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Re: Joint Utilities' Comments Regarding IURC's Proposed Procedural Efficiency Improvements

The Joint Utilities[1] appreciate the Indiana Utility Regulatory Commission's ("Commission") desire to improve procedural efficiency in docketed proceedings. To that end, we are amenable or not opposed to several of the Commission's proposals. However, we also continue to have concerns about certain specific items related to this effort that could have unintended consequences, both legally and practically. Our comments are noted, as follows. Please note that the Commission's proposals are in **bold**, and the Joint Utilities' comments are in *italics*. Proposals which the Joint Utilities have not commented on are those to which we do not object or have no comments or questions.

The Joint Utilities also recommend that the Commission give parties sufficient lead time to adapt their practices and schedules to meet any new requirements – at least six (6) months lead time is recommended.

I. In all docketed Proceedings:

A. The Petitioner must provide supporting testimony, in addition to a petition.

Utilities' Comment: In the interest of administrative efficiency, we recommend that service territory modification cases be excepted from this requirement, as such cases do not require witnesses or an evidentiary hearing. Additionally, in cases where a motion for confidential treatment is filed, it should be recognized that the confidential testimony will not be filed at the same time as the petition; rather, it will be filed once the Commission rules on the motion for confidential treatment.

B. The Petitioner should provide more information in its case-in-chief, including, but not limited to:

[1] The Joint Utilities consist of the following utilities: Citizens Energy Group, Duke Energy Indiana, Indiana Michigan Power Co., Indianapolis Power & Light Co., Northern Indiana Public Service Co., and Vectren/Centerpoint.

1) **Visibly listing in the petition the estimated dollar amount and percentage increase for which cost recovery is being requested;**
Utilities' Comment: We will endeavor to provide in cost recovery petitions (or attachments to petitions) the estimated dollar amount and average percentage increase being requested in such proceeding. However, this requirement may not be as simple as one might think in all cases. Would this require only the overall total on dollar and percentage basis? More detailed information, e.g., average retail rate impact estimate, estimate by major customer classes, breakdown between volumetric and other charges, is better suited to presentation via an attachment that is generally included in the utility's case-in-chief. Further, it is important that this directive should be understood to be based on circumstances and factors known at the time the estimate is made, and should not be interpreted or applied to serve as a cap on requested relief or recovery. Also, this rate impact estimate must be able to be updated or amended as the proceeding progresses, without requiring an amendment of the petition or a delay or change in any procedural schedule. And, the petitioner should be allowed to include this information in its case-in-chief testimony rather than in the petition itself (with an indication in the petition as to where in testimony to find it).

A suggested revision to the proposed guidance is as follows:

Visibly listing in the petition, filing index or other filed attachment, the estimated overall dollar amount and average percentage increase for which approval of an immediate change to rates and charges is being requested in the order on the petition.

2) **Answers to questions asked in any pre-petition meetings with Commission staff, the Office of Utility Consumer Counselor ("OUCC"), and other potential parties; and**
Utilities' Comment: As a legal matter, a petitioner should not be required to include in its case-in-chief anything beyond what is necessary to prove a prima facie case. As a practical matter, this directive could result in misunderstandings and unnecessary arguments as to what question was asked and whether a petitioner has complied with the directive. Additionally, for rate cases, Ind. Code 8-1-2-42.7(b) defines and prescribes the contents of a utility's case-in-chief, In addition, this proposal still presents burden of proof issues. The prima facie standard of proof and the requirements for what must be included in rate cases have long been established.[2] As long as the petitioner meets its burden of proof, it has and must retain the ability to control the contents of its case-in-chief. Other parties must be required to meet their burden by presenting

[2] *See, e.g., In Re Indiana Michigan Power Co.,* Cause No. 39314 (IURC; Nov. 12, 1993); *City of Terre Haute v. Terre Haute Water Works Corp.*, 180 N.E.2d 110 (Ind.App. 1962); Ind. Code § 8-1-2-48.

their own issues and concerns in their respective cases-in-chief. Indeed, permitting other parties to shape the evidence that a petitioner is mandated to include in its case-in-chief is fundamentally unfair and raises serious due process issues. We assume that the Commission's proposal is not designed to impact these legal issues.

For practical reasons, as well, we strongly recommend that this directive be eliminated. Note that many pre-petition meetings and communications are considered by the parties to be confidential settlement communications. Under no circumstances should the Commission require confidential settlement discussions (which are inadmissible) to be included in an evidentiary record.

It is also important to keep in mind that such questions from parties can always be addressed through the discovery process (to the extent relevant and not otherwise objectionable). It is also important to note that this directive, if adopted and applied broadly, could have a chilling effect and result in fewer pre-petition meetings. Petitioners will be less inclined to offer pre-petition meetings out of concern they may be asked questions that are outside the scope of their cases-in-chief and that would normally be objectionable as part of the discovery process. Also, petitioners will be reluctant to agree to pre-petition meetings because of the challenges inherent in documenting all of the questions asked that must therefore then be addressed.

Finally, having to address pre-petition questions has the potential to delay the preparation and filing of cases-in-chief, which are generally substantially complete at the time pre-petition meetings are held.

If this directive is not eliminated, we strongly recommend that this proposal be modified to encourage, but not require, petitioners to consider addressing in their case-in-chief testimony major issues identified by other parties prior to filing, without disclosing any confidential settlement discussions. We also suggest any such directive make clear it is not intended to impose any new requirements that would change established statutory or case law regarding a petitioner's burden of proof.

3) Workpapers as Excel spreadsheets with formulas intact.

C. An index of issues should be included:

1) In cases in which the utility has more than 8,000 customers and the filing party has at least four witnesses providing testimony and at least two of those witnesses are providing testimony on the same issue(s);
Utilities' Comment: We support the index requirement for base rate cases. However, we do not believe indexes should be required for other cases,

particularly for smaller cases (i.e., five or fewer witnesses) or for ongoing tracker cases. In addition, the Commission's proposal is problematic because there may be different views as to whether two witnesses are providing testimony on the same issue (e.g., one witness addressing the engineering aspects of a project, and another witness addressing ratemaking for the project). Accordingly, we recommend that an index of issues be required in all base rate cases, but that such an index be encouraged but not required in other significant non-tracker cases having more than five witnesses.

2) **By all parties in cases that qualify under C(1) above; and**

3) **Using the example of the Indiana Michigan Power Company rate case (IURC Cause No. 45235).**

D. All hearings and pre-hearing conferences may be conducted electronically:

1) **if no party objects; and**

2) **at the discretion of, and determination by, the Presiding Officers, on a case-by- case basis.**

E. Proposed orders should:

1) **Provide facts used to support the findings and cite those facts, providing the exhibit name/designation and page number;**

2) **Limit the recitation of facts to those that are the substantive evidence upon which the findings that support the ultimate conclusion(s) are based;**
Utilities' Comment: This directive should require at most a good faith effort to limit the recitation of facts to those that are the substantive evidence upon which findings are based; the Administrative Law Judge or Commission may have different views about what facts are necessary to support ultimate findings.

3) **Not contain any new evidence or new arguments (i.e., not submitted or made during evidentiary hearing); and**
Utilities' Comment: We agree that proposed orders should not attempt to include new evidence. However, it is entirely appropriate for proposed orders to include legal arguments which have not been made or presented in witnesses' testimony, and such should not be prohibited or limited. Proposed orders and briefs, not witness testimony, are the most appropriate channels for legal arguments.

A suggested revision to the proposed guidance is as follows:

Not contain any new factual evidence.

4) **Not include settlement agreements entered into after the record is closed.**
Utilities' Comment: We believe settlements should be encouraged, even those reached after the evidentiary hearing and memorialized in the form of an agreed upon proposed order. This is consistent with Indiana law, which favors settlements. See, e.g., J.W. v. State, 113 N.E.3d 1202, 1206 (Ind. 2019); Jonas v. State Farm Life Ins. Co., 52 N.E.3d 861, 868 (Ind. Ct. App. 2016). While we understand the Commission's preference for settlement agreements to be presented before an evidentiary hearing, there are cases where settlement or agreement on some or all issues simply does not happen prior to the evidentiary hearing. And such settlements or agreements, although later in the process, can still reduce litigation risk for the parties, and create efficiencies for the Commission. Accordingly, we recommend that the Commission allow parties to narrow the issues even after the evidentiary hearing, including memorializing such through proposed orders. If parties can, after the evidentiary hearing, reach consensus on some or all issues and submit a full or partial agreed upon proposed order, the Commission should welcome that.

II. Rate case proceedings:

A. MSFRs should be amended to:

1) **Contain requirements for future test year;**
Utilities' Comment: We agree that separate and distinct requirements for historic, hybrid, and future test years will be helpful. However, particularly as we all have some experience with future test year proceedings now, the Commission should not require full documentary support/MSFRs for both a future test year and an historic base period.

In addition, it should be noted that the MSFRs cannot be changed absent a rulemaking process. As a part of such process, the Joint Utilities will want to make sure that we have input into any proposed requirements as they may impact us.

2) **Require workpapers, testimony, and schedules to be in the same order as listed in the MSFRs or index/references are provided, so the workpapers, testimony, and schedules can be located easily;**
Utilities' Comment: It is not always feasible to use the same ordering as listed in the MSFRs for testimony, as some utilities organize their rate case testimony by issue. Accordingly, this directive should not apply to testimony. However, the Joint Utilities are amenable to providing a detailed index with references showing witness/topics/workpapers/schedules.

3) **Extend the timeline for review and requirements for completeness;**
Utilities' Comment: This directive is problematic, given the consequences of failing to meet completeness requirements (per below directive). If this timeline is extended, we recommend a relatively minor extension (e.g., from 20 days to 30 days). Further, such extension should not be allowed to impact the 300-day rate case timeline, so long as the lack of completeness is cured within the requisite time period for such. Finally, in order to avoid ambiguity and disagreements about completeness, we recommend that completeness requirements be well defined, and perhaps include a definitive checklist.

4) **Provide for a consequence for failure to file a complete case-in-chief (for example, the timeline for the rate case would not start until the filing of a complete case-in-chief as defined in the MSFR rule); and**
Utilities' Comment: Some consequences can be oversights that can be fixed quickly (for example, if one minor workpaper is not filed or if it's not readable) and should not jeopardize the 300-day rate case schedule. The utility should be able to receive a deficiency notice from the IURC and be able to respond promptly and not delay the timeline for the case in this example. Further, the MSFR rules already provide the Commission the authority to extend the procedural schedule, thus additional consequences are not necessary. However, if additional consequences are promulgated, then the consequences should depend on the severity of the deficiency; and deficiencies that are cured promptly should not affect the rate case timeline.

Notably, the timeline for the ability to implement interim rates in a rate case is established by Ind. Code § 8-1-2-42.7(e), which provides for a 300-day timeline that commences upon the utility's filing of its case-in-chief. To the extent the above items in III(A)(3),(4) interfere with or are seeking to potentially extend the timeline as found in that statute, the Joint Utilities object, because not only are we opposed to any potential extension of the timeline, but such a change to a statutory requirement cannot be made by a rule modification.

5) **Possibly update technical requirements and eliminate those no longer necessary.**
Utilities' Comment: With the caveat that we would need to understand which technical requirements would be updated and in what manner, we are supportive of eliminating requirements that are not useful to the Commission or the parties.

B. **Accounting Schedules – testimony and workpapers shall present three specific schedules – Sch. 1 Revenue Requirements, Sch. 4. Net Operating Income, and the Gross Revenue Conversion Factor in the format of municipal and investor-owned utility strawman schedules, which are posted on the Commission's website for**

comment and feedback. Specifically, Sch. 4 *Pro Forma* statement should be detailed by each revenue and expense category. Every adjustment to revenues and expenses should at a minimum include the pro-forma, test year, and adjustment amounts, as well as reference(s) to where more detail of the calculation may be found. (Note: We understand that significant resources have been expended in the development of utility rate accounting schedules; therefore, in addition to the three required schedules, the utility may also submit their preferred style of accounting schedules containing all necessary items for the rate case.)
Utilities' Comment: It is not clear what format the Commission would propose for a utility that uses many other accounting schedules and workpapers beyond the three specific schedules. In addition, we have several technical questions about the Commission's proposals. We recommend that a discussion among technical rate experts would be helpful in this area before requirements are finalized.

Further, some schedules attempt to resolve contested issues or are otherwise inconsistent with existing precedent. For example, Schedule 1 contemplates the use of an original cost rate base, which is inconsistent with the fair value statute, Ind. Code § 8-1-2-6. Any attempt to resolve contested issues through the use of consistent accounting schedules is inappropriate and should be rejected.

Additionally, the use of consistent accounting schedules should recognize that there will be exceptions to this "one size fits all" approach due to differences amongst the utilities. It is important to note that consideration will need to be given to differences between investor owned utilities and municipal/nonprofit ratemaking requirements and formulas, as well as differences (and in some cases, limitations) among utility accounting systems which may constrain a utility's ability to produce accounting schedules in prescribed formats. Further, the examples of schedules provided by the Commission are from water and wastewater utilities, and therefore do not address certain things specific to energy utilities. Accordingly, at a minimum, any consistent schedules should include provisions for how to address utility specific items.

Finally, we have a few minor/detailed comments and questions on the schedules:

- *Schedule 1 Revenue Requirements:*
  - *Line 5 should say NOI increase required, to be consistent and clear*
  - *Line 9 add the word "Gross" before operating revenues, to be clear*
- *The example provided on the strawman for the gross revenue conversion tab would need modification specific to the type of utility: for instance, removal of the URT and URT revenues collected that are taxable for state income taxes, etc.*
- *The strawman had both alpha and numbers in the labeling so a consistent method should be used. If alpha is used, a common naming scheme should be* used.

III. Pilot programs should:

A. Provide necessary information;
Utilities' Comment: It would be helpful to have more guidance and clarity regarding what is considered to be "necessary information."

B. Describe the use of objective criteria for evaluation of the success or usefulness of the program;

C. Allow for reasonable flexibility; and
Utilities' Comment: We recommend that the Commission clarify what is meant by "reasonable flexibility."

D. Include testimony regarding why the program benefits all of the utility's customers, not just the participants (i.e., why it is in the public interest of all of the utility's customers).

Thank you for the opportunity to comment.

Respectfully submitted,

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