opportunity to hear and consider evidence and argument, and to rule on the pending issues, the parties made requests that the Commission amend and hold in abeyance the implementation requirements of the Phase II Order until further order of the Commission.

On November 12, 2010, Duke, I&M, IPL, NIPSCO and Vectren South filed a written response to the Minority Report and renewed their request that the Commission amend and hold in abeyance the implementation dates and energy savings targets contained in the Phase II Order; issue an order clarifying the confusion among the parties about the legal implications of the Phase II Order and related evidentiary requirements, and thereafter establish a procedural schedule to accept prefiled evidence and conduct a hearing on the issues raised in the Minority Report (“Utilities’ Response”).

On November 16, 2010, Movants submitted their Notification that Respondents Continue to Request Approval of Agreed Upon Procedural Schedule on Motion for Accounting Authority to Defer TPA and EM&V Costs. No party objected to this notification, and a docket entry was issued on November 18, 2010 establishing the procedural schedule. The Industrial Group submitted its Hearing Brief on Deferral Motion and Request for the Commission to Take Administrative Notice (“Hearing Brief”) on November 24, 2010. Movants filed a Response to the Industrial Group’s Hearing Brief on Deferral Motion (“Hearing Brief Response”) on December 3, 2010.

The Commission issued a docket entry on December 7, 2010 requiring the Movants to provide information on the efforts taken by the DSMCC or the Movants to ensure the costs assessed by the TPA and EM&V were reasonable. The Movants filed a written response on December 9, 2010.

Pursuant to notice, duly published as required by law, an Evidentiary Hearing was held in this Cause on December 10, 2010, at 9:30 a.m. EST, in Room 222, 101 West Washington Street, Indianapolis, Indiana. The Movants, OUCC, CAC and NIPSCO appeared by their respective counsel. At the Evidentiary Hearing, the Movants’ evidence was admitted into the record without objection. The Movants also notified the Commission that they were withdrawing their request to recover any carrying costs associated with any costs the Commission may authorize for deferral.³ The presiding officers granted the Industrial Group’s request to take administrative notice of its Objection to DSMCC Action to Open Negotiations with Non-Least Cost Bidder filed in this Cause on September 17, 2010 and the Redacted Minority Report Opposing Approval of Third Party Administrator Contract filed in this Cause on November 1, 2010. No members of the ratepaying public were present at the Evidentiary Hearing.

The Commission, based upon applicable law and being duly advised in the premises, now finds as follows:

1. Notice and Jurisdiction. Due, legal and timely notice of the Evidentiary Hearing in this Cause was given and published as required by law. Movants are “public utilities” as that term is used in Ind. Code § 8-1-2-1(a) subject to the jurisdiction of this Commission in the manner and to the extent provided by the laws of the State of Indiana. The Commission has

³ Therefore, this Order does not address the parties arguments or otherwise address carrying costs.

jurisdiction over the Movants and the subject matter of this proceeding pursuant to Ind. Code §§ 8-1-2-10, -12 and -14.

2. Relief Requested. Movants request the Commission enter an order authorizing Respondents to defer, for subsequent recovery, the costs incurred by Respondents for the TPA and EM&V to provide Core Programs. Respondents incurred start-up costs in October through December of 2010 necessary for the TPA and EM&V selected by the DSMCC to make the Core Programs available by December 31, 2010. Additional start-up activities were frozen due to the November 18, 2010 Docket Entry suspending the implementation deadline for the Core Programs set forth in the Phase II Order. Movants request authority to defer the costs that have already been incurred plus any additional costs assessed by the TPA and EM&V upon Commission approval of the selected TPA and EM&V prior to the time Movants' individual rate mechanisms for DSM are approved.⁴

3. Evidence Presented. Movants submitted Joint Exhibit 1 which was supported by Diana L. Douglas, Jeffrey L. Brubaker, James L. Cutshaw and M. Susan Hardwick. Joint Exhibit 1 states that the Commission's Phase II Order established mandatory requirements that jurisdictional utilities offer the Core Programs on a uniform basis throughout the State. The Core Programs are to be offered through the TPA and evaluated by the EM&V. The DSMCC, of which Movants are members, was established to oversee engagement and implementation of this model. Subcommittees of the DSMCC have negotiated agreements to engage a TPA and EM&V, the DSMCC majority has approved those agreements and submitted those agreements to the Commission for approval on October 22, 2010.

Joint Exhibit 1 acknowledges the Phase II Order concluded that ratemaking and cost recovery issues for the jurisdictional utilities would be evaluated in separate proceedings initiated by them. The Movants have all initiated petitions seeking this relief. Movants requested authority in this proceeding to defer, for future recovery, prudent start-up and program costs incurred prior to final orders in their separate DSM proceedings authorizing recovery of such costs through rate mechanisms. The Movants propose to treat these costs as a regulatory asset using FERC CFR account 182.3, until inclusion of such costs in retail rates, pursuant to Accounting Standards Codification 980 (formerly the Statement of Financial Accounting Standards ("SFAS") No. 71). The Movants' witnesses testified that the Generally Accepted Accounting Principles specifically discuss the accounting for a regulator's actions designed to protect a utility from the effects of regulatory lag. Topic 980 of FASB's Accounting Standards Codification ("ASC") covers the accounting guidance for regulated operations formerly provided in SFAS No. 71. The witnesses further testified that costs associated with regulatory lag can be capitalized for accounting purposes, provided the provisions of ASC 980-340-25-1 are met. The guidance states:

Rate actions of a regulator can provide reasonable assurance of the existence of an asset. An enterprise shall capitalize all or part of an incurred cost that would otherwise be charged to expense if both of the following criteria are met: (a) It is probable (as defined in Topic 450) that future revenue in an amount at least equal

⁴ The Movants all have proceedings pending for approval of ratemaking mechanisms for the DSM costs resulting from the Phase II Order. Vectren South's Petition was filed in Cause No. 43938 on August 16, 2010. Duke's Petition was filed in Cause No. 43955 on September 28, 2010. IPL's Petition was filed in Cause No. 43960 on October 13, 2010. I&M's Petition was filed in Cause No. 43959 on October 12, 2010.

to the capitalized cost will result from inclusion of that cost in allowable costs for ratemaking purposes and (b) Based on available evidence, the future revenue will be provided to permit recovery of the previously incurred cost rather than to provide for expected levels of similar future costs. If the revenue will be provided through an automatic rate-adjustment clause, this criterion requires that the regulator's intent clearly be to permit recovery of the previously incurred cost. A cost that does not meet these asset recognition criteria at the date the cost is incurred shall be recognized as a regulatory asset when it does meet those criteria at a later date.

Upon receipt of approval of ratemaking authority necessary to recover these costs through approved cost recovery mechanisms, the regulatory asset will be recovered in accordance with approved allocation methodologies.

Movants explained that deferral of these costs is necessary because Movants do not currently have authority to incur or recover the full expected cost they will incur from the TPA and EM&V to implement the Core Programs. The Movants have already incurred costs from the TPA and EM&V in an effort to commence operation by December 31, 2010, including costs required to acquire supplies for various information technology investments. The Movants have suspended the incurrence of most additional costs from the TPA and EM&V pending a lifting of the suspension imposed by the November 18, 2010 Docket Entry in this proceeding. Movants explained that some additional expense to prepare a report summarizing branding discussions conducted by the TPA would be incurred to ensure that the work is documented and available for future use. Movants noted that the requested authority to defer costs associated with the Core Programs may also be necessary after the Commission rules on the legal and evidentiary issues concerning the selection and cost recovery for the TPA contract and lifts the suspension for implementation of the Core Programs by the TPA because the Movants may not have received authority to recover these costs through rates at that time.

Movants stated that the TPA selected by the DSMCC majority estimated it would include start-up costs of \$350,000 in October, 2010, \$660,450 in November, 2010 and \$660,450 in December, 2010. Due to the suspension, most additional start-up costs were stopped after November 18, 2010. The costs that are incurred will be allocated to all of the utilities that offer Core Programs through the TPA. Because of the suspension of the Core Programs' implementation, Movants have limited the expenses incurred prior to Commission approval of the TPA and EM&V costs to \$802,200. Movants also provided evidence on the estimates of the costs they might incur implementing the Core Programs once the TPA and EM&V are approved. Based on the Movants' July 1, 2010 Annual DSM Reports which were attached to Joint Exhibit 1, the Movants estimate that an average monthly cost of the Core Programs will range from \$477,778 to \$1,537,414 per Movant.

The Movants testified that in order to defer the expenses and reflect the costs as a regulatory asset, it must be probable that such costs will be recovered through rates in future periods. In order to satisfy the probability standard, Movants requested that the Commission's order in this proceeding specifically approve the proposed accounting treatment and state the intent to allow the recovery of the costs in future rates.

Movants believes their request for deferral authority is consistent with the objectives of the Phase II Order which required the DSMCC to take immediate steps to identify and retain a

TPA and EM&V. They note the Commission's April 22, 2010 Docket Entry requires the Core Program implementation to begin no later than December 31, 2010. In reliance on these instructions, the Movants incurred costs necessary to meet these deadlines. While the deadlines have been suspended pending acceptance of evidence and issuance of an order, the Movants believe it is appropriate that they be granted the necessary authority to defer the costs they incur in connection with implementing the Commission mandated Core Programs.

The Movants filed a written response to the Commission's December 7, 2010 docket entry requesting information on efforts to ensure the reasonableness of costs assessed by the TPA and EM&V. The Movants explained the efforts taken to ensure the start-up costs assessed by the TPA and EM&V were reasonable. Prior to the incurrence of the costs, the DSMCC requested the TPA and EM&V provide an estimate, by month, of the costs to be incurred. The utilities emphasized the need to minimize the costs since approval of the TPA and EM&V had not occurred. The estimated costs were compared to the start-up costs identified by all of the TPA bidders in response to the DSMCC's request for proposals. The selected TPA's costs were the second lowest and included costs to perform branding services that were not included in the lowest cost bid. Movants also indicated that participants in the DSMCC sought clarification regarding the nature of the costs to ensure that (1) the costs being incurred were necessary to incur as start-up costs; (2) the type of costs being incurred were consistent with the proposal and (3) the level of costs were reasonable. Movants also pointed to provisions of the Master Services Agreement with the TPA and EM&V designed to limit expenses to reasonable levels.

No other party submitted evidence on Movants' request.

4. Industrial Group's Hearing Brief. In lieu of filing evidence, the Industrial Group filed its Hearing Brief and Motion for Administrative Notice. In its Hearing Brief, the Industrial Group maintained that deferrals are extraordinary remedies that the Commission must carefully consider because they distort the regulatory *quid pro quo* and prohibition against retroactive ratemaking. The Industrial Group emphasized the need to balance the interests of the utility and its ratepayers because deferring these costs now will impact ratepayers in the future and advocated a compromise to balance the interests of shareholders in having assurance that investments will be recovered and ratepayers in being protected from unjustified and unnecessary rate increases. Hearing Brief at 2 *citing Indiana Michigan Power*, Cause No. 40980, pp. 5-7 (IURC Nov. 12, 1998) and *Indiana Bell Tel. Co.*, Cause No. 39348, pp. 23-24 (IURC Dec. 30, 1992).

The Hearing Brief characterizes the Movants' approach to DSM programs as requesting authority to recover every penny of DSM cost through a tracker, including lost revenues and shareholder incentives. The Industrial Group argued that the Movants and other utilities should be required to "put some skin in the game" to incent cost containment and avoid a ballooning of DSM costs at ratepayer expense and a blunting of the effectiveness of the programs.

The Industrial Group contends that the request for deferred accounting treatment illustrates the need to require the individual utilities to account for the risks they have assumed in this proceeding. The Movants incurred costs from the TPA selected by the DSMCC with full knowledge that the Commission had not yet approved the contract and that the Industrial Group had raised objections to the selected TPA. The Industrial Group contends that the apparent rationale (*i.e.*, that the programs be in place by December 31, 2010) no longer justifies the Movants' decision as that date has been suspended. The Industrial Group argued that such

grounds, on their own, should be sufficient to deny, or at least severely restrict, the Movants' demand for deferred accounting treatment.

The Industrial Group argues that if deferral of the costs is permitted, the amount deferred should be subject to subsequent and continued review for prudence and reasonableness, as was the case in *Indiana Bell*, Cause No. 39948, p. 24, including a meaningful opportunity to review and allocate any deferred expenses between ratepayers and shareholders. The Industrial Group further argued that the Commission's own DSM regulations call for such a review, citing to 170 IAC 4-8-5(c) and 5(e).

5. Movants' Response to Industrial Group's Hearing Brief. The Movants agreed with the Industrial Group that approval to defer costs should not be a license to incur imprudent costs and ultimately recover those costs from ratepayers, but they noted that the utilities' ability to control the costs incurred by the TPA is very different from the normal costs incurred by utilities. While utilities generally decide to incur whatever level of costs they believe to be prudent with the risk of disallowance for costs found to be imprudent or unreasonable by a regulator, the Phase II Order requires Movants to implement the Core Programs through a TPA selected by the DSMCC. The Movants noted that under this paradigm, they have neither a choice about incurring the costs nor direct control over the level of costs incurred. The Movants did not believe that requiring them to "put some skin in the game" by risking non-recovery of mandated costs would serve the purpose of controlling costs under these circumstances because the Respondents cannot individually control the costs. In its Phase II Order, the Commission created the DSMCC and provided voting rights to both utilities and consumer advocates to oversee implementation of the Core Programs to keep costs in check. The Movants noted that there is further opportunity for dissenting members to appeal to the Commission, as the Industrial Group has done. Under this rubric, the Movants did not believe the subsequent prudence review sought by the Industrial Group is necessary with respect to the TPA costs.

The Movants also responded to the circumstances cited by the Industrial Group as warranting denial of the deferral request or shifting risk to the Movants of subsequent disallowance. They explained that their decision to incur the start-up costs for the Core Programs in advance of Commission approval resulted from the mandate in the Phase II Order and the April 22, 2010 Docket Entry to make the Core Programs available through the TPA by December 31, 2010. The Movants stated the undisputed evidence establishes that incurring start-up costs as early as October, 2010 was necessary to ensure that the TPA had the ability to offer Core Programs by December 31, 2010. Moreover, Movants argue the suspension of the deadline does not render incurrence of the costs imprudent because the Movants could not have known at the time the costs were incurred that the suspension would be issued. No suspension had been requested at the time Movants incurred the costs. Movants note that the prudence standard requires the Commission to "review the circumstances as they existed considering what was known or should reasonably have been known at the time of the actions" and that the Commission "not engage in a hindsight analysis." *Duke Energy Indiana, Inc.*, Cause No. 38707 FAC76 S1 at 16 (Oct. 21, 2009). The Movants also did not believe that the Industrial Group's initial objection warranted disregarding the regulatory risk faced by the Movants of not having the Core Programs available through the TPA by December 31, 2010. That initial objection was rejected by the Commission's October 19, 2010 docket entry.

6. Commission Discussion and Findings. Our April 23, 2008 Phase I Order in Cause No. 42693 ("Phase I Order") found that "it is unmistakable that the current procedure, in

which jurisdictional utilities consider DSM as part of their IRPs, and propose DSM programs to the Commission at their discretion, has failed to lead to the creation and implementation of creative, effective, predictable, and comprehensive DSM Programs throughout the State.” Phase I Order at 29. We set about to remedy this and other concerns about DSM in Indiana in our Phase II Order. One remedy was to require statewide Core Programs provided through a TPA that was to be selected through a Commission-reviewed RFP issued by the DSMCC and approved by the Commission. The Phase II Order contemplated that jurisdictional utilities would offer Core Programs by December 31, 2010 and our April 22, 2010 Docket Entry in this Cause established a schedule to be included in the RFP requiring TPA implementation of the Core Programs by December 31, 2010.

The background is pertinent to the request by the Movants to defer, for subsequent recovery through rates, both start-up costs (some of which have already been incurred by the TPA and EM&V selected by the DSMCC) and operation costs assessed the Movants by the TPA and EM&V. While each of the Movants has initiated proceedings before us requesting authority to recover these and other costs resulting from implementation of the Phase II Order, this request for authority to defer the TPA and EM&V costs, for subsequent recovery through rates, was driven by the need to incur start-up costs and potentially operating costs prior to the resolution of their individual cost-recovery proceedings in order to meet the Phase II Order implementation deadline. The primary controversy in this proceeding relates to the incurrence of start-up costs Movants incurred prior to our approval of the TPA and EM&V agreements. While our approval of those agreements was originally expected to occur by November 19, 2010, objections to the TPA by the Industrial Group have necessitated a delay so that there is an opportunity for evidence and an evidentiary hearing to evaluate objections. We suspended implementation of the Core Programs while these objections are being considered in our November 18, 2010 Docket Entry in this Cause. Movants, however, had already incurred \$802,200 in start-up costs prior to suspension of the implementation deadline. They request authority to defer these costs, plus any additional costs they incur from the TPA and EM&V after we approve the TPA and EM&V agreements but before specific authority to recover these costs through rate mechanisms is received by the Movants.

The Movants disclosed in their Motion and accompanying evidence the necessity of incurring start-up costs from the TPA and EM&V in October of 2010 so that the TPA could implement the Core Programs by December 31, 2010 in accordance with our April 22, 2010 Docket Entry. Joint Exhibit 1 at 1-3. The Movants acknowledged they incurred these costs prior to Commission approval of the TPA and EM&V, which was scheduled to occur on November 19, 2010. *Id.* at 3. However, based on the evidence presented, failure to incur these costs prior to Commission approval of the TPA and EM&V would have rendered it impossible for the TPA to implement the Core Programs by December 31, 2010. The Movants’ Joint Exhibit 1 discloses that the TPA estimated start-up costs in October and November of 2010 would be \$350,000 and \$660,445, respectively. *Id.* at 4. Due to the suspension of the deadline for implementing the Core Programs, Movants and other utilities suspended any further costs from the TPA and EM&V and agreed to cap the costs incurred prior to Commission approval of the TPA and EM&V at \$802,200. *Id.*

The Industrial Group contends that the requested authority should be denied, or severely restricted, because the Movants incurred these costs prior to Commission approval of the TPA and EM&V selected by the DSMCC and with the knowledge that the Industrial Group objected

to the TPA selected by the DSMCC and believed the DSMCC majority failed to support the selected TPA. Hearing Brief at 3-4. We disagree with the Industrial Group that the requested accounting authority should be denied on these grounds. First, the Movants incurred these costs prior to our approval of the TPA and EM&V contracts to comply with the requirement that the TPA's implementation of the Core Programs begin on December 31, 2010. Had Movants not incurred these costs, they risked being held responsible for the failure of the Core Programs to be implemented in accordance with the Phase II Order. We will not penalize Movants for incurring costs intended to allow compliance with the Commission's desire to have the Core Programs implemented by December 31, 2010.

The Industrial Group's only response to the regulatory dilemma faced by the Movants is to say that the implementation deadlines no longer justify the Movants' decision to incur these costs because they are now suspended. However, we do not review Movants' actions with such hindsight analysis. Rather, we "review the circumstances as they existed considering what was known or should reasonably have been known at the time of the actions." *Duke Energy Indiana, Inc.*, Cause No. 38707 FAC76 S1, 2009 Ind. PUC LEXIS 400 at *46 (Oct. 21, 2009). The Movants could not have known that the implementation deadlines would be suspended at the time they incurred the costs. Once the implementation deadlines were suspended, we find Movants took reasonable steps to limit additional start-up costs except as necessary to protect work that has already been done. Joint Exhibit 1 at 4. Movants also agreed to cap the level of costs incurred until we approve the TPA and EM&V contracts at \$802,200. *Id.*

Second, the knowledge of the Industrial Group's objection to the selected TPA does not render the decision to incur these costs imprudent. The Industrial Group's original objection to the TPA selected by the DSMCC was filed on September 17, 2010 and relied on legal grounds that were rejected in an October 19, 2010 Docket Entry. The Movants' knowledge that the Industrial Group disagreed with the TPA selected by the DSMCC did not eliminate the implementation deadline imposed on them or provide them an alternative to incurring these costs to ensure compliance with that deadline.

Third, we fail to see how the alleged "evidentiary failure to support the selection of the preferred TPA" has any bearing on the request to defer these costs. Hearing Brief at 4. We note initially that this is the Industrial Group's view of what has been presented to us and is not based on any conclusion we have reached. Moreover, we need not address the sufficiency of the evidence submitted in support of the TPA selection because we have suspended the implementation deadlines to allow precisely the more detailed evidentiary submission and hearing the Industrial Group indicated was necessary in its Redacted Minority Report Opposing Approval of Third Party Administrator Contract submitted on November 1, 2010.

Finally, as pointed out by the Industrial Group, we have previously recognized deferrals are extraordinary remedies and the Commission must necessarily balance the interests of the utility and its ratepayers. Based on the requirements imposed on jurisdictional utilities by the Commission's Phase II Order with respect to the offering of Core Programs and the evidence presented herein, the Commission finds it to be reasonable and in the public interest to allow the Movants to defer costs reasonably and appropriately assessed by the TPA and EM&V. We note that our decision in this matter is consistent with the Commission's decision to authorize deferral of costs in *Joint Petition of Duke Energy Ind. Inc., et al.*, Cause No. 43426, 2008 Ind. PUC LEXIS 388 at *66-71 (Phase I Order, Aug. 13, 2008), wherein the utilities were members of the Midwest ISO (which the Commission had previously authorized and encouraged) and were

going to be incurring charges due to the start of the Ancillary Services Market in the Midwest ISO.

Because we are not rejecting the Movants' request to defer the TPA and EM&V costs for subsequent recovery, we turn to the Industrial Group's request that we specify that any deferred amount is subject to subsequent and continued review for prudence and reasonableness as we did in *Indiana Bell Tel. Co.*, Cause No. 39348, 1992 Ind. PUC LEXIS 409, *98-99 (Dec. 30, 1992). In *Indiana Bell*, we authorized utilities to create a regulatory asset for the portion of their booked costs for post retirement benefits other than pensions that exceeded the cash basis expense of such benefit. A change in accounting rules required the utilities to change the book cost recognized for these expenses. *Id.* at *5-9. We noted there that "to the extent such utilities continue to provide reasonable benefits to their retirees at reasonable costs, it is highly probable that such regulatory assets will be recovered over time through revenue collected from ratepayers as a part of Indiana's ratemaking and regulatory process." *Id.* at *87

The circumstances here are very different than in *Indiana Bell*. The costs at issue in *Indiana Bell* fit the traditional regulatory paradigm recognizing that utilities may incur whatever level of costs they choose but will face disallowance of any costs we find imprudent or excessive. *City of Evansville v. Southern Ind. Gas and Elec. Co.*, 339 N.E.2d 562, 569 (Ind.Ct.App. 1975) ("While the utility may incur any amount of operating expenses it chooses, the Commission is vested with broad discretion to disallow for rate-making purposes any excessive or imprudent expenditures.") However, in this case the Movants are required to incur these costs by our Phase II Order and have only indirect control over the level of costs incurred. The DSMCC selects the TPA and EM&V and is responsible for maintenance of these programs, while the Commission prescribes the Core Programs that must be available. Phase II Order at 36, 42. The Movants actively participate in the DSMCC, but no individual Movant can control the costs that are imposed upon them by the decision of the DSMCC.⁵

The Movants, who actually contract with and pay the invoices issued by the TPA and EM&V, are responsible for reviewing and challenging any costs that are inconsistent with the contracts we ultimately approve. To the extent a Movant fails to object to an invoice that is erroneous or bills for items that violate the agreements, recovery of such costs in a Movant's individual cost-recovery proceeding may be found to be imprudent or unreasonable and not allowed. Movants indicated in their response to our December 7, 2010 docket entry that they required the TPA and EM&V to estimate the start-up costs, compared the estimates to the costs for other bidders and negotiated contract provisions limiting expenses by excluding recovery for items like first class domestic airfare or renting luxury vehicles. Based on this evidence, we conclude that the start-up costs incurred in October and November of 2010 by Movants were prudent and reasonable.

We find that the Movants prudently incurred start-up costs from the selected TPA and EM&V to ensure that the Core Programs could have been available by December 31, 2010 absent the subsequent events that led to our suspension of these deadlines. The Movants have capped those expenses at \$802,200. We find the Movants shall each be authorized to defer such

⁵ We acknowledge that a Movant or other participant in the DSMCC can object to the majority's decision. The Industrial Group has invoked such right. Such objection, however, is not a unilateral veto and offers no presumption that we will not approve the decision of the DSMCC majority.

expenses, book them as a regulatory asset and seek recovery of those costs through their pending DSM rate mechanisms. It is also possible that Movants will incur future TPA and EM&V costs prior to the receipt of authorization to recover those costs through rate mechanisms. To the extent those additional costs are incurred after we approve the TPA and EM&V contracts, Movants shall each be authorized to defer such expenses, book them as a regulatory asset and seek recovery of any authorized costs through their pending DSM rate mechanisms.

We note that nothing in this Order shall be deemed as pre-determining the merits of the Industrial Group's objection to the TPA selected by the DSMCC majority. Under the circumstances faced by the Movants, their agreement to incur start-up costs for the TPA and EM&V in advance of the timeline established for approval in our April 22, 2010 Docket Entry was reasonable and prudent to ensure that the Movants were in a position to have a TPA implement the Core Programs by December 31, 2010. Incurrence of these costs was reasonable even if the Commission ultimately rejects the TPA selected by the DSMCC given the implementation mandates that Respondents faced.

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

1. Movants' request to defer, for subsequent recovery through rates, the start-up and operation costs identified herein and any additional costs reasonably and appropriately assessed by the TPA and EM&V after Commission approval of the selected TPA and EM&V, but prior to the resolution of a Movant's individual cost-recovery proceeding, shall be and hereby is approved.

2. Movants shall be and hereby are authorized to create a regulatory asset using FERC CFR account 182.3 to book the TPA and EM&V costs identified in Finding Paragraph No. 6 for accounting purposes until such costs are approved for recovery through Movants' DSM rate mechanisms.

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

ATTERHOLT, LANDIS AND ZIEGNER CONCUR; MAYS NOT PARTICIPATING:

APPROVED: JAN 26 2011

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



Brenda A. Howe

Secretary to the Commission