In the
Indiana Supreme Court

Indiana Office of Utility Consumer Counselor, et al.
Appellants,

v.

Duke Energy Indiana, LLC, et al.,
Appellees.

Supreme Court Case No. 21S-EX-432

Court of Appeals Case No. 20A-EX-1404

Indiana Utility Regulatory Commission Case No. 45253

Order

Appellee's Petition for Rehearing is hereby DENIED.
Done at Indianapolis, Indiana, on 5/26/2022.

Loretta H. Rush
Chief Justice of Indiana

Rush, C.J., and David, Massa, and Slaughter, JJ., concur.
Goff, J., dissents with separate opinion.

Goff, J., dissenting from denial of rehearing.

Duke Energy asks this Court to "reconsider its conclusion that the Commission's approval of Duke's deferred coal-ash costs constituted retroactive ratemaking." Pet. for Reh'g at 8. The Court's opinion, Duke submits, incorrectly concluded that the accounting method used to recover these costs is irrelevant, and, by doing so, it "invades specific authority the legislature delegated to the Commission." *Id.* at 15 (citing Ind. Code § 8-1-2-10). The Indiana Energy Association joins as amicus in support of Duke's petition, emphasizing that judicial deference to IURC accounting methods—and the ratemaking implications of those methods—rests on this Court's precedent, not just the Court of Appeals cases the opinion dismissed as non-binding and inapposite. Amicus Br. at 6–7 (citing *Boone Cty. Rural Elec. Membership Corp. v. Pub. Serv. Comm'n*, 239 Ind. 525, 159 N.E.2d 121 (1959)).

Because I agree with these arguments, I would grant Duke's petition for rehearing.

Discussion

To begin with, I acknowledge that "a court's deference to an agency's decision under [the applicable] standard [of review] is appropriate only if no proposition of law is contravened or ignored by the agency conclusions." *Indiana Office of Util. Consumer Counselor v. Duke Energy Indiana, LLC*, 183 N.E.3d 266, 272 (Ind. 2022) (Goff, J., concurring in part and dissenting in part) (internal quotation marks omitted). But here, "the IURC's order violates **no** proposition of law" because "decisions involving the 'accounting practices followed by public utilities are policy determinations committed to the sound discretion of the Commission.'" *Id.* (quoting *NIPSCO v. Office of Util. Consumer Couns.*, 826 N.E.2d 112, 119 (Ind. Ct. App. 2005)). And "the Commission's authority to determine a utility's accounting practices ascends from the legislature itself." *Id.* at 73 (citing I.C. § 8-1-2-10 and *Boone Cty.*, 239 Ind. at 536, 159 N.E.2d at 126).

The Court's opinion dismissed these points, summarily concluding, with no reference to *Boone County*, that it's "not bound by court-of-appeals

precedent." *Id.* at 269. And even if it agreed with that precedent, the Court added, those cases "simply said that reasonable accounting practices are left to the commission's discretion." *Id.* In reaching this conclusion, the Court framed the issue not as "whether Duke used a proper accounting method to track its remediation costs in its balance sheet," but, rather, "whether the commission can approve reimbursement for a deferred asset, even one properly accounted for, without violating the statutory bar against retroactive ratemaking." *Id.*

The Court's opinion, in my view, mistakenly omitted discussion of *Boone County*, concluding—incorrectly—that the IURC's statutory authority to determine accounting methods for regulated utilities is irrelevant to the rate-making process.

I. The Relevance of *Boone County*

The dispute in *Boone County* arose from a tax provision authorizing accelerated depreciation of specified property "over a five-year period instead of over the normal expected life of the property." 239 Ind. at 535, 159 N.E.2d at 126. The Public Service Commission (now the IURC) approved "an accounting procedure by the utility to set aside a reserve out of the income tax savings" that would satisfy future-year "increased taxes because of no allowance for the depletion or depreciation in years beyond the five-year period." *Id.* at 535–36, 159 N.E.2d at 126. Appellants "t[ook] issue with the methods used by the Commission in computing its figures in its finding as to what is a reasonable net operating return for the purpose of rate fixing." *Id.* at 532, 159 N.E.2d at 124. Specifically, the appellants argued that "the Commission was in error in the treatment of accruals for deferring federal income tax," insisting further that "the full benefit of the tax savings" should be recognized in utility income during the five years in which it was received. *Id.* at 535–36, 159 N.E.2d at 126.

In a clear show of judicial deference, this Court emphasized that the "right and power of the Commission to authorize an accounting system under which reserves are set up for future tax increases, losses or contingencies **is an administrative matter and, so long as such procedure is within reason and prudence, the trial court has no right to interfere**."

Id. at 536, 159 N.E.2d at 126 (emphasis added). "The Commission is fully authorized by statute to determine the accounting system and procedure to be followed," the Court added, ultimately finding "no merit" in the appellant's argument "that the Commission was in error in excluding from income the provisions for deferred federal income tax." *Id.* at 536–37, 159 N.E.2d at 126.

Despite the clear import of *Boone County*, the Court found no need to address it. And by failing to address it, the Court's opinion suggests—incorrectly, in my view—that the IURC's authority to determine accounting methods for regulated utilities is irrelevant to the rate-making process.

II. The Ratemaking Implications of Regulatory Accounting Standards

Contrary to the Court's suggestion, a utility's method of accounting has a direct and inextricable impact on the ratemaking process. As the Court in *Boone County* observed, the "accounting figures" the Commission "relied upon" ultimately determined "the necessary figure for a fair return for future operations." 239 Ind. at 529, 159 N.E.2d at 123. *See also N. Indiana Pub. Serv. Co. v. Indiana Office of Util. Consumer Counselor*, 826 N.E.2d 112, 119 (Ind. Ct. App. 2005) (pointing to the "ratemaking significance" of the "applicable accounting standard"). While the Court's opinion on transfer recognizes the IURC's statutory authority to determine the proper system of accounting, *see Duke Energy*, 183 N.E.3d at 269 (citing I.C. § 8-1-2-10), it ultimately fails to recognize "the ratemaking implications" of the IURC's chosen method of accounting, *see Int'l Bhd. of Elec. Workers, Local Union 1395 v. Indianapolis Power & Light Co.*, 920 N.E.2d 721, 725 (Ind. Ct. App. 2010) (deferring to the IURC's "decision as to the accounting treatment of [certain] costs and the ratemaking implications of that treatment").

To be sure, the Court in *Boone County* noted that the regulatory accounting system determines "the necessary figure for a fair return **for future operations**," 239 Ind. at 529, 159 N.E.2d at 123 (emphasis added), suggesting, as the Court's opinion does here, that a utility may **not** recover

costs "adjudicated under a prior rate order," *Duke Energy*, 183 N.E.3d at 267. But while the IURC's 2004 rate order expressly covered coal-ash costs, that order did not—indeed could not—contemplate the **additional** costs of complying with **new** federal and state environmental remediation regulations. *Compare In Re PSI Energy, Inc.*, 234 P.U.R.4th 1, 58 (Ind. U.R.C. May 18, **2004**) (noting the assumption at the time "that the only thing necessary to decommission an ash pond was to pump it dry and cover the ash pond with approximately two feet of soft soil"), *with* 40 C.F.R. § 257.102 (**2015**) (requiring either the installation of a final cover system for a CCR or the removal and decontamination process of a CCR unit according to federal guidelines).

In the end, the legislature has spoken on the issue presented here. Our utilities-regulation code mandates the IURC to "consider **any system of accounting** established by any federal law, commission or department and any system authorized by a national association of such utilities." *Duke Energy*, 183 N.E.3d at 273 (Goff, J., concurring in part and dissenting in part) (quoting I.C. § 8-1-2-10). And the system of accounting used here—deferred-asset accounting—"enjoys sanction by both state and federal law." *Id.* at 273 n.1 (citing applicable state and federal regulations). Had our legislature considered that method of accounting as a violation of the prohibition against retroactive ratemaking, it could have made that clear by excluding it from our utilities-regulation code. *See Town of Merrillville, Lake Cnty. v. Peters*, 655 N.E.2d 341, 343 (Ind. 1995). But it didn't. And with no such exception, the IURC acted within its legal guardrails, ultimately calling for judicial deference. *See Boone Cnty.*, 239 Ind. at 529, 159 N.E.2d at 123 (showing deference to the "accounting figures" that the Commission "relied upon" in "arriving at the necessary figure for a fair return for future operations"). By reaching a contrary conclusion, the Court's opinion, in my view, "invades specific authority the legislature delegated to the Commission." *See* Pet. for Reh'g at 15.

Conclusion

Because the opinion omitted discussion of relevant precedent from this Court, and because it failed to properly consider the ratemaking

implications of regulatory accounting methods, I would grant Duke's petition for rehearing. *See State Bd. of Tax Comm'rs v. Stanley*, 231 Ind. 338, 340, 108 N.E.2d 624, 624 (1952) (rehearing petition may point out errors or omissions on questions properly presented but "overlooked or improperly decided" by the court) (internal citation and quotation marks omitted).