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STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

**VERIFIED PETITION OF DUKE ENERGY)
INDIANA, INC. SEEKING (1) APPROVAL OF)
AN ONGOING REVIEW PROGRESS)
REPORT PURSUANT TO IND. CODE §§8-1-)
8.5 AND 8-1-8.7; AND (2) AUTHORITY TO)
REFLECT COSTS INCURRED FOR THE)
EDWARDSPORT INTEGRATED)
GASIFICATION COMBINED CYCLE)
GENERATING FACILITY (“IGCC)
PROJECT”) PROPERTY UNDER)
CONSTRUCTION IN ITS RATES AND)
AUTHORITY TO RECOVER APPLICABLE)
RELATED COSTS THROUGH ITS)
INTEGRATED COAL GASIFICATION)
COMBINED CYCLE GENERATING)
FACILITY COST RECOVERY)
ADJUSTMENT, STANDARD CONTRACT)
RIDER NO. 61 PURSUANT TO IND. CODE §§)
8-1-8.8-11 AND -12)**

CAUSE NO. 43114 IGCC 9

APPROVED:

FEB 25 2015

ORDER OF THE COMMISSION ON REMAND

Presiding Officers:

David E. Ziegner, Commissioner

David E. Veleta, Administrative Law Judge

On June 8, 2012, Duke Energy Indiana, Inc. (“DEI”) filed its Verified Petition with the Indiana Utility Regulatory Commission (“Commission”) in this Cause. In its Petition, DEI requested: (1) approval of an ongoing review progress report; and (2) authority to reflect costs incurred through March 31, 2012 for the Edwardsport Integrated Gasification Combined Cycle Generating Facility (“IGCC Project”) property under construction in its retail electric rates; and authority to recover certain other applicable related costs through its Integrated Coal Gasification Combined Cycle Generating Facility Cost Recovery Adjustment, Standard Contract Rider No. 61 (“Rider 61” or “IGCC Rider”). An Evidentiary Hearing was convened on January 15, 2013, at 9:30 a.m. in Room 222 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana. The Sierra Club, Citizens Action Coalition of Indiana, Save the Valley, and Valley Watch (collectively “Joint Intervenors”), DEI, and the Indiana Office of Utility Consumer Counselor (the “OUCC”) appeared and participated at the hearing. No members of the general public were present or sought to testify.

The Commission issued an Order on DEI’s Petition on April 3, 2013 (“Commission’s Order”). The Commission’s Order approved the ongoing review progress report for the IGCC

Project and the IGCC Project costs incurred through March 31, 2012 as reasonable. Joint Interveners filed its Notice of Appeal on May 2, 2013. On September 8, 2014, the Indiana Court of Appeals issued an Opinion (“Remand Order”) in the pending appeal remanding the proceeding to the Commission for clarification of certain issues addressed in the Commission’s Order. *Citizens Action Coalition of Ind., Inc. v. Duke Energy Ind., Inc.*, 16 N.E.3d 449 (Ind. Ct. App. 2014).

On February 2, 2015, DEI filed the *Motion of Duke Energy Indiana, Inc. Regarding Proceedings Post-Remand* (“Request”). DEI requested the Commission make additional findings without reopening the record, or set a procedural schedule for the submission of proposed additional findings. On February 12, 2015, Joint Interveners filed its response to DEI’s Request. Joint Interveners requested the Commission deny DEI’s Request and convene an attorney’s conference to discuss how to proceed with supplementing evidence into the record. On February 19, 2015, DEI filed its reply in support of its Request. It is not necessary for the Commission to reopen the record in this cause for taking additional evidence. Instead, consistent with the Remand Order, we issue the following additional findings.

Based upon applicable law and the evidence presented herein, the Commission finds as follows:

1. Notice and Jurisdiction. This cause is pending before the Commission pursuant to the Remand Order. The Remand Order remanded this proceeding to the Commission “[f]or findings as to whether the three-month delay was chargeable to Duke, and if so, what impact that delay had on Duke’s customers’ rates.” *Id.* at 460. Further, the Remand Order remanded this proceeding to the Commission “[f]or a clear statement of the policy and evidentiary considerations underlying its determination regarding Duke’s request that 50% of the Plant be deemed to be in-service.” *Id.* at 462.

2. Commission Discussion and Findings. In the Remand Order, the Court of Appeals seeks additional findings to facilitate judicial review. In accordance with the Remand Order, the Commission enters its findings and conclusion explaining the relief granted. We address each of the issues identified in the Remand Order as follows:

A. Three-Month Delay and Financial Impact. The Court of Appeals concluded in the Remand Order that “[t]he findings were insufficient to support the Commission’s conclusions that Duke was entitled to recover through the IGCC Rider the \$61 million in financing charges incurred during the three-month delay in commissioning the Plant.” *Id.* at 458.

Joint Interveners alleged imprudence on the part of DEI resulting in scheduling delays on the IGCC Project. Furthermore, Joint Interveners sought a disallowance of the financing charges related to the scheduling delays with the IGCC Project. In support of their position, Joint Interveners offered Kerwin L. Olson’s testimony and exhibits. However, to support their allegation of imprudence, Joint Interveners primarily relied on documents created by the General Electric Company (“GE”) covering the time period at issue in this proceeding (“GE

Documents”). The GE Documents include monthly progress reports for the IGCC Project prepared by GE for DEI.

DEI responded to Joint Intervenors’ allegations by offering the prefiled testimony and exhibits of W. Michael Womack. Mr. Womack noted in his prefiled rebuttal testimony that “[p]rojecting an exact date for achieving the In-service and the Substantial Completion milestones is difficult due to the potential for unexpected and unavoidable issues encountered during the remainder of the project.” Pet’r’s Ex. E at 8. Further, Mr. Womack’s testimony was the subject of extensive cross-examination by Joint Intervenors related to the schedule delays with the IGCC Project. Mr. Womack was questioned at length over the various documents related to the IGCC Project. Further, Mr. Womack was asked about specific issues DEI had encountered with the IGCC Project and the actions taken. Mr. Womack testified concerning the IGCC Project progress report and issues relating to start-up, testing, validation, and bulk commodity quantities. He explained that through extensive testing of the IGCC Project, DEI encountered delays in testing and commissioning due to issues that were identified and subsequently corrected.

The facts surrounding the construction of the IGCC Project, as detailed by DEI in the ongoing review that has encompassed this and eight previous semi-annual filings as well as the extensive record in the IGCC-4S1 proceeding, highlights the complexity of the generation technology selected by DEI. Thus, the fact that the schedule was delayed does not in itself mean that DEI acted unreasonably. To the contrary, based on the extensive evidence offered by DEI in this proceeding, we find that DEI’s actions during the review period were not unreasonable. Specifically, we find that the schedule delays did not result from unreasonable actions taken by DEI in light of the complexity of the task being undertaken. In contrast, Joint Intervenors offered very little evidence to support their allegations of imprudence. Instead, Joint Intervenors relied on the GE Documents to support their allegations that DEI acted imprudently during this ongoing review period. However, GE was not a party to this proceeding. Furthermore, no witnesses from GE testified during the proceeding. Thus, the Commission was denied the opportunity to judge the credibility of the statements made in the GE Documents. In addition, an administrative decision may not be based solely upon hearsay evidence. *RAM Broadcasting of Indiana v. MCI Airsignal of Indiana*, 484 N.E.2d 26, 35 (Ind. Ct. App. 1985). Also, we cannot ignore the fact that GE and DEI are currently engaged in arbitration involving the IGCC Project.¹ Therefore, we find it reasonably plausible that the opinions expressed in the GE Documents may be influenced by the ongoing commercial dispute. Mr. Womack expressed the Commission’s concern in his redirect examination when he stated that GE was “[d]oing commercial posturing with their monthly reports....” Tr. of Jan. 15, 2013 hearing at B-24. For the above reasons, we gave the GE Documents limited weight in determining whether DEI acted prudently during this ongoing review period.

¹ On June 27, 2014, in Cause No. 43114 IGCC 4S1, DEI filed Duke Energy Indiana’s Semi-Annual Report on the Status of Construction Litigation Related to the Edwardsport Integrated Gasification Combined Cycle Facility (“Construction Litigation Report”). In the Construction Litigation Report, DEI notes that “[o]n December 11, 2012, Duke Energy Indiana filed an arbitration action against General Electric Company (General Electric) and Bechtel [Power] Corporation (Bechtel) in connection with their work at the Edwardsport IGCC facility. Duke Energy Indiana is seeking damages of not less than \$560 million. An arbitration hearing is scheduled for October 2014.”

Despite the finding above, we address the topic of Joint Intervenors' allegations that the delay led to financing charges of \$61 million. As a threshold issue, there was no evidence purporting to quantify the costs of the delay. Ms. Douglas testified that the construction work in progress financing costs for the IGCC Project were approximately \$20.38 million per month. However, she did not equate this amount with the delay in the schedule. Importantly, the schedule delay in question is the delay of the projected in-service date from September 2012 to December 2012, which would implicate the financing costs incurred from September 2012 to December 2012 as the costs that should be denied for cost recovery. Thus, even if DEI was imprudent during this ongoing review period, there is no evidence in the record that quantifies the impact of the schedule delay in light of the actual costs subject to exclusion.

The dual reviews occurring in this proceeding are highlighted by this fact set. The first review is the progress report review while the second review is the adjustment of rates to recover incurred costs. This proceeding reviewed DEI's actual expenditures for the IGCC Project through March 31, 2012. Thus, the financing costs incurred for which recovery was sought and granted were the financing costs incurred through March 31, 2012. The IGCC Project was not scheduled to be in-service during the review period and therefore the financing costs would be the same during the review period with or without the delay.² We also note that the ratemaking applied to the IGCC Project as authorized by Indiana Code ch. 8-1-8.8 effectively means that the in-service date used for such ratemaking purposes is, in terms of financing costs, not determinative. The application of Construction Work In Progress ("CWIP") cost recovery places the investment financing costs into rates in a manner that is similar to an investment being declared in-service and used and useful. Summarily, there are no financing costs for which recovery was sought in this proceeding that are subject to denial, even if the Joint Intervenors' had prevailed on their allegations.

B. In-Service Date. The Court of Appeals requested in the Remand Order "[a] clear statement of the policy and evidentiary considerations underlying its determination regarding Duke's request that 50% of the Plant be deemed to be in-service." *Citizens Action Coalition of Ind., Inc.*, 16 N.E.3d at 462.

Joint Intervenors argue that DEI's declaration of one half of the IGCC Plant in-service for income tax purposes violates the Settlement Agreement approved in Cause No. 43114 IGCC 4S1. Furthermore, Joint Intervenors request that the Commission only approve any IGCC-9 rates on an interim basis because of DEI's unilateral action.

Ms. Douglas testified during the hearing that:

The Settlement Agreement, I don't recall that it says anything about tax in-service. I think the only thing that it really establishes is what's the criteria for considering the plant in service for regulatory purposes, and it lays out some terms for doing that, one of which is that it must meet the criteria for FERC accounting purposes, and another was that it had

² This does not suggest that no recourse is available in the event actions found to be unreasonable in the review period drive costs that will be incurred outside the review period. One such recourse could be the direction to exclude such costs from recovery when they become reviewable costs.

to have operation on both gas and syngas.... Tr. of January 15, 2013 hearing at B-52.

The Settlement Agreement referenced by the Parties was approved by the Commission on December 27, 2012 and included requirements that DEI had to meet before the IGCC Project would be declared in-service. The entity that ultimately must determine when DEI should declare the IGCC Project in-service for federal income tax purposes is the Internal Revenue Service, not the Commission. The Commission determines the in-service date for ratemaking purposes. Utilities often keep separate books and records designed to address different reporting and regulatory requirements, as is generally the case for tax purposes and for regulatory purposes. To be clear, a utility's taxes due are a cost of service and as such impact the rates that customer's pay, so the influence of such decisions must be understood. Specifically, because the tax conditions of a utility impact the weighted average cost of capital and revenue conversion factors that influence rates ultimately charged to customers, the Commission previously explored and accepted DEI's August 1, 2012 in-service date for tax purposes in Cause Nos. 42061 ECR 19 and ECR 20. These cases were the first to address the IGCC Project's in-service date for tax purposes and its impact on rates. In the August 29, 2012 Order, in Cause No. 42061 ECR 19, the Commission ordered DEI to notify the Commission in a future ECR proceeding and IGCC proceeding when a definite determination of the timing of the in-service date for tax purposes has been made. Ms. Douglas' testimony submitted in this proceeding provided the Commission with the requested notification. Additionally, Joint Intervenors did not question the accuracy of Ms. Douglas' rate calculations. Because the Commission had allowed the impact of DEI's in-service date for tax purposes to be recognized for ratemaking purposes in prior proceedings, and we were not presented with any evidence suggesting a reversal of those decisions, we did not discuss it explicitly in the Commission's Order.

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

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

STEPHAN, HUSTON, MAYS-MEDLEY, AND ZIEGNER CONCUR; WEBER ABSENT:

APPROVED: FEB 25 2015

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



Brenda Howe
Secretary to the Commission