

**IN THE
INDIANA COURT OF APPEALS**

CASE NO. 20A-EX-1404

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR, ET AL.)	Appeal from the
)	Indiana Utility Regulatory Commission
)	
Appellants,)	IURC Cause No: 45253
)	
)	Hon. James F. Huston, Chairman
v.)	
)	Hon. Sarah E. Freeman, Stefanie
)	Krevda, David Ober and
DUKE ENERGY INDIANA, LLC, ET AL.)	David E. Ziegner, Commissioners
)	
Appellees.)	Hon. David E. Veleta,
)	Senior Administrative Law Judge.

**BRIEF OF APPELLANT
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STATEMENT OF THE ISSUES

Whether the Indiana Utility Regulatory Commission (“IURC”) erred when it granted Duke Energy Indiana, LLC (“DEI”) the right to rate recovery of costs incurred in the past in contravention of Ind. Code ch. 8-1-8.4 and traditional ratemaking treatment, even though the costs were previously incurred.

STATEMENT OF THE CASE

On July 2, 2019, DEI filed a request with the IURC for an increase to its base rates and charges in a case docketed as Cause No. 45253. CCS at 4. Multiple intervenors and Indiana Office of Utility Consumer Counselor (“OUCC”), the statutory representative of the public under I.C. § 8-1-1.1-4.1, participated.¹ Among other issues, things, the OUCC’s testimony opposed DEI’s requested recovery of expenses for remediation of coal combustion residuals (“CCR”, also known as coal ash) that DEI incurred in the period between 2015 and 2018. CCS at 11, Ex. Vol. 46 at 000158. On June 29, 2020, the IURC issued its final order, granting DEI’s requested CCR cost recovery. Appealed Order p. 48, Joint Appellants’ App. Vol. II p. 67. The OUCC timely appealed on July 29, 2020. CCS at 21.

¹ Intervening parties were Citizens Action Coalition (“CAC”), Sierra Club, the Duke Industrial Group, Nucor Steel, Wabash Valley Power Association, Walmart, Inc., Kroger, Inc., Indiana Community Action Alliance, Inc., Environmental Working Group, Department of the Navy, Indiana Coal Council, Inc., ChargePoint, Inc., Hoosier Energy Rural Electric Cooperative, Inc., Indiana Laborers District Council, and Zeco Systems, Inc., d/b/a Greenlots.

STATEMENT OF THE FACTS

DEI is a public utility providing electric service in multiple counties in Indiana, Ex. Vol. 2 at 000012, and is subject to the jurisdiction of the IURC pursuant to I.C. § 8-1-2-1.² *Id.* at 000051. On July 2, 2019, DEI filed a rate case with the IURC pursuant to I.C. §§ 8-1-2-42.7 and -61 requesting an increase to its basic rates and charges. CCS at 4. DEI's rates and charges were last established in 2004. Ex. Vol. 2 at 000019. Among the items for which DEI sought recovery was \$211.7 million it had incurred between 2015 and 2018 for CCR remediation. Ex. Vol. 2 at 000020.

DEI requested IURC approval of a certificate of public convenience and necessity ("CPCN") for the CCR expenses under I.C. § 8-1-8.4-1, *et seq.*, as well as traditional ratemaking. Ex. Vol. 39 at 000005. DEI argued that "the requested base rate cost recovery, with both return on and of the costs, is the same ratemaking treatment the costs would have received if they had been treated as a normal retirement and is consistent with historical Indiana practice for regulated utilities." *Appealed Order* p. 33, *Joint Appellants' App.* Vol. II p. 51.

CCR, or coal ash, is a waste product produced by coal-burning electric generating plants. Ex. Vol. 46 at 000159. Elements remain in coal ash and can leach from the ash into groundwater. *Id.* In 2015, the U.S. Environmental Protection Agency ("EPA") issued

²² DEI also qualifies as an "energy utility" as defined in I.C. § 8-1-2.5-2, which is one of the requirements for utility applicants in the Federal Mandate statute. I.C. § 8-1-8.4-3 and -6 (b).

rules regarding the treatment of CCR. *Id.* The CCR rules imposed obligations to remove or otherwise remediate CCR “ponds”.³ *Id.*

Indiana Code ch. 8-1-8.4, the “Federal Mandate” statute, provides a mechanism for utilities to recover costs incurred as a consequence of compliance with a federal mandate, in this case the EPA’s CCR rules.⁴ Ex. Vol. 2 at 000059; I.C. § 8-1-8.4-5(7). Recoverable costs include “capital, operating, maintenance, depreciation, tax or financing costs.” I.C. § 8-1-8.4-4(a). While DEI had received IURC approval for some CCR-related activities between 2015 and 2018, Tr. Vol. 5 at 000109, the items included in the rate case had not received prior IURC approval. Ex. Vol. 2 at 000059, Tr. Vol. 7 at 000088 ll. 7-9. Apart from I.C. ch. 8-1-8.4, DEI offered no evidence of any “[minimum standard filing requirement],⁵ GAO best practice, or Commission rule that addresses Coal Ash Remediation and Closure Costs not previously approved by the Commission.” Tr. Vol. 7 at 000089-90.

The OUCC’s testimony recommended against approval of the past CCR costs because DEI had failed to seek approval for the costs under I.C. ch. 8-1-

³ All utilities were aware of CCR compliance obligations in 2015. Ex. Vol. 46 at 000159. DEI’s request for future CCR costs (2019 forward) are not at issue in this appeal, as those costs were deferred to an IURC subdocket that is still pending. Appealed Order p. 32, Joint Appellants’ App. Vol. II p. 50.

⁴ DEI also sought to include costs related to compliance with Indiana Department of Environmental Management (“IDEM”) requirements. Ex. Vol. 46 at 000161.

⁵ Under 170 Ind. Admin. Code 1-5, *et seq.* (2020), the Minimum Standard Filing Requirements (“MSFR”), set forth standardized documents for a utility to file with the IURC in expedited rate cases. 170 I.A.C. 1-5-2. DEI sought recovery under I.C. § 8-1-2-42.7, which qualifies as one such “expedited” case.

8.4 before incurring them. Ex. Vol. 46 at 000164.

The IURC granted DEI's CCR request in two paragraphs. Appealed Order p. 48, Joint Appellants' App. Vol. II p. 67. The IURC's findings were comprised of the first and last paragraphs of DEI's proposed order on that subject with minor modifications. *Id.*; Joint Appellant's App. Vol. IV pp. 116, 126. The IURC accurately found that "no party disputed that the CCR Rule is a federal mandate," but made no findings pursuant to I.C. § 8-1-8.4-6 to establish that DEI had satisfied the statute's requirements to be granted a federal mandate CPCN. Appealed Order p. 48, Joint Appellants' App. Vol. II p. 67. The IURC's findings based on traditional ratemaking were not supported by facts and did not acknowledge that DEI's request also failed to meet traditional ratemaking standards. *Id.* The OUCC timely appealed. CCS at 20.

SUMMARY OF THE ARGUMENT

The CCR determination in the IURC's Order failed to comply with the requirements of I.C. ch. 8-1-8.4 and traditional ratemaking; it is not supported by specific findings of fact, sufficient evidence, or analysis of the various specific issues of fact that bear on DEI's CCR recovery. The IURC did not make sufficient findings to support its approval of DEI's requested CCR cost recovery under traditional ratemaking, referencing inapposite cases and concepts and violated traditional standards of rate regulation prohibiting retroactive ratemaking.

ARGUMENT

The IURC's Order does not comply with requirements of I.C. ch. 8-1-8.4, violates established ratemaking, and relies on inapposite precedent. The IURC's Order adopted the opening and concluding paragraphs of DEI's proposed order on this subject with minor edits, none of which provided evidentiary support. The IURC did not make findings based on record evidence, and cited cases that support prospective, rather than retroactive, rate recovery.

A. Standard of Review

Under I.C. § 8-1-3-1, “[a]n assignment of errors that the decision, ruling, or order of the commission is contrary to law shall be sufficient to present both the sufficiency of the facts found to sustain the decision, ruling, or order, and the sufficiency of the evidence to sustain the finding of facts upon which it was rendered.” Our Supreme Court held that:

[W]e apply three levels of review: one for factual findings; another for mixed questions of law and fact; and a third for questions of law.... Appeals involving claims of insufficient findings to sustain the ultimate conclusions contained in the order present questions of ultimate fact—or mixed questions of law and fact. In these cases, we review the Commission's conclusions for reasonableness, deferring to the Commission based on the amount of expertise exercised by [it].

NIPSCO Indus. Gp. v. N. Ind. Pub. Serv. Co., 125 N.E.3d 617, 624 (Ind. 2019) (citations and internal punctuation omitted).

In this case, the IURC's findings fail the reasonableness test due to the absence of evidentiary support. “A decision is contrary to law when the

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Commission fails...to abide by the statutory and legal principles that guide it.” *Gary–Hobart Water Corp. v. Ind. Util. Regulatory Comm’n*, 591 N.E.2d 649, 652 (Ind. App. 1992), *reh’g denied*. The Court must determine if the decision is supported by specific findings of fact and sufficient evidence and whether the decision is contrary to law. *Micronet, Inc. v. Ind. Util. Regulatory Comm’n*, 866 N.E.2d 278, 284-85 (Ind. App. 2007), *trans. denied*.

The Indiana Supreme Court recently restated the standard of review where the agency construes a statutory provision:

[I]n *[NIPSCO Ind. Gp. v. N. Ind. Pub. Serv. Co.]*, 100 N.E.3d 234, 241 (Ind. 2018)] and here, we note that we ordinarily review legal questions addressed by an agency de novo....[in *NIPSCO*] we found the agency’s interpretation contrary to the statute itself and, thus, necessarily unreasonable. *Compare id.* at 237–38, 242, *with Jay Classroom Teachers Ass’n*, 55 N.E.3d at 816 (instructing that we accept an agency’s interpretation only if it is reasonable), *and Chrysler Grp., LLC*, 960 N.E.2d at 123 (providing that an agency’s interpretation that is inconsistent with the statute itself does not receive ‘great weight’).

Moriarity v. Ind. Dept. of Natural Resources, 113 N.E.3d 614, 619 (Ind. 2019).

In addition, there must be specific findings that tie the facts and evidence to allow the Court to assure itself that the IURC has properly exercised its jurisdiction and authority:

[T]he Commission’s decision or order must include basic findings upon all material facts in issue. These findings must be drawn with sufficient specificity to enable the Court of Appeals to intelligently review the decision. The degree of specificity required will vary in each individual case depending on the factual complexity and the amount and quality of evidence introduced.

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Counselor, 473 N.E.2d 1043, 1047 (Ind. App. 1985). “[T]here must be sufficient findings of basic fact to support the ultimate conclusions of the Commission.” *RAM Broadcasting of Ind., Inc. v. Digital Paging Sys. of Ind., Inc.*, 463 N.E.2d 1104, 1111 (Ind. Ct. App. 1984). The IURC’s findings below do not meet these standards, and therefore must be overturned.

B. The IURC’s required factual determinations and evidentiary findings are absent.

(1) *The IURC’s statement that I.C. ch. 8-1-8.4 provided “collateral support” for its decision is directly contradicted by the IURC’s further findings.*

[W]e nonetheless note that the federal mandate statute analytical framework and specific considerations can reasonably be understood to be a means of evaluation that provides collateral support of our decision to allow recovery of such costs in this manner. Absent the timing of the request these costs would have been the type of costs that are recoverable under the federal mandate statute. Accordingly, applying the statutory considerations of the federal mandate statute was helpful to our conclusion.⁶

The IURC’s conclusion that it viewed I.C. ch. 8-1-8.4 as “collateral support” for its approval of the retroactive CCR cost recovery is directly contradicted by the IURC’s language a few lines later. Appealed Order p. 48, Joint Appellants’ App. Vol. II p. 67. The IURC acknowledged that I.C. ch. 8-1-8.4 does not authorize retroactive recovery of costs when it stated “[a]bsent the timing of the request these costs would have been the type of costs that are recoverable under the federal mandate statute.” *Id.*, (emphasis added). This acknowledgement that the timing of the costs – in the past – made them not recoverable under I.C. ch.

⁶ Appealed Order p. 48, Joint Appellants’ App. Vol. II p. 67 (emphasis added).

8-1-8.4 is at odds with the IURC's finding that I.C. ch. 8-1-8.4 provided "collateral support" for granting DEI's requested CCR cost recovery.

Before the IURC can grant a utility a CPCN for federally mandated costs, it must determine whether the utility's request complies with the statute. I.C. § 8-1-8.4-6(b). In its petition for a CPCN, the utility must provide a description of the proposed project(s) with estimated costs, how the project allows the utility to comply with the federal mandate, and whether the project(s) will increase the operating life of the facility. *Id.* This requires specific findings on each element, which the IURC has shown itself capable of doing on multiple occasions.⁷ The IURC must determine if the project is required to comply with a federal mandate under I.C. § 8-1-8.4-5, and a compliance project "includes: (1) an addition; or (2) an integrity, enhancement, or a replacement project[.]" I.C. § 8-1-8.4-2.

The IURC has already held that DEI cannot recover costs incurred in the past under I.C. ch. 8-1-8.4. *Verified Petition of Duke Energy Ind., LLC*, Cause No. 44367 FMCA 4, 2019 WL 4600201 (Ind. Util. Regulatory Comm'n Sept. 19, 2019), *aff'd on recon*, 2019 WL 6683737 (Dec. 4, 2019) ("FMCA Orders"). The IURC rejected DEI's request to recover previously incurred costs, stating:

⁷ The IURC made detailed findings under I.C. ch. 8-1-8.4 in, *inter alia*, *Petition of Duke Energy Ind., LLC*, Cause No. 42061 ECR 33, 2019 WL 4054842 at *6 (Ind. Util. Regulatory Comm'n Aug. 21, 2019); *Verified Petition of Duke Energy Ind., LLC*, Cause No. 44367 FMCA 3, 2018 WL 3835077 at *16 (Ind. Util. Regulatory Comm'n Aug. 8, 2018); *Verified Petition of Duke Energy Ind., LLC*, Cause No. 44367 FMCA 2, 2017 WL 2831192 at *12 (Ind. Util. Regulatory Comm'n June 28, 2017); *Verified Petition of Duke Energy Ind., LLC*, Cause No. 44367 FMCA 1, 2015 WL 5920878 at *12 (Ind. Util. Regulatory Comm'n Oct. 7, 2015).

[F]uture recovery is implicit in the requirement that the utility request a CPCN *before* acquiring the right to collect any qualifying costs from ratepayers....

Allowing the recovery of costs incurred before the Commission has authorized the utility to do so undoes the purpose of Commission oversight. The point of a CPCN proceeding is to determine whether the project and its attendant costs are prudent *before* the utility passes such costs to consumers.

Therefore, we reject DEI's request to collect costs absent prior authorization. Had the legislature intended utilities to be able to recover federally mandated costs that were already spent, it would have said so. There is no such language in Ind. Code ch. 8-1-8.4. Applying for a CPCN and disclosing project specifics, including costs and alternatives, before performing the project is part of the regulatory bargain engraved in Ind. Code ch. 8-1-8.4 for an energy utility to receive authorization to recover its prospective costs.

Id. at *28-29 (emphasis in original).

On reconsideration, the IURC affirmed its findings, stating:

We note that the Commission performed a thorough statutory construction analysis of the applicable statutes in Ind. Code ch. 8-1-8.4 in its Final Order at pages 28-29. Ind. Code § 8-1-8.4-1 and -7 state that: (1) a CPCN is required before recovery can be granted; and (2) a utility must (a) receive approval of proposed compliance projects, and (b) the Commission must find that the public convenience and necessity will be served before rate recovery is allowed. The point of a CPCN proceeding is to determine whether the proposed compliance project and its attendant costs are prudent before the utility passes such costs to consumers.

We agree that the legislative intent of Ind. Code ch. 8-1-8.4 is to provide timely recovery of federally mandated expenses that comply with the parameters established in Ind. Code ch. 8-1-8.4. Those parameters establish the framework for the Commission to authorize an energy utility to recover costs when the energy utility submits its plans and costs for approval in a timely fashion. A key phrase in Ind. Code 8-1-8.4-7(c)(1) is allowing "timely recovery" of approved federally mandated costs. The legislative intent to provide timely cost recovery for approved compliance projects is not furthered by a utility that intentionally waits to seek approval of

federally mandated costs until such costs accumulate over several years and at a time that fails to afford any meaningful and timely opportunity for the Commission to consider possible alternatives for compliance.

2019 WL 6683737 at *2.⁸

The OUCC cited the IURC's FMCA Orders⁹ in its testimony and proposed order, but the IURC's findings did not even mention the FMCA Orders' findings. Ex. Vol. 7 p. 000164, ll. 5-26; Joint Appellants' App. Vol. V pp. 122, 130-31. DEI's proposed order below attempted to distinguish the FMCA Orders from its rate case by referencing the Reconsideration Order and stating that the Order "should be limited to the facts and circumstances of that case." Joint Appellants' App. Vol. IV p. 123. DEI's proposed order excused its failure to seek prior approval by stating that it was "between a rock and a hard place." *Id.* DEI further argued that because it told the IURC in a prior proceeding that it "would be seeking" future CCR costs, the IURC had not been "surprised". *Id.* at 124. Thus, DEI argued that the CCR costs should be includable in rates. *Id.*

The OUCC's proposed order continued to argue that the IURC should follow its own findings in the FMCA Orders. Joint Appellants' App. Vol. V pp.

⁸ When asked by DEI to make it clear that the ruling was only applied prospectively, the IURC stated "because the Final Order only applies to DEI and the facts presented herein, it cannot have retroactive application to any other case or utility." 2019 WL 6683737 at *5. Since the rate case below was decided *after* the FMCA Orders, there is no violation of the IURC order to consider it herein.

⁹*Verified Petition of Duke Energy Ind., LLC*, Cause No. 44367 FMCA 4, 2019 WL 4600201 (Ind. Util. Regulatory Comm'n Sept. 19, 2019), *aff'd on recon*, 2019 WL 6683737 (Dec. 4, 2019).

130-31. The IURC did not mention the FMCA Orders in its findings, nor did it distinguish the case at bar from the FMCA cases.¹⁰

The IURC's explicit statutory analyses in the FMCA Orders stand in stark contrast to the total lack of findings below. Where the FMCA Orders reviewed each element of the statute and made findings on each to determine DEI's eligibility, the order on appeal provides no dispositive substance to support a finding under I.C. ch. 8-1-8.4. To interpret the statute as DEI suggests would produce an absurd result, one the Court should reject. *Appolon v. Faught*, 796 N.E.2d 297, 300 (Ind. Ct. App. 2003). There is no language in I.C. ch. 8-1-8.4 to allow utilities to be able to retroactively recover federally mandated costs.

Rather than making findings of fact and conclusions of law, the IURC's findings adopted unsupported, inconsistent, and inapposite law. "[T]he appropriate standard of review for 'questions of law' concerning Commission-formulated standards of regulatory policy is one of reasonableness." *City of Evansville v. S. Ind. Gas & Elec. Co.*, 167 Ind. App. 472, 339 N.E.2d 562, 574 (Ind. Ct. App. 1975), *citing Pub. Serv. Comm'n v. Ind. Bell Tel. Co.*, 235 Ind. 1, 130 N.E.2d 467 (Ind. 1956); *Pub. Serv. Comm'n v. City of Indianapolis*, 235 Ind. 70, 131 N.E.2d 308 (Ind. 1956). [T]here must be sufficient findings of basic fact to support the ultimate conclusions of the Commission." *RAM Broadcasting*, 463 N.E.2d at 1111. The IURC's ultimate conclusion lacked sufficient findings of fact. *Id.*

¹⁰ Appealed Order p. 48, Joint Appellants' App. Vol. II p. 67.

(2) *Citation to inapposite precedent does not support the IURC's findings.*

[W]e have consistently allowed recovery of environmental compliance costs generally and coal ash related compliance costs in particular. See for example, our Orders in Cause Nos. 44765, 44794, 45052, and 44872.¹¹

In the proceeding below, DEI argued that the IURC had previously granted retroactive approval for CCR expenses under I.C. ch. 8-1-8.4, but DEI later admitted under cross-examination that none of the cited cases approved retroactive recovery. Tr. Vol. 5 at 000109, l. 23; 000111, l. 7; 000112, ll. 12-14; 000113 ll. 3-6. Instead, the cited cases granted prospective relief only. *Id.*

Nonetheless, the IURC ignored the cross-examination evidence and cited those same cases in its approval of retroactive recovery. This factual finding is directly contrary to the evidence and is based on directly contradictory evidence, in violation of legal principles. Ind. R. Evid. 104(b) states that “[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.” The fact of precedent for retroactive recovery was not established and was in fact directly controverted, making the IURC’s finding factually wrong and therefore unsupported. The IURC’s approval of prospective recovery of environmental costs does not support a conclusion that previously incurred costs are similarly recoverable. The

¹¹ Appealed Order p. 48, Joint Appellants’ App. Vol. II p. 67.

Commission deviated from the applicable statute and therefore, the order is legal error and must be overturned.

(3) “Deeming” the CCR costs as AROs does not mean that they are AROs, and does not constitute substantial evidence in support of the judgment.

[T]hese costs *have been deemed to be* AROs, such costs would be reflected in costs of removal and depreciation rates and recoverable in that manner. In other words, in the absence of required ARO accounting, both a “return on” and a “return of” these costs would have been built into rate base.¹²

The IURC also cited as support for its decision that the CCR “costs have been *deemed to be* AROs [asset retirement obligations]¹³ [and] such costs *would be* reflected in costs of removal and depreciation rates and recoverable in that manner.” Appealed Order p. 48, Joint Appellants’ App. Vol. II p. 67, emphasis added. The use of the word “deemed” renders the IURC’s finding infirm. The legal definition of deem is:

1. To treat (something) as if (1) it were really something else, or (2) it has qualities that it does not have <although the document was not in fact signed until April 21, it explicitly states that it must be deemed to have been signed on April 14>.2. To consider, think, or judge <she deemed it necessary.

¹² Appealed Order p. 48, Joint Appellants’ App. Vol. II p. 67 (emphasis added).

¹³ An ARO is recognized for accounting purposes when a utility becomes aware of an obligation to retire part of its utility plant. Under the Uniform System of Accounts (“USOA”), which are the accounting standards for, *inter alia*, electric utilities, “[t]he utility shall initially record a liability for an asset retirement obligation...related to the plant that gives rise to the legal obligation. The asset retirement cost shall be depreciated over the useful life of the related asset that gives rise to the obligations.” 18 C.F.R. Pt. 101 (25)(B). Those depreciation costs are included in a utility’s rates. I.C. § 8-1-2-19.

Black's Law Dictionary (11th ed. 2019).¹⁴

While DEI treated the CCR costs as if they were AROs, the AROs were not previously recognized for ratemaking purposes. Multiple witnesses testified that the deferral of costs absent prior IURC approval is inconsistent with IURC precedent. Appealed Order pp. 32-34, Joint Appellants' App. Vol. II p. 52-54. DEI itself was aware of the need to seek approval to defer costs, as it had previously sought such authority before the IURC. *See, in Citizens Action Coalition of Ind., Inc. v. Duke Energy Ind., Inc.*, 16 N.E.3d 449, 451 (Ind. Ct. App. 2014) (DEI sought authority to defer its property tax expense, post-in-service carrying costs, depreciation costs, and operation and maintenance costs associated with the project on an interim basis until the costs could be included in DEI's retail electric rates); *accord, Citizens Action Coalition of Ind., Inc. v. Duke Energy Ind., Inc.*, 44 N.E.3d 98 (Ind. Ct. App. 2015); *Duke Energy Ind., Inc. v. Ind. Ofc. of Util. Consumer Counselor*, 983 N.E.2d 160 (Ind. Ct. App. 2012).

Absent prior approval for such a deferral, the IURC's recognition of a "deemed" ARO was in the nature of a fiction and therefore error, in the absence of record evidence or precedent.

¹⁴ The commentary in Black's definition of deem states "'Deem' has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively by 'deeming' something to be what it is not or negatively by 'deeming' something not to be what it is[.]" G.C. Thornton, *Legislative Drafting* 99 (4th ed. 1996).

(4) *The IURC's rate recovery findings for DEI's CCR costs are inconsistent and factually inaccurate.*

The IURC's rate recovery findings for DEI's CCR costs are inconsistent and factually inaccurate. When unpacked and examined, the overall result is like puzzle pieces from different puzzles jammed together: the sum of the parts does not result in a coherent whole that this Court can uphold. The IURC's CCR findings were almost verbatim repetition of DEI's first and last paragraphs on the issue. Joint Appellants' App. Vol. IV p. 116, 126 (DEI proposed order); Appealed Order p. 48, Joint Appellants' App. Vol. II p. 67 (IURC findings). Wholesale acceptance of a party's proposed order weakens the Court's "confidence that those findings were 'the result of considered judgment.'" *River Ridge Development Auth. v. Outfront Media, LLC*, 146 N.E.3d 906, 916 (Ind. 2020), *citing Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 273 n.1 (Ind. 2003). While proposed orders are common and "the practice of adopting a party's proposed findings is not prohibited," *In re Marriage of Nickels*, 834 N.E.2d 1091, 1096 (Ind. Ct. App. 2005), the IURC "should remember that when it signs one party's findings, it is ultimately responsible for their correctness." *Id.*, (citations omitted). The IURC must "scrutinize parties' submissions for mischaracterized testimony and legal argument rather than the findings of fact and conclusions of law[.]" *Id.* Adoption of the first and last paragraphs of DEI's proposed order on the CCR costs without the requisite factual or legal conclusions erodes the Court's customary deference. When reviewing the IURC's action, the Court must

“inquire if specific findings exist as to all factual determinations material to the ultimate conclusions, and if substantial evidence exists within the record as a whole to support the Commission’s basic findings of fact.” *Lincoln Utils., Inc. v. Ofc. of Util. Consumer Counselor*, 661 N.E.2d 562, 564 (Ind. Ct. App. 1996) (citations omitted), *trans. denied*.

The IURC’s finding was two-fold: the IURC stated the costs were recoverable under both traditional ratemaking and “collaterally” under I.C. ch. 8-1-8.4. Appealed Order p. 48, Joint Appellants’ App. Vol. II p. 67. However, the traditional ratemaking finding fails because DEI’s accrual of CCR costs was not previously approved, as traditional recovery requires IURC approval before a utility may “book” (make an accounting entry for) an asset retirement obligation. Further, retroactive approval of costs is prohibited under traditional ratemaking. This Court has found that “the [IURC] does not have the statutory authority to set rates retroactively.” *Airco Indus. Gases v. Ind. & Mich. Power Co.*, 614 N.E.2d 951, 953 (Ind. Ct. App. 1993), *accord*, *Ind. Bell Tele. Co. v. Ind. Util. Regulatory Comm’n*, 855 N.E.2d 357 (Ind. Ct. App. 2006).

In addition, the IURC made findings on a lack of evidence, violating the requirement that findings must be supported by substantial evidence and specific factual determinations. This does not meet the standard of I.C. § 8-1-3-1 that the IURC’s findings must contain “sufficien[t] ...facts found to sustain the decision, ruling, or order, and...sufficien[t]...evidence to sustain the finding of facts upon which it was rendered.”

The “federal mandate” statutory finding also fails because the IURC made none of the required findings to grant DEI a CPCN, and the IURC had previously found that the statute did not grant the right to retroactive recovery. *In re Petition of Duke Energy Ind., LLC*, Cause No. 44367 FMCA 4, 2019 WL 4600201 (Ind. Util. Regulatory Comm’n Sept. 19, 2019), *aff’d on recon*, 2019 WL 6683737 (Dec. 4, 2019). Proceeding through the IURC’s findings shows that the results are not supported and should be overturned.

(5) *The absence of evidence is not evidence.*

No party disputed that the CCR Rule is a federal mandate with which the Company must comply, nor did any party dispute that the Company must comply with the IDEM solid waste management rules. Additionally, no party provided evidence of any imprudence on the part of DEI with respect to its coal ash basin closure and remediation activities to date.¹⁵

The IURC’s Order stated that no party argued that the CCR was not a federal mandate, and “that no party disputed the reasonableness or prudence of [DEI’s] activities and costs incurred to date, with respect to either the CCR Projects or the IDEM Projects.” Appealed Order p. 48, Joint Appellants’ App. Vol. II p. 67. “[A]rguments by attorneys are not evidence that the trial court may consider when making a factual determination[.]” *El v. Beard*, 795 N.E.2d 462, 467 (Ind. Ct. App. 2003), *citing Fulk v. Allied Signal, Inc.*, 755 N.E.2d 1198, 1203 n. 4 (Ind. Ct. App. 2001).

¹⁵ Appealed Order p. 48, Joint Appellants’ App. Vol. II p. 67.

In this case, the IURC found that the lack of objection – the *absence* of evidence - was support for a finding that the projects were federally mandated. As discussed above, the IURC’s grant of a federal mandate CPCN requires specific factual and legal determinations. I.C. § 8-1-8.4-6. The IURC made no factually based finding that DEI’s costs were prudently incurred or that they qualified as federally mandated under I.C. § 8-1-8.4-6. The absence of objection or argument by parties does not meet these affirmative requirements. *Id.* And if arguments are not evidence, then the *lack* of arguments cannot be evidence either.

Similarly, it is the IURC’s responsibility to determine the reasonableness and prudence of a utility’s expenses. A utility may incur any cost that it chooses, but the Commission is free to disallow costs it deems excessive or imprudent. *L.S. Ayres & Co. v Indianapolis Pwr. & Light Co.*, 351 N.E.2d 814, 820 (Ind. Ct. App. 1976). Whether a party *argued* imprudence on DEI’s part is not a factual determination by the IURC that DEI either was – or was not – imprudent. If Duke had made a timely filing seeking preapproval under I.C. ch. 8-1-8.4, it would have been required to present evidence supporting each of the required findings under that statute. Duke is not relieved of that burden where it failed to seek approval before incurring the costs, and then sought recovery after the fact without an adequate foundation in the record or the law.¹⁶

¹⁶ The IURC also noted as a preface to its grant of recovery that it could not “ignore that coal generating stations have historically supplied most of the energy

(6) *The IURC's stated reasons for granting traditional rate recovery were vague and unsupported by facts or precedent and should not be granted deference.*

We find that the CCR Project costs and the IDEM Project costs were properly deferred and preserved for recovery consideration in this proceeding. We further find that such costs are recoverable under traditional ratemaking: the costs at issue are significant and infrequent (stemming from federal and state mandated requirements) and will provide longstanding benefits, in terms of compliance with such federal and state mandates, improved environmental footprints, and the ability to continue to use utility properties.¹⁷

The IURC's statement that the CCR costs were "properly deferred and preserved" fails to state the standard under which the IURC made that determination. If traditional ratemaking supports the deferral (thus making it "proper"), the IURC was required to state the applicable standard and cite to precedent or statutes showing that support. The IURC did not.

Indeed, the very statement that a deferral was "proper" indicates that there is a standard that the deferral has been measured against. The order reveals no such standard. In this circumstance the relevant meaning of "proper" is "[a]ppropriate, suitable, right, fit, or correct; according to the rules <a proper request>."¹⁸ Saying that something is "proper" is only meaningful if the standard at issue is identified, and the IURC did not provide one. "[T]he Commission's

to Indiana's retail customers and that ongoing environmental regulations drive costs associated with that history[.]” Appealed Order p. 48, Joint Appellants’ App. Vol. II p. 67. While this statement may be factually true, it is not evidence in support of the finding.

¹⁷ Appealed Order p. 48, Joint Appellants’ App. Vol. II p. 67.

¹⁸ Black’s Law Dictionary (11th ed. 2019).

decision or order must include basic findings upon all material facts in issue. These findings must be drawn with sufficient specificity to enable the Court of Appeals to intelligently review the decision.” *Bd. of Dirs. for Utils. of the Dept. of Pub. Utils.*, 473 N.E.2d at 1047.¹⁹

Another reason that the IURC offered as support for recovery was “the costs at issue [being] significant and infrequent[.]”²⁰ But the size of the expense is not determinative of recovery. The IURC’s enabling statute does not provide a utility rate recovery based on the size or frequency of a cost. A review of I.C. § 8-1-2-4, I.C. § 8-1-2-6 (general rate references) or I.C. § 8-1-2-42.7 (the specific section under which DEI sought its rate increase) will not reveal any references to the frequency or size of an expense as grounds for rate recovery. A utility may incur an expense that the IURC determines is ineligible for rate recovery, and even a “significant” expense may be disallowed. *See, Citizens Energy Coalition, Inc. v. Ind. & Mich. Elec. Co.*, 396 N.E.2d 441 (Ind. 1979) (rate recovery for cancelled nuclear plant denied). Similarly, the infrequency of an expense does not create a right to recover it in rates. The costs of a cancelled nuclear plant were not incurred frequently, yet our Supreme Court disallowed them just the same. *Id.* The IURC’s asserted reasons do not constitute sufficient evidence to be sustained.

¹⁹ Because the CCR costs were incurred between 2015 and 2018, they did not occur within DEI’s forward-looking test year. Joint Appellants’ App. Vol. II p. 28, I.C. § 8-1-2-42.7(d).

²⁰ Appealed Order p. 48, Joint Appellants’ App. Vol. II p. 67.

Conclusion

The Commission’s findings in this cause relating to CCR costs are not supported by the necessary references to the record or precedent, and do not satisfy the requirements that IURC findings be made with specificity. The IURC cited factually inapposite “precedent” and did not comply with the requisite federal mandate findings under I.C. ch. 8-1-8.4 to establish its stated “collateral support” for its decision. Joint Appellants’ App. Vol. II p. 67. I.C. ch. 8-1-8.4 does not grant the right to recover costs incurred in the past, and DEI did not seek prior authority to defer or recover the CCR costs. The IURC’s grant of CCR recovery was not supported. Because the IURC’s “interpretation [was] contrary to the statute itself [it is] necessarily unreasonable” and cannot be accepted. *Moriarity*, 113 N.E.3d at 619.

The IURC’s findings of basic fact “must reveal the Commission’s analysis of the evidence and its determination therefrom regarding the various specific issues of fact which bear on the particular claim.” *Gary-Hobart Water Corp.*, 591 N.E.2d at 652.

Because the IURC's CCR cost determination lacks analysis, probative evidence, or precedent, recites inapposite facts, the Court should grant no deference to its findings. Further, the IURC's ultimate conclusions under I.C. ch. 8-1-8.4 do not meet the statute's requirements. The Court must therefore reverse the IURC's finding on recovery of CCR costs.

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

I verify that this brief contains no more than 14,000 words.



Lorraine Hitz-Bradley, Attorney No. 18006-29
Deputy Consumer Counselor

CERTIFICATE OF SERVICE

I certify that on October 14, 2020, I electronically filed the foregoing *Brief of Appellant Indiana Office of Utility Consumer Counselor* using the Indiana E-Filing System (IEFS). I also certify that on October 14, 2020, the foregoing *Brief of Appellant Indiana Office of Utility Consumer Counselor* was served upon the following persons via IEFS.

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