IURC RM #11-05

RESPONSE TO RULEMAKING COMMENTS ON VOLUNTARY CLEAN ENERGY PORTFOLIO STANDARD PROGRAM PROPOSED RULE

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SUBMITTED BY

INDIANA INDUSTRIAL GROUP

The Indiana Industrial Group, by counsel, submits the following response to the comments and redlined strawman submitted by various stakeholders in furtherance of the Commission's adoption of rules under Ind. Code 4-22-1 to establish the Indiana voluntary clean energy portfolio standard program (the "Program"). The Industrial Group appreciates the Commission's consideration and welcomes any questions or comments.

I. Response to the Comments of the Indiana Energy Association.

Introduction

As discussed below, the proposed changes to the strawman submitted by the IEA are contrary to the CHOICE program goals and the public interest. They would:

(A) Eliminate any requirement that a utility provide basic information regarding generation options, cost-benefit analysis and estimated program costs and risks in connection with its CHOICE program application (*Comments 4*);
(B) Entitle a utility to collect financial incentives and non-refundable trackers immediately upon application approval with no additional investment, without obtaining any of the CPS goals, without complying with its own CPS plan, and without disclosure of risks of higher program costs (*Comments 7, 8, 11, 13*); and
(C) Eliminate any obligation to disclose to the Commission a utility's belief that its rates and charges under the CHOICE program are unjust or unreasonable (*Comments 12*).

These proposed changes, taken together with the fact that utilities need do little- if anything – to achieve CPS Goals based their current energy resources, represents a radical expansion of tracked costs and shareholder incentives with little or no

additional investment or risk, and without any duty to disclose how unjustifiable, sub-optimal or inefficient its plan may be. They should therefore be rejected.

Specific Responses

Response to IEA Comment #4: The Program Application Requirements Are Reasonable and Necessary.

The IEA complains that 170 IAC 17-4-2 sets forth "overly restrictive" program application requirements that would require utilities to provide basic information about its CHOICE plan, such as other generation options considered or information showing that its plan that its plan resources are the optimal and economic choices. For example, the IEA rejects the Commission's requirement to provide a cost-benefit study or IRP modeling, and objects to providing estimates of project costs -- despite the fact that those same project costs would be recoverable from ratepayers via a tracker immediately upon approval of the application (See proposed rule 170 IAC 17-4-4(e)). As such, the IEA appears to be advocating the granting of an incentive and tracker recovery with no requirement that a utility disclose what those program costs are, or any analysis of the reasonableness or prudency a utility's plan for achieving CPS Goals.

When asked during the stakeholder meeting to further describe why the requirements set forth in the strawman were overly burdensome, the IEA did not respond directly, but instead suggested that all questions as to other generation options, cost-benefit analysis, program costs and other factors would be fully addressed through its analysis of ratepayer impact required under 170 IAC 17-4-2-(K). However, without the detailed information required under the strawman rule, neither the Commission nor other stakeholders have any significant basis upon which to assess the factors, assumptions or risks associated with a utility's ratepayer analysis or its conclusions. Moreover, the expedited nature of the proceedings means that ratepayers and other stakeholders will have little time in which to conduct the discovery necessary to test a utility's conclusions.

More broadly, the IEA claims that application requirements exceed the requirements of IC 8-1-37-11(c). However that statute section addresses what determinations the Commission must make in order to approve the application – including a determination that the application is complete and complies with the purpose of the program. It does not address what must be in (or excluded from) the application itself. In order to determine what a utility must include in its application we look to IC 8-1-37-11(a), which leaves it to this Commission to determine the manner and form of the application. In this case, the Commission has properly determined that if a utility desires the significant benefits associated with CHOICE participation, it must supply information relevant to its accomplishment of program goals. Moreover, under IC 8-1-37-11(c)(3) it is the utility's burden of proving to the Commission that the application meets the requirements.

Next, the IEA claims that it is impossible to identify with any degree of certainty the requirements proposed in 170 IAC 17-4-2 (A), (B), (C) and (E) prior to 2025. However, the proposed strawman does not require certainty – rather, it requires a participating utility to set forth its *expectations* in exchange for participation, and the attending incentives and trackers. See subsections A through E ("the manner in which the electricity supplier **expects** to meet the CPS goals"; "identification of the owner, operator or manager of the clean energy resources **expected** to be utilized"; the type of the clean energy resources **expected** to be utilized"; the amount of clean energy **anticipated**…including the clean energy credits that are **expected** to be submitted.") Likewise, the IEA claims that the risk factors listed in (J) are too difficult to quantify and subject the applicant to uncertainty, yet again a review of section (J) reflects the need for "estimates" – not absolute certainty.

Response to IEA Comment # 7: The Consideration of Incentive Criteria is Necessary and Appropriate

Beyond its objection to providing basic information to the Commission, the IEA objects to the Commission's consideration of certain criteria when a utility applies for an incentive. IEA claims that the criteria listed in 170 IAC 17-4-4(c) exceed the language of the Statute. However, IC 8-1-37-13 confers upon the Commission discretion to determine the financial incentive on a case by case basis. That discretion is reflected in the strawman rule, and includes discretion to determine both the applicability and amount of any incentive. Indeed, the criteria set forth in 170 IAC 17-4-4(c) such as avoided capital costs, risk of higher future costs, and existing incentives is both consistent with the enumerated statutory considerations found in IC 8-1-37-13(b) and necessary for the Commission to fulfill its statutory duties thereunder.

Response to IEA Comment #8: Incentives Are Only Appropriate After Obtaining CPS Goals

The IEA seeks financial incentives immediately upon approval of a CHOICE program application. However, this ignores the clear language of Section 12 which states that in order to "qualify for the financial incentives set forth in Section 13 of this chapter, a participating electricity supplier must obtain clean energy to meet the requirements" of the CPS goal. IC 8-1-37-12. Thus, a utility is not even qualified until the goals are obtained. This intention is reflected in each CPG Goal Period wherein the statute talks about the CPS goal having been "obtained" – not "to be obtained" or "in the process of being obtained". Likewise, the definition of "CPS goal" found in IC 8-1-37-5 refers to a goal set forth in 12(a) "that a participating electricity supplier *must achieve*…to qualify for one (1) or more of the financial incentives described in section 13 of this chapter." Additionally, IC 8-37-13(a) makes clear that an incentive is available "whenever the participating electricity supplier *attains* a CPS goal set forth in Section 12(a) of this chapter."

Moreover, because the CPS goals are stated in terms of an average percentage of clean energy over a period of time, the IEA's proposal envisions a mechanism by which neither the Commission nor stakeholder could prove that the average would not be met until the goal period was over. As such, it would impermissibly shift the burden from the utility to demonstrate that an incentive is appropriate through meeting of CPS goals, onto others to disprove that a CPG goal would or could be met. The IEA's references to IC 8-1-37-13(g) goes to when an incentive ends, not when a utility qualifies for an incentive.

Response to IEA Comment #9: Preexisting Clean Energy Resources Should Not be Included

The IEA advocates the inclusion of clean energy resources obtained upon the effective date of Section 16 of SEA 251, claiming that resources procured after that date "may have been obtained in anticipation of meeting program goals." However SEA 251 contemplated this very rulemaking process in which issues such as the applicability of resources to the CHOICE program, and the program applications and incentives, would be determined. Thus, to the extent that a utility obtained resources prior to the effective date of the CHOICE program it did so at its own risk, which was no doubt a carefully calculated in light of then-existing factors. Indeed, the same risk may have been assumed by utilities at any stage of the legislative history of SEA 251 or prior to the effective date of the program when the rules have been established, highlighting the somewhat arbitrary nature of the IEA's proposal.

Response to IEA Comment #12: Utilities Should Be Required to Advise if Program Results in Unreasonable Rates

In addition to proposing that the program and incentive applications be stripped of information relating to program costs and risks, the IEA suggests that a utility be relieved of any obligation under 170 IAC 17-5-2(c) to disclose its belief that its rates and charges resulting from the program have become unjust or unreasonable due. It instead proposes to continue collecting incentives and trackers from the ratepayers over and above its authorized return despite a belief that doing so is unjust and unreasonable, and therefore in violation of its Choice plan. The IEA's position is particularly ironic given the heavy significance the IEA has placed on the Commission's initial determination that the program will not result in an increase in retail rates under 170 IAC 17-4-4 as a basis for not providing information respecting the risk of higher future costs.

Moreover, the IEA misstates the requirement of 170 IAC 17-5-2(c) – it does not place the burden on a participating utility to demonstrate when rates will no longer be just and reasonable. Instead, a utility is required to advise the Commission of if a utility has a reasonable belief that it is no longer in compliance with its Choice Program because of increased rates and charge. It is for the Commission to make the determination – not the utility. Such a reporting requirement is a fair and reasonable

exchange for the benefits of program participation, and furthers both the program purposes and the public interest.

Response to IEA Comment #13: Utilities Should Not Be Permitted to Retain Unjust and Unreasonable Costs

Having proposed the elimination of program cost information from the program and tracker applications, and the elimination of any duty to disclose a utility's belief that its rates and charges have become unjust or unreasonable, the IEA next proposes that any costs incurred by the utility during its continued participation in the program be *non-refundable*. Indeed, the IEA goes a step farther in proposing that even unreasonable and unjust program costs be subject to a utility's authorized rate of return – essentially double-dipping in a poisoned well by earning a return on and return of with respect to incentives that should not have been awarded. The Commission should reject the proposals as overreaching efforts by the IEA to insulate utilities from overcharging the public, even in cases where that overcharging is an intentional act in violation of a utility's own approved CHOICE plan.

Response to IEA Comment #2: The Rule Should Retain the Definitions set forth in IC 8-1-37-4.

170 IAC 17-3-4 sets forth the requirements necessary to meet a CHOICE Program goal. The IEA has proposed elimination of the specific reference to clean energy resources "as defined in IC 8-1-37-4" and inserted in its place two illustrative examples using the more ambiguous term "energy savings". The IIG believes the IEA's proposed change could wrongfully imply an expanded definition of "clean energy resource" as opposed to the specific list "as defined in IC 8-1-37-4," and therefore urges the Commission to reject the proposed change. To the extent that there is "potential for confusion" it can and should be addressed during the application process.

Response to IEA Comment # 3: Expedited Program Application Proceedings should be Retained.

170 IAC 17-4-3 and -6 set forth the scope and procedures for expedited program and incentive application proceedings. The IEA has proposed eliminating both sections because they are "not needed," stating that the Commission's existing Rules of Practice and Procedure addressing MSFR filings "address identical issues". We disagree. 170 IAC 1-5 is generally applicable to general rate case filings, whereas the procedures proposed under the strawman are focused on the unique requirements and challenges of the CHOICE program, provide needed certainty, and should be retained for the benefit of both the utilities and the stakeholders.

II. Response to the Comments of the Office of Consumer Counselor.

The Industrial Group is generally supportive of the comments provided by the Indiana Office of Consumer Counselor ("OUCC"), however it appears that the intended effect of the OUCC's filed comments may not be fully implemented in its redlined document. On page 4 of its comments the OUCC states that by eliminating existing resources from the clean portfolio standard goal under 170 IAC 17-3-4(c), the restrictions on incentives under 170 IAC 17-4-4(d) becomes unnecessary. However, clean energy resources under 170 IAC 17-3-4(c) address the means by which a utility may achieve CHOICE program goals. The OUCC's proposed change does not alter the definition of "Clean energy resource," but merely excludes a certain category of clean coal resource from being used to meet a CHOICE program goal. 17 IAC 17-4-4(d), on the other hand, addresses what clean energy resources may be considered for purposes of approving CHOICE program incentives, therefore the elimination of 17 IAC 17-4-4(d) leaves open the possibility that an incentive may be approved for the pre-existing resource that would not necessarily apply towards a CPS goal. For example, a facility could be built prior to the effective date of the CHOICE program, but produce clean energy both before and after the effective date of the program. 17 IAC 17-4-4(d) precludes incentives based on the former while the OUCC's proposed change to 170 IAC 17-3-4(c) only address the latter.

To clarify this issue, the Industrial Group left the Commission's proposed language intact, and included a change to 170 IAC 17-3-4(c) stating that pre-effective date resources shouldn't apply to the program at all – thereby excluding them from consideration "program costs".

III. Response to the Comments of the Hoosier Environmental Council

The Industrial Group believes that Comment #7 submitted by the Hoosier Environmental Council is helpful. In that comment, the HEC recommended an addition to 170 IAC 17-4-4(c) such that the Commission, when considering the awarding of an incentive, may also consider whether or not the resource is required due to federal or state regulation, court action, Agreed Order, Commissioner's Order or Consent Decree. That change makes significant sense, as a utility should not receive an incentive for doing that which it is compelled to do by operation of law or agreement. Indeed, in the case of a Consent Decree the utility may have already received the benefit of a settlement from the public, and an additional incentive would essentially amount to "double dipping." As such, the proposed change is consistent with program goals and public policy.

The comments set forth herein do not constitute an exclusive recitation of the views of the Industrial Group. The Industrial Group welcomes the opportunity to provide additional information or clarification to the extent the Commission might find it helpful.