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IN THE
INDIANA COURT OF APPEALS

CAUSE NO. 20A-EX-00800

IPL INDUSTRIAL GROUP, INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR, CITY OF INDIANAPOLIS, CITIZENS ACTION COALITION OF INDIANA, **Appellants (Intervenors and Statutory Party below),** **v.** **INDIANAPOLIS POWER & LIGHT COMPANY and INDIANA UTILITY REGULATORY COMMISSION,** **Appellee (Petitioner and Administrative Agency Below).**	**Appeal from Indiana Utility Regulatory Commission** **Cause No. 45264** **The Hon. James F. Huston, Chairman** **The Hon. Sara E. Freeman,** **The Hon. Stefanie N. Krevda,** **The Hon. David L. Ober,** **The Hon. David E. Ziegner, Commissioners** **The Hon. Jennifer L. Schuster, Administrative Law Judge**

JOINT BRIEF OF APPELLANTS

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I. STATEMENT OF THE ISSUES

The TDSIC Statute, Ind. Code ch. 8-1-39, allows a regulated energy utility to seek preapproval of proposed infrastructure investments, and then recover the approved costs through rate increases every six months as the work is completed. The threshold proceeding requires the utility to present a Plan that satisfies defined statutory requirements, including identification of the proposed improvements, the best estimate of the costs, and a showing that incremental benefits justify the proposed level of costs. Indianapolis Power & Light Company ("IPL") presented a proposed Plan involving $1.2 billion in system investments over a 7-year period, and the Indiana Utility Regulatory Commission ("Commission") granted approval over the objections of all the consumer parties. This appeal raises three issues:

1. Whether the Commission erred by allowing IPL to supplement the record with tens of thousands of pages of highly material documents at effectively the end of the evidentiary hearing, where:

    a. The materials constituted key evidence that IPL chose not to include in its case-in-chief or rebuttal submissions, and were offered only after the opposing parties had rested and cross-examination of the knowledgeable IPL witnesses had been completed;

    b. The materials were offered without any sponsoring witness or supporting testimony, were not verified or self-authenticating, and had no foundation for admission into evidence other than unsworn assertions by IPL's attorney; and

    c. The admission was highly prejudicial because the materials went to statutory requirements on which IPL had the burden of proof but that IPL had failed to satisfy to that point.

2. Whether the Commission misapplied the statutory requirement that incremental benefits must justify the estimated costs, where:

a. The Order accepted IPL's position substituting "risk reduction" for the statutory term "incremental benefits," even though the IPL system is already highly reliable and the existing risk is very small;

b. IPL admitted it was not attempting to show any incremental change in system performance and offered no evidence of expected impact on reliability metrics; and

c. There was no showing that unquantified gains in reliability, if any, justified the extremely high $1.2 billion level of expense.

3. Whether the Commission failed to make specific findings on material issues raised below, by making only a conclusory finding in summary fashion on the vigorously disputed cost-justification requirement, and in particular by accepting a "monetization" analysis offered by IPL, without accounting for miscalculations and invalid assumptions identified by opposing parties.

II. STATEMENT OF THE CASE

A. The Statutory Framework

This case arises under the Transmission, Distribution, and Storage System Improvement Charge ("TDSIC") statute, Ind. Code ch. 8-1-39. Unlike traditional ratemaking through a "rate case" involving comprehensive review of a utility's operations and financial status, the TDSIC mechanism is a statutory "tracker" permitting tailored rate adjustments between rate cases for specified categories of expenses. See NIPSCO Industrial Group v. Northern Indiana Public Service Co., 100 N.E.3d 234, 238-39 (Ind. 2018) (describing statutory framework). The specific costs eligible for tracking under the TDSIC Statute are preapproved infrastructure

investments to improve an energy utility's transmission, distribution or storage systems. See Ind. Code §8-1-39-2.

The TDSIC Statute provides for two distinct types of proceedings. First, pursuant to Section 10, the utility must secure Commission preapproval of a Plan to complete identified improvement projects at a stated budget over a specified time period. See Ind. Code §8-1-39-10. To be approved, the Plan must satisfy listed statutory criteria, including the "best estimate" of the costs, a finding of public convenience and necessity, a showing of reasonableness, and a determination that "the estimated costs of the eligible improvements included in the plan are justified by incremental benefits attributable to the plan." Id. §10(b). Once a Plan is approved, the utility may then, pursuant to Section 9, seek periodic rate increases at 6-month intervals to recover 80% of the approved costs as the planned work is completed. Id. §9(a). Up to the authorized expenditures, rate recovery is "automatic." Id. The other 20% is accumulated in a deferred account for recovery, with carrying charges, in the utility's next rate case. Id. §9(c).

B. The Petition and Parties Below

On July 24, 2019, IPL filed its petition with the Commission under Section 10, seeking approval of a TDSIC Plan. See App. vol. II at 37-59. The IPL Plan involved proposed expenditures of $1.2 billion over a 7-year period. Id.

By statute, the ratepaying public is represented in all utility proceedings by an independent state agency, the Office of Utility Consumer Counselor ("OUCC"). See Ind. Code §8-1-1.1-4.1. In addition, three other consumer parties intervened in

this proceeding. The IPL Industrial Group ("Industrial Group") is an *ad hoc* group comprised of several large volume consumers served by IPL. See App. vol. II at 101-05. The City of Indianapolis (the "City") intervened in its capacity as an IPL ratepayer with an interest in the impact of IPL rates on the local economy and its citizenry. Id. at 116-18. Finally, Citizens Action Coalition ("CAC") and Environmental Law & Policy Center ("ELPC") (together "Joint Intervenors") are advocacy organizations for consumer and environmental interests that were jointly represented below. Id. at 106-09, 121-25. The OUCC, Industrial Group, City and CAC will be referred to collectively as the "Consumer Parties."

C. The Prefiling of Direct and Rebuttal Evidence

Formal Commission proceedings are conducted through an adversarial process that largely utilizes the procedures and standards of civil litigation, including the Indiana Rules of Trial Procedure and Indiana Rules of Evidence. See 170 Ind. Admin. Code §1-1.1-26(a). Some features of the process, however, utilize agency-specific rules and practices. Id.

At the same time that it filed the petition, and pursuant to Commission procedure (see 170 Ind. Admin. Code §1-1.1-18(g)), IPL "prefiled" its case-in-chief evidence consisting of the written testimony and exhibits of six witnesses. See App. vol. II at 60-71. By Commission rule, such prefiled evidence may be later admitted in the record at the time the evidentiary hearing occurs, upon proper authentication by the witness under oath, subject to the same rules of admissibility and cross-examination applicable to live testimony. See 170 Ind. Admin. Code §1-1.1-18(h).

Also on the same day that the petition and prefiled evidence were filed, IPL further submitted voluminous "workpapers" consisting of supporting materials associated with the witness testimony. See App. vol. II at 72-73. Again consistent with Commission practice, those workpapers were filed and served, but were not part of IPL's case-in-chief evidence. See id. at 111 ¶10.

All of the Consumer Parties opposed IPL's request for approval of the proposed Plan. In accordance with an agreed procedural schedule established by the Commission (see App. vol. II at 110-12), the Consumer Parties prefiled their written testimony and exhibits on October 7, 2019. Id. at 126-33. Together, the Consumer Parties prefiled the testimony of seven witnesses (id.), although one of the seven submissions was not later offered into evidence at the Commission hearing and hence did not become part of the evidentiary record. See Tr. vol. 2 at 10.[1] The Industrial Group and the City followed their evidentiary submissions with the submission of workpapers relating to their respective witnesses' testimony (see App. vol. II at 137-40), but as with IPL's workpapers at the time, those materials were not offered into evidence and accordingly did not become part of the evidentiary record.

[1] In accordance with the Commission's procedural rules, the Docket Entry that established the procedural schedule stated: "Any witness testimony to be offered into the record of this proceeding shall be made under oath or affirmation. In accordance with 170 IAC 1-1.1-18(h), if the prefiled testimony of a witness is to be offered into evidence at the evidentiary hearing, and the witness sponsoring the prefiled testimony is not required to, and does not, attend the evidentiary hearing, the prefiled testimony shall be accompanied by the witness's sworn affidavit or written verification at the time the evidence is-offered into the record." See App. vol. II at 111 ¶7.

On October 23, 2019, IPL completed the prefiling process with the submission of its rebuttal evidence. See App. vol. II at 143-48. IPL's rebuttal consisted of the written testimony and attachments of seven witnesses. Id. IPL did not file any additional workpapers in connection with its rebuttal evidence. Moreover, IPL did not offer any of its previously filed workpapers as exhibits to the testimony of any of the rebuttal witnesses, or otherwise seek to establish evidentiary status for those workpapers. In conjunction with its rebuttal submission, IPL also filed a written Request for Administrative Notice. Id. at 149-50. That filing sought to incorporate two specified documents from prior Commission proceedings into the evidentiary record in this case. Id. IPL's written request did not, however, seek administrative notice with respect to any of IPL's workpapers. Id.

D. The Evidentiary Hearing

The Commission held a publicly noticed evidentiary hearing over the course of three days, on November 14, 21 and 22, 2019. See Order at 2 (App. vol. II at 8). At the hearing, the prefiled testimony and exhibits were offered and admitted into the evidentiary record, and six of the thirteen witnesses were subject to cross-examination, redirect examination, and questions from the Administrative Law Judge and Presiding Commissioner. See Tr. vol. 2 at 10-153; Tr. vol. 3 at 6-64, 65-115, 116-35, 136-209, 210-35. The six witnesses who provided live testimony appeared at the hearing, were sworn in, and formally adopted their prefiled testimony and exhibits, establishing a foundation before those submissions were admitted into the record. See Tr. vol. 2 at 10-16; id. vol. 3 at 6-9, 65-69, 116-18, 136-

38, 210-12. For the other seven witnesses, the prefiled evidence was tendered and admitted into the record by stipulation (see Tr. vol. 2 at 154-57, 164-66), and in each such instance the testimony and exhibits were supported by a written Verification that was signed under the penalties of perjury by the witness. See Non-Conf. Ex. vol. 2 at 107, 117, 128, 132, 161, 189; id. vol. 3 at 31; id. vol. 4 at 133, 162. For one additional witness, the prefiled testimony was not offered into evidence and did not become part of the record. See Tr. vol. 2 at 10.

On the third and final day of the hearing, after the penultimate IPL witness had testified and both cross-examination and redirect had been completed, IPL's counsel orally requested that the Commission take administrative notice of the voluminous workpapers that had been submitted by IPL at the outset of the proceeding. See Tr. vol. 3 at 205-06. In a Commission proceeding, a motion for administrative notice has essentially the same function and effect as a request for judicial notice in a trial court proceeding. See 170 Ind. Admin. Code §1-1.1-21(f) to (k). In this case, the workpapers consisted of 328 spreadsheets with 1,672 tabs and, in all, some 19,791 pages of materials. See Suppl. Ex. vol. 1 at 7, 11.

By contrast, the entirety of IPL's case-in-chief and rebuttal submissions put together was only 558 pages. See Non-Conf. Ex. vol. 1 at 11-234; id. vol. 2 at 4-80, 89-181; id. vol. 5 at 57-103; id. vol. 6 at 57-100, 103-144; Conf. Ex. vol. 1 at 4-34. Hence, the volume of workpapers was over 35 times greater than IPL's case in chief and rebuttal combined. Even including the added cross-examination and redirect exhibits offered by IPL at the hearing as well as administrative notice materials

admitted by stipulation (see Non. Conf. Ex. vol. 3 at 60-229; id. vol. 4 at 4-107; id. vol. 5 at 129-31; id. vol. 6 at 4-23, 56; Conf. Ex. vol. 1 at 35-36), the workpapers accounted for more than 95% of the total documentary evidence offered by IPL.

That immense collection of documents had been submitted and served by IPL concurrent with the petition on July 24, 2019, but those materials were not included in IPL's prefiled case-in-chief evidence nor in its prefiled rebuttal evidence. The workpapers had not been offered as exhibits in connection with the testimony of any IPL witness at the hearing, and were offered at a time when only one witness had not yet testified. The one witness who testified subsequently addressed accounting issues that were unrelated to nearly all of the mass of workpapers, and that witness did not identify, authenticate or reference the workpapers during his testimony. See Tr. vol. 3 at 210-35.

In response to the oral request for administrative notice of the workpapers, the Consumer Parties objected at the hearing. See Tr. vol. 3 at 206-07. The Consumer Parties asserted the request was untimely, the workpapers were not in evidentiary form and had not been sponsored by any witness, and IPL should have included the workpapers in its prefiled evidence if it wanted them to be part of the evidentiary record. Id. The Consumer Parties further stated that the requested administrative notice would be prejudicial and unfair, coming at essentially the end of the evidentiary hearing and consisting of a massive volume of documents with material significance. Id. The Commission, however, did not make a ruling on the

request at the time, and instead indicated that the issue would be taken under advisement. Id. at 206, 207.

Subsequent to the hearing, the parties made post-hearing submissions consisting of proposed orders and supporting briefs. See App. vol. II at 151-92, 193-204; id. vol. III at 2-78, 79-94, 95-100, 101-28, 129-220. In the initial post-hearing submission, IPL did not file any written motion formalizing its request for administrative notice, but did include a proposed ruling in its favor on that request as part of its proposed order. Id. vol. II at 191. The Consumer Parties subsequently all joined in three submissions: an alternative proposed order that rejected the proposed TDSIC Plan and denied administrative notice of the workpapers, a supporting brief addressing the cost-justification standard under the TDSIC Statute, and a separate opposition to the request for administrative notice. Id. vol. III at 2-78, 79-94, 95-100. IPL then completed the briefing with a reply brief and a revised proposed order on December 20, 2019. Id. vol. III at 129-220.

E. The Commission Order

The Commission issued its final order on March 4, 2020 (the "Order"). See App. vol. II at 7-36. In the Order, the Commission addressed the statutory criteria under Section 10 of the TDSIC Statute and ultimately approved the Plan as proposed by IPL in its entirety. See Order at 20-30 (App. vol. II at 26-36). As part of the Order, the Commission also granted IPL's request for administrative notice of its workpapers. Id. at 28-29 (App. vol. II at 34-35).

On April 2, 2020, the Industrial Group timely filed a Notice of Appeal seeking judicial review of the Order. On the next day, the OUCC, the City and CAC all filed their appearances as appellants and joined in the Notice of Appeal.

III. STATEMENT OF THE FACTS

A. The Proposed TDSIC Plan

IPL's proposed TDSIC Plan involved estimated costs of $1.2 billion for infrastructure investments over a 7-year period. See Order at 3 (App. vol. II at 9). The Plan was intended to address grid resiliency, so that the system could withstand the impact of weather and service could be restored more easily when outages occur. Id. IPL utilized an outside consultant to identify and prioritize investments through a "Risk Model," a risk-based assessment of IPL's transmission and distribution systems. Id. at 3-4 (App. vol. II at 9-10). The Risk Model prioritized assets based on the amount of risk – in terms of likelihood of failure and consequence of failure – and the cost to buy down risk, in order to achieve the highest risk reduction per dollar invested. Id. at 4 (App. vol. II at 10). IPL projected that the planned projects would result in system risk reduction of about 36.6% over the 7-year period. Id. at 5 (App. vol. II at 11).

As a confidential attachment to the prefiled direct testimony of an IPL witness, IPL included a Plan document that listed each proposed project by type of project and name, and also recited the planned year for the project, the cost estimate, and a quantity in various units. See Conf. Ex. vol. 1 at 4-25. Aside from the summary listing, however, the support for the cost estimates and the

description of most of the particular projects was included only in IPL's workpapers, not presented in IPL's case-in-chief or rebuttal evidence. As part of its actual evidentiary filings, IPL only provided some "examples" of how the cost estimates were derived (see Conf. Ex. vol. 1 at 26-34), but otherwise the line items and computations supporting the dollar figures in the summary list were included only in the workpapers.

B. The Status of IPL's Electric System

IPL's electric system has a strong history of highly reliable service. See Non-Conf. Ex. vol. 4 at 115-19. The IPL website states: "IPL's reliability rate ranks high among investor-owned utilities nationwide." Id. at 115. In two recent rate proceedings at the Commission, an IPL witness testified that IPL's system is "well maintained" and in "good condition," and described IPL as a "top performer" in reliability in Indiana with top quartile performance in a national analysis on three key performance metrics. Id. at 117. Another IPL witness quoted a report indicating "first-decile performance" over a 5-year period and stating on that basis that "one might be expected to prefer to be an IPL customer than any other investor owned utility in Indiana or indeed most other states." Id. at 118.

Those assessments are substantiated by the reliability metrics that are regularly monitored by the Commission. See Non-Conf. Ex. vol. 4 at 115-17, 134-48. In the most recent available report through the end of 2018, IPL stated it "continues to perform quite well," it had "achieved another year of strong reliability performance," and a key metric "is expected to be in the top quartile in the industry

for 2018." Id. at 115, 134. Similarly, a Commission report assessing historic and current reliability metrics for the five investor-owned electric utilities in Indiana through 2018 showed that IPL consistently had the best or second-best performance throughout the 17 years of data presented. Id. at 117, 141-48. The results for 2018 specifically were comparable to or better than IPL's 5-year and 10-year averages, indicating no recent deterioration in performance. Id.

The system performance through 2018, furthermore, did not reflect additional reliability measures that were implemented by IPL following its most recent rate case, which concluded in late 2018. See Non-Conf. Ex. vol. 4 at 118-19. In that rate case, IPL received a revenue increase to support nearly a tripling of its annual budget for tree trimming, from $4.1 million to $11 million, based on IPL testimony that identified trees as by far the leading cause of power outages for the prior 5-year period, accounting for 40% of outages. Id. The anticipated reliability improvements from that increased budget for the leading cause of outages, funded by customers through regulated rates, were not reflected in the reliability reports for 2018. Id.

Of the five major electric utilities in Indiana, IPL has the smallest service territory, covering a compact area in and around Indianapolis. See Non-Conf. Ex. vol. 4 at 120. Three other electric utilities already have approved TDSIC Plans: Duke Energy, the largest utility, has a $1.4 billion plan; Northern Indiana Public Service Company, serving a heavy concentration of industrial load in a much larger territory than IPL, has a $1.2 billion plan; and Vectren South, with a larger

territory but smaller load than IPL, has a $446 million plan. Id. IPL's $1.2 billion Plan is thus at a magnitude comparable to much larger utilities, despite IPL's consistent history of stronger performance on reliability metrics. Id.

C. IPL's Risk Reduction Rationale

Despite IPL's record of reliable service and the availability of regularly reported performance metrics, IPL's evidentiary submissions did not include any analysis of the projected impact of the planned work on the performance of the IPL system. See Non-Conf. Ex. vol. 4 at 116, 119, 149-53. IPL did not provide any forecast of expected improvements to its reliability indices arising from the system investments proposed in the TDSIC Plan, and did not report on any after-the-fact results showing the effectiveness of similar investments by other utilities. Id. In addition to the reliability metrics that IPL regularly reports to the Commission, there are other industry standards to measure outage impacts on customers, but IPL did not present or analyze those indices, either, in its evidentiary submissions. Id. at 116.

As IPL admitted in a post-hearing filing, "IPL is not seeking to move its system reliability from one level to another level." See App. vol. II at 186-87. Instead, IPL explained that its Plan used a "risk-based approach" oriented on achieving risk reduction. See Order at 13-14 (App. vol. II at 19-20). The Commission, notably, did not find that the IPL Plan would result in any actual improvement to system reliability or service quality, but rather described the

asserted benefits using the disjunctive "maintain or improve." See Order at 23, 24 (App. vol. II at 29, 30).

D. The Monetization Analysis Presented by IPL

IPL supported the cost-justification element of its case, under the provision in the TDSIC Statute requiring incremental benefits that justify the estimated costs, by presenting a "monetization" analysis. See Order at 6 (App. vol. II at 12). Using a Department of Energy calculation tool, IPL "monetized" the impact of projected outages over a 20-year period, which IPL asserted could be avoided through the planned projects. See Non-Conf. Ex. vol. 2 at 51-64. According to IPL, the monetization analysis showed a net benefit of $939 million to IPL customers by the end of the 20-year period. See Order at 6 (App. vol. II at 12).

The Consumer Parties, however, identified a number of material deficiencies in IPL's monetization analysis. The net benefit computation involved a mismatch of time periods, with 20 years of computed benefits compared to 7 years of system investments. See Non-Conf. Ex. vol. 4 at 120-21. In addition, the asserted benefits were overstated while the projected costs were understated. Id. at 121-22; id. vol. 5 at 113-18.

The computed benefits were overstated in two respects. First, despite the 20-year horizon, IPL did not discount the monetized benefits, which were weighted toward the end of that period, to present value. See Non-Conf. Ex. vol. 4 at 121; id. vol. 1 at 80; id. vol. 6 at 5-6. On rebuttal, IPL offered an alternative calculation with a present value adjustment, dropping the asserted net benefit result by 75%,

down to $242 million. See id. vol. 2 at 154. The second respect in which the benefits were overstated was that IPL based its computation in comparison to a "do nothing" alternative, in which all system assets would be allowed to run until they failed. See id. vol. 4 at 121-22. The "do nothing" scenario is contrary to standard utility practice involving regular efforts to keep the system in good working condition, so that IPL assumed progressively more asset failures, especially late in the 20-year period, that normal maintenance and system management would prevent. Id.

The costs of the Plan under IPL's monetization analysis, moreover, were understated in two key respects. First, the costs used by IPL in its analysis were the total capital investments that IPL proposed to make in its Plan, but the amounts paid by IPL customers through regulated rates would be far greater than the dollars spent by IPL. See Non-Conf. Ex. vol. 5 at 117-18. That is because regulated rates include not only a "return of" capital through a depreciation component, but also a "return on" capital to compensate investors for risk. See, e.g., NIPSCO Industrial Group v. Northern Indiana Public Service Co., 31 N.E.3d 1, 10-11 (Ind. App. 2015). By the end of the 20-year period, the total rate revenue provided by ratepayers arising from the planned TDSIC investments would be an additional $772 million on top of the amount relied on in the IPL analysis. See Non-Conf. Ex. vol. 5 at 117-18. Second, IPL compared 20 years of computed benefits to only 7 years of proposed TDSIC spending, but infrastructure investment would not end after 7 years. See Non-Conf. Ex. vol. 4 at 122. Assuming continued

investment at the level proposed for the first 7 years, the total spend by the end of 20 years would be in the range of $3.5 billion, indicating a net deficit in the billions of dollars rather than any net benefit. Id.

E. The Estimated Costs and Associated Rate Impact

Under the TDSIC Statute, a utility with an approved Plan can file for "automatic" rate increases every six months to recover 80% of the approved TDSIC costs and authorized capital expenditures as they are incurred. See Ind. Code §§8-1-39-9(a), 9(f). The other 20% is held in a deferred account with accumulating carrying charges and is recovered in rates when the utility brings its next general rate proceeding, which must be filed by the end of the TDSIC Plan period. Id. §§9(c), 9(e). With the cumulative addition of each 6-month increment, the tracked 80% portion as well as the deferred 20% account continually increase over the course of the Plan. In the next rate case, then, the total tracked and deferred sums are rolled into base rates as part of a general increase.

By the end of the IPL Plan specifically, the projected rate impact would add $115.3 million in annual tracker revenue collected by IPL from its customers. See Non-Conf. Ex. vol. 4 at 114. By comparison, IPL had two successive general rate cases in the 5 years prior to seeking approval of its TDSIC Plan, and the authorized annual revenue increase for the first was $29.6 million and for the second was $43.9 million, or $73.5 million together. Id. The proposed rate impact from the TDSIC Plan, in other words, is considerably greater than the last two rate cases combined. Id. Since the next rate case will include recovery of the 20% deferred TDSIC

account in addition to the $115.3 million of annual revenue in the TDSIC tracker, the TDSIC-related portion of IPL's next rate case will involve a base rate increase that is on the order of double the impact of the last two rate cases put together. Id.

IV. SUMMARY OF THE ARGUMENT

This appeal arises from a regulatory proceeding, but the three issues presented for judicial review do not implicate the Commission's administrative expertise. The first question concerns the untimely admission of a mass of highly material evidence near the end of the hearing, raising a point of process that is subject to review under the rules of evidence and administrative notice, without need for deference relating to the Commission's ratemaking function. The second issue is a matter of statutory interpretation that is properly reviewed *de novo*, whether the Commission misconstrued the cost-justification provision by substituting a "risk reduction" criterion for the statutory "incremental benefits" standard. Finally, the third error involves deficiencies in the composition of the Order, which lacked specific findings on material disputes raised below, and hence addresses a structural requirement for a valid Commission order.

The untimely admission of thousands of pages of IPL workpapers at effectively the end of the evidentiary hearing was unfairly prejudicial, contrary to principles of evidence and process, and an abuse of discretion. The issue concerns a voluminous mass of highly material evidence, going to statutory requirements on which IPL bore the burden of proof, which IPL chose not to include in its case-in-chief or rebuttal submissions. The radical reformulation of the evidentiary record

occurred after the Consumer Parties had rested, after cross-examination of the knowledgeable IPL witnesses had been completed, and at a time when only one IPL witness addressing unrelated issues remained. The materials were not testimonial in nature, were unverified, were not self-authenticating, were offered without any sponsoring witness, and were admitted without any foundation beyond the unsworn representations of IPL's attorney. The only rationale expressed in the Order – that the materials had been previously disclosed – cannot cure the fundamental unfairness of a massive evidentiary reformation as the record was being closed.

The TDSIC Statute requires, as a prerequisite to Plan approval, a showing that "the estimated costs of the eligible improvements included in the plan are justified by incremental benefits attributable to the plan." IPL, however, did not attempt to identify any cost-justified "incremental benefits," and did not show the Plan would yield any improvements to system reliability or service quality. Instead, IPL relied on a "risk reduction" rationale, premised on the theory that a percentage reduction in risk, no matter how small that risk may be, is sufficient justification for the enormous $1.2 billion investment proposed. That shift from the statutory standard significantly altered the analysis, because the undisputed record shows IPL has a highly reliable system with a consistent history of strong performance and IPL recently received added rate funding to target the leading cause of outages. IPL's revision to the statutory cost-justification requirement is underscored by the excessive costs needed to achieve a negligible change in system performance, as IPL proposed a budget on par with much larger utility systems that have much greater

reliability challenges. The Commission erred by adopting IPL's misinterpretation of the cost-justification provision in the TDSIC Statute.

A basic principle of judicial review requires specific findings by the Commission addressing all of the material issues raised by the parties. That articulation requirement prohibits any assumption of a supporting rationale unless specifically expressed in the Order. Here, the Commission found the statutory cost-justification requirement satisfied in only a few short conclusory sentences, without confronting or refuting the substance of the points raised by the Consumer Parties. Even IPL proposed three pages of findings on those disputes, but the Order neither adopted nor revised IPL's analysis and instead truncated the determinations by in essence announcing a conclusion. In particular, the Commission endorsed IPL's "monetization" report without critical scrutiny, despite a record that showed a mismatch of time periods based on 7 years of spending compared to 20 years of computed benefits, with the benefits greatly overstated and the costs materially understated. The lack of specific findings on the pivotal disputes raised below concerning the cost-justification requirement is reversible error.

V. ARGUMENT

The three issues presented in this appeal each implicate distinct standards of review. None of the three issues, notably, involve questions of ratemaking expertise within the particular competence of the Commission. The applicable principles, rather, concern the presentation of evidence, the interpretation of statutory provisions, and the composition of administrative orders.

The established framework for judicial review of Commission orders was explained in Northern Indiana Public Service Co. v. United States Steel Co., 907 N.E.2d 1012 (Ind. 2009). At the first level of review, there must be substantial evidence in light of the entire record to support the findings of basic fact. Id. at 1016. At the second level, "the order must contain specific findings on all the factual determinations material to its ultimate conclusions." Id. Ultimate facts are reviewed on a sliding scale of deference, depending on the degree of administrative expertise utilized. Id. Finally, an order is subject to review as "contrary to law," which addresses questions of jurisdiction and conformance with statutory standards and legal principles. Id. "[L]egal propositions are reviewed for their correctness." Id. at 1018 (quoting McClain v. Review Board, 693 N.E.2d 1314, 1318 (Ind. 1998)).

Generally, the admission or exclusion of evidence and order of presentation are matters reviewed for an abuse of discretion. See State Farm Mut. Auto. Ins. Co. v. Woodgett, 59 N.E.3d 1090, 1093 (Ind. App. 2016) (finding abuse of discretion in admission of evidence); State Farm Mut. Auto. Ins. Co. v. Shuman, 175 Ind. App. 186, 199-200, 370 N.E.2d 941, 952 (1977) (applying abuse of discretion standard in context of principle that "a party should not withhold part of his proof and introduce it as rebuttal instead of offering it as part of his case in chief"). An abuse of discretion occurs when the evidentiary decision is clearly against the logic and effect of the facts and circumstances, or the reasonable, probable and actual deductions to be drawn therefrom, or if the decision is without reason or based on impermissible considerations. See Woodgett, 59 N.E.3d at 1093; Arlton v. Schraut, 936 N.E.2d

831, 836 (Ind. App. 2010), transfer denied, 950 N.E.2d 1200 (Ind. 2011). Reversible error may be found where the ruling is inconsistent with substantial justice. See Woodgett, 59 N.E.3d at 1093.

"However, to the extent that the evidentiary issue depends on the construction of a rule of evidence, and not the rule's application to any particular set of facts, our review is *de novo*." Arlton, 936 N.E.2d at 836. See also VanPatten v. State, 986 N.E.2d 255, 260-67 (Ind. 2013) (finding admission of evidence erroneous absent adequate foundation as required by rule). In this case, the untimely admission of IPL's workpapers is subject to review for an abuse of discretion, but the requirements of the applicable rules may be determined by this Court as a matter of law.

The proper interpretation of the statutory provision requiring that the incremental benefits of a TDSIC Plan must justify the projected costs is subject to *de novo* review. As a creature of statute, the Commission's authority is circumscribed by the terms of its enabling legislation. See NIPSCO, 907 N.E.2d at 1015; NIPSCO Industrial Group, 31 N.E.3d at 5. Accordingly, the correct construction of statutory provisions is an issue of law for the courts. See Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission, 715 N.E.2d 351, 354 (Ind. 1999) (applying *de novo* review); BP Products North America, Inc. v. Office of Utility Consumer Counselor, 947 N.E.2d 471 (Ind. App.), mod'd on rehearing on different grounds, 964 N.E.2d 234 (2011), transfer dismissed, 963 N.E.2d 1120 (Ind.

2012) ("The interpretation of a statute is a question of law reserved for the courts, and we review such interpretation under a *de novo* standard.").

In NIPSCO Industrial Group, 100 N.E.3d at 241, the Supreme Court rejected a "tie-goes-to-the-agency" approach to statutory construction: "In discharging our constitutional duty, we pronounce the statutory interpretation that is best and do not acquiesce in the interpretations of others. Deciding the scope of the Commission's authority under the TDSIC Statute falls squarely within our institutional charge." See also id. ("We review questions of law *de novo*, . . . and accord the administrative tribunal below no deference.") (citation omitted). No deference is due to the Commission, therefore, with respect to the construction of the cost-justification provision in the TDSIC Statute.

Finally, the principle that a Commission order, to be valid, "must contain specific findings on all the factual determinations material to its ultimate conclusions" (NIPSCO, 907 N.E.2d at 1016), is an established requirement under Indiana law. See Hidden Valley Lake Property Owners Ass'n v. HVL Utilities, Inc., 408 N.E.2d 622, 626 (Ind. App. 1980); L.S. Ayres & Co. v. Indianapolis Power & Light Co., 169 Ind. App. 652, 662, 351 N.E.2d 814, 822 (1976). The requirement of specific findings is essential to intelligent judicial review, and serves to prevent arbitrary or ill-considered action. See L.S. Ayres, 169 Ind. App. at 662, 351 N.E.2d at 822. "There is little assurance that an administrative agency has made a reasoned analysis if it need state only ultimate findings or conclusions." Id. A lack of specific findings, therefore, is reversible error. See Citizens Action Coalition v.

Duke Energy Indiana, Inc., 16 N.E.3d 449, 457-62 (Ind. App. 2014) (reversing Commission order for lack of specific findings on material issues).

A. The Commission Abused Its Discretion and Violated Evidentiary Principles by the Belated Admission of IPL's Workpapers

At effectively the end of the Commission hearing, IPL sought to supplement the evidentiary record with a massive volume of additional documents, through a request for administrative notice of nearly 20,000 pages of workpapers that had been submitted at the outset of the case but not previously offered into evidence. That request came after IPL chose not to include those documents with its prefiled case-in-chief evidence, with its prefiled rebuttal evidence, or as redirect exhibits at the hearing. The admission of those voluminous materials was highly prejudicial and unfair, because the documents went to key elements on which IPL bore the burden of proof, yet IPL did not seek to introduce them into evidence until after the Consumer Parties had rested their cases and cross-examination of the knowledgeable IPL witnesses had been completed. Administrative notice was improper because no foundation was laid, there was no sponsoring witness, and the documents were not verified or self-authenticating. Admission of the workpapers at that juncture was contrary to substantial justice and is reversible error.

1. IPL's supplementation of the record with its voluminous workpapers was untimely

This is a statutory proceeding in which IPL, as petitioner, bore the burden of proof to establish the essential elements for relief under Section 10 of the TDSIC Statute. See Ind. Code §8-1-39-10(b). Just like a plaintiff in a civil case, IPL was

required to present the necessary evidence to support its claim in its case in chief, and not in piecemeal fashion through rebuttal, redirect or beyond. "[I]n furtherance of orderly trial procedure, a party should not withhold part of his proof and introduce it as rebuttal instead of offering it as part of his case in chief." Shuman, 175 Ind. App. at 199-200, 370 N.E.2d at 952. That basic principle of fair process has been an established feature of Indiana law for more than a century. See Hilker v. Hilker, 153 Ind. 425, 55 N.E. 81, 82 (1899) ("The rule is that a party cannot divide his evidence, and give part in chief and part in rebuttal; and, if he goes into a subject originally, he must then present all his evidence upon that point.").

That general requirement is specifically reflected in the Commission rule governing the submission of evidence through the taking of administrative notice. That rule states: "A request by a party for administrative notice of a factual matter that should be included in a party's prefiled testimony *shall be made at the same time the related evidence is prefiled*." See 170 Ind. Admin. Code §1-1.1-21(j) (emphasis added). In accordance with the Commission's rule on prefiling (id. §18(g)), IPL prefiled its case-in-chief evidence concurrent with the filing of its petition, including the written testimony of six witnesses and attached exhibits. See App. vol. II at 60-71. Section 21(j) required IPL to seek administrative notice of any additional supporting materials "at the same time" it prefiled its case-in-chief evidence. IPL did not do so. Instead, IPL waited until the end of the evidentiary hearing four months later before requesting administrative notice of its workpapers. See Tr. vol. 3 at 205. The belated request deviated from the timing requirement in

the administrative notice rule, and further contravened the basic principle that case-in-chief evidence must be presented as part of the case in chief and not offered at a later stage of the proceeding.

The delay in presentation was seriously prejudicial and unfair. This issue does not involve merely a discrete contested exhibit, but rather a massive volume of highly material documents going to essential elements of IPL's case. The nearly 20,000 pages of materials were so voluminous that they were not presented with hard copies, and instead were offered on two CDs. See Tr. vol. 3 at 205. The belated submission dwarfed the rest of the record, accounting for over 95% of the total volume of written evidence submitted by IPL.

Furthermore, to secure approval of its TDSIC Plan, IPL was required to present evidence to support a finding of "best estimates" for the cost of the planned work. See Ind. Code §8-1-39-10(b)(1). When asked at the hearing, "Where are the best estimates?", IPL's witness answered: "They are in my Workpapers 1, 2, and 3, and they're summarized in the sortable list, Workpaper 5." See Tr. vol. 3 at 204. IPL's counsel then requested administrative notice, describing the materials as "the workpapers supporting the Distribution Automation and the TRIP Project" and "the workpapers which are *the actual cost estimates*." Id. at 205 (emphasis added).

By contrast, the Plan itself as presented in IPL's prefiled case in chief consisted of a narrative description of the planning process, objectives, benefits, cost estimates, and major projects (see Non-Conf. Ex. vol. 1 at 59-146), with certain appendices (id. at 147-234; vol. 2 at 4-64). One appendix included a list of projects

by year, with line items that referenced the type of project, location, a cost estimate, and number of units. See Conf. Ex. vol. 1 at 4-25. However, IPL provided only a few "examples" of how the cost estimates were derived. Id. at 26-34. The estimates in the evidentiary filing were otherwise an unsupported recitation of dollar figures. The support for the cost estimates, necessary to satisfy the statutory "best estimate" requirement, was contained only in the workpapers that IPL did not include in its case-in-chief evidence. See App. vol. II at 75-76 (stating the workpapers contain "the detailed cost estimates for the TDSIC Plan"); id. at 85, items 5-9 (using "WP" for workpapers to identify the cost estimate documents).

Similarly, the list of projects in IPL's evidentiary submission was presented in summary format. See Non-Conf. Ex. vol. 2 at 15-41. However, the specific description and identification of each project, and why it was selected for inclusion in the Plan, was set forth in the workpapers that were not offered in evidence with IPL's case in chief. Those workpapers included support for several major projects as well as "an identification of the specific asset and locational information, its consequence of failure and likelihood of failure, the asset-specific data underlying heat maps, and an asset-specific risk profile." See App. vol. II at 76-77; id. at 86-87, items 12-16.

The distinction between the actual *evidence* in IPL's case in chief as opposed to the *workpapers* that had been submitted by IPL but were not included as part of its evidence, furthermore, is a matter of consequence. As the Supreme Court

emphasized in Public Service Commission v. Indiana Bell Telephone Co., 235 Ind. 1, 27, 130 N.E.2d 467, 479 (1955) (emphasis added):

> [T]he Commission cannot act on its own independent information, but must base its findings upon evidence presented in the case, with an opportunity to cross-examine witnesses, to inspect documents or exhibits, and to offer evidence in explanation or rebuttal and *nothing can be treated as evidence which has not been introduced as such*.

IPL was the master of its case-in-chief submission, and had every opportunity to include all the evidence that it wished to present to support the elements of its claim for relief. IPL chose to prefile the written testimony and attached exhibits of six witnesses as its case in chief, but chose not to include the workpapers. By the end of the hearing, when IPL sought to supplement the evidentiary record with the voluminous workpapers that it had previously decided not to include in its case in chief, IPL's counsel was clearly conscious of the importance of the evidentiary shortfall at that juncture, commenting that "[t]hese cases have a way of finding themselves before the Court of Appeals." See Tr. vol. 3 at 208. Obviously, IPL's counsel realized the record was deficient without the added support of the workpapers that IPL had not previously offered into evidence.

The last-minute submission was highly prejudicial and grossly unfair to the Consumer Parties. All other parties framed their opposing evidence in response to the contents of IPL's case in chief. IPL then prefiled its rebuttal evidence, with the information and exhibits that IPL selected to address the points raised in the Consumer Parties submissions, but again did not include its workpapers. IPL did file a request for administrative notice with its rebuttal evidence, but that request

did not seek notice of the workpapers. See App. vol. II at 149-50. Later, as the hearing approached, IPL sought stipulations for the admission of additional administrative notice materials in lieu of cross-examining one of the witnesses, but yet again did not include the workpapers in that request. See Tr. vol. 2 at 157-63.

The parties proceeded to hearing on that basis. The Consumer Parties had completed the presentation of their own evidence, and the cross-examination of the relevant IPL witnesses had been completed, before IPL raised the question of administrative notice of the workpapers. Indeed, IPL had completed the redirect examination of the penultimate witness before making the request. See Tr. vol. 3 at 205-09. The only remaining witness addressed unrelated accounting matters, and his testimony did not reference the workpapers at all. Id. at 210-35. In all relevant respects, the massive submission of some 20,000 pages of highly material evidence occurred at the end of the hearing. The parties litigated the entire case on less than 1,000 pages of IPL evidence, and then IPL was permitted to present over 95% of its case just before the record was closed, over the Consumer Parties' objections.

The Court addressed a similar issue in NIPSCO Industrial Group, 31 N.E.3d at 7-8. That case, like this, involved review of a Commission order approving a TDSIC Plan, and the Court reversed, finding the utility failed to present sufficient detail identifying the planned projects. On appeal, the utility argued the necessary detail was included in a rebuttal exhibit, but the Court held that exhibit was not sufficient to support the Plan where it was offered only in response to the OUCC's assertion of concerns about the lack of detail. Id. Here, the tardiness is even more

egregious. Unlike the rebuttal exhibit in NIPSCO Industrial Group, IPL did not offer its workpapers into evidence with its rebuttal submission, and instead waited until the Consumer Parties had offered all their evidence and had completed cross-examination of the knowledgeable IPL witnesses before seeking administrative notice. The massive reformulation of the record at that point was severely prejudicial and manifestly unfair.

Notably, the Commission did not make a ruling at the time of the hearing on IPL's request for administrative notice, and instead took the question under advisement. See Tr. vol. 3 at 206-07. The Consumer Parties, consequently, did not have reasonable opportunity to seek procedural relief, such as continuing the hearing, recalling the knowledgeable IPL witnesses, or supplementing their own evidentiary submissions. The ruling and grant of administrative notice came only in the Commission's final Order concluding the proceeding. See Order at 28-29 (App. vol. II at 34-35). At that point, it was too late to pursue alternative avenues in response to IPL's untimely supplementation of the evidentiary record. This appeal is the only effective recourse.

2. The workpapers were admitted in violation of the rules of evidence and administrative notice

As explained in Section A(1), supra, IPL's supplementation of the record with a voluminous mass of highly significant exhibits at essentially the end of the evidentiary hearing contravened the principle that the entirety of case-in-chief evidence should be presented as part of the petitioner's case in chief. See Shuman, 175 Ind. App. at 199-200, 370 N.E.2d at 952; Hilker, 153 Ind. 425, 55 N.E. at 82.

That untimely submission also violated the Commission rule requiring that any request for administrative notice relating to a party's prefiled testimony "shall be made at the same time the related evidence is prefiled." See 170 Ind. Admin. Code §1-1.1-21(j). In addition to being offered too late as the record was being closed, the workpapers were improperly admitted because the materials lacked foundation and were not subject to administrative notice.

The workpapers consisted of tens of thousands of pages of exhibits that possibly had been prepared by or under the direction of IPL witnesses, but were not offered with any supporting testimony by any sponsoring witness. See Tr. vol. 3 at 205-09. They were not direct examination exhibits, cross-examination exhibits, or redirect exhibits. There was no testimony identifying or authenticating the documents, or otherwise providing a foundation for admission. There was no available IPL witness for the Consumer Parties to cross-examine regarding the documents, their preparation, or the predicates for admissibility. The testimony of a witness with knowledge is the ordinary method of identifying and authenticating exhibits for purposes of admission into evidence, and none of the alternatives set forth in Ind. R. Evid. 901 are applicable here.[2] Instead of witness testimony, the workpapers were offered by IPL solely pursuant to the rule on administrative notice, which parallels the rule governing judicial notice in court proceedings. See

[2] Specifically, the workpapers did not involve opinions about handwriting, comparisons with any authenticated specimen, distinctive characteristics of an item, opinions about a voice, the contents of a telephone conversation, public records, ancient documents, description of a process or system, or an authentication method provided by statute or rule. See Evid. Rule 901(b).

170 Ind. Admin. Code §1-1.1-21(f) to (k); Ind. R. Evid. 201. Without any foundation or sponsoring witness, however, the workpapers were not subject to admission by notice.

Significantly, the workpapers were not testimonial in nature, such as transcripts of prior proceedings, deposition testimony or affidavits. The massive collection of documents, furthermore, was not verified or in any way attested to with any sworn certification. The materials were not, by any stretch, self-authenticating. See Ind. R. Evid. 902. In Reef v. Asset Acceptance, LLC, 43 N.E.3d 652 (Ind. App. 2015), the Court reversed summary judgment and held the trial court erred by considering exhibits that, like the workpapers in this case, were not properly authenticated, lacked foundation, and were neither self-authenticating nor supported by affidavit or other sworn statement. Id. at 653-54.

The only support for the presentation here was the unsworn representations made by IPL's counsel. See Tr. vol. 3 at 205-09. Such assertions by counsel of record are non-testimonial and insufficient to support the admission of evidence. See, e.g., Bell v. Topeka, 496 F. Supp.2d 1182, 1185 (D. Kan. 2007) ("The personal affidavit submitted by plaintiff's counsel is insufficient to provide authentication when plaintiff's counsel is not the author of these documents nor does he state that he has any personal knowledge of the facts contained within those documents.") (footnote omitted). See also Seth v. Midland Funding, LLC, 997 N.E.2d 1139, 1142-43 (Ind. App. 2013) (holding affidavit describing business records deficient for lack of personal knowledge and absence of sworn, certified or self-authenticated copies of

the records); Coghill v. Badger, 430 N.E.2d 405, 406-07 (Ind. App. 1982) (finding attorney affidavit deficient absent personal knowledge).

Aside from taking notice of laws, judicial notice of a factual matter is appropriate only where it either "is not subject to reasonable dispute because it is generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." See Ind. R. Evid. 201(a)(1). Judicial notice can also be given as to the "existence" of published regulations, municipal ordinances, or court records. Id. 201(a)(2). The Commission rule on administrative notice, similarly, allows for notice of official Commission publications, Commission orders, exhibits introduced in evidence in other Commission proceedings, and other documents in the Commission's official files or previously filed with the Commission. See 170 Ind. Admin. Code §1-1.1-21(f), (h). Those rules do not authorize admission of the workpapers by notice in these circumstances.

Unquestionably, the materials at issue are not "generally known" in the territory and are not readily determinable from "sources whose accuracy cannot reasonably be questioned." This situation is different in kind from taking notice of, for example, a weather report or the weekday on which a given date fell. Rather, these are documents prepared for litigation by IPL and its agents. They are not official Commission documents such as orders, regulations or reports. At most, they were in the Commission files because they were previously submitted by IPL, but they are not pleadings, verified submissions, or documents offered solely for proof of

filing. The rules of judicial and administrative notice do not support the use of previously filed documents as substantive proof on the merits of disputed issues.

The judicial notice rule contemplates only taking notice of the "existence" of court records (see Evid. Rule 201(a)(2)), and the Commission rule allowing notice of documents in the Commission's official files is properly treated in a consistent manner. In this case, IPL did not offer the workpapers solely to establish that they had, in fact, been filed with the Commission. To the contrary, IPL offered the contents of the workpapers as substantive evidence to support the elements of proof required to support its claim for relief.

If a party, for example, files an unverified motion with the Commission, that party cannot later seek notice of that document to prove the truth of an unsworn assertion in the motion. Filing in itself does not establish a foundation for the admission of evidence. See In re D.P., 72 N.E.3d 976, 982 (Ind. App. 2017) ("it would stretch the concept of judicial notice too far to allow the contents of the previous filings in this case to be accepted as substantive evidence"); id. at 983 ("taking notice of substantive facts contained in preliminary filings in this case would exceed the proper bounds of judicial notice principles"); Twin Lakes Regional Sewer District v. Teumer, 992 N.E.2d 744, 748 (Ind. App. 2013) ("while a party's pleading may be judicially noticed, the facts in those pleadings are not necessarily subject to judicial notice"; "facts within the report . . . were not suitable for judicial notice").

The admission of the workpapers was material to the Commission's findings on the merits of IPL's petition, particularly in connection with the statutory "best estimate" requirement. See Order at 4 (App. vol. II at 10) (IPL's cost estimates were "supported" by "IPL's workpapers"); id. at 15 (App. vol. II at 21) ("Mr. Bentley's workpaper showed that the TRIP project has a benefit to cost ratio of 3 .3 and is cost effective"); id. at 22 (App. vol. II at 28) ("IPL's confidential workpapers included electronic spreadsheets underlying the sortable list. IPL's confidential workpapers also included *the detailed cost estimates for the TDSIC Plan projects*.") (emphasis added). An IPL witness answered the question "Where are the best estimates?" by stating: "They are in my Workpapers." See Tr. vol. 3 at 204. IPL's counsel admitted the workpapers contained "the actual cost estimates." Id. at 205.

The necessary proof on that statutory requirement was presented by IPL only through unverified, unauthenticated documents offered without any supporting testimony or sponsoring witness. The workpapers were admitted into evidence over the objections of the Consumer Parties solely by the taking of administrative notice, where the only foundation was that the tens of thousands of pages were included in a previous submission that was, itself, unsupported by affidavit or other sworn declaration. Despite the Commission's grant of notice, that does not count as evidence. The workpapers should not have been admitted in the record on that basis.

3. The improper admission of the workpapers by administrative notice is reversible error

The foregoing points and considerations were not addressed by the Commission in the portion of the Order granting IPL's request for administrative notice, aside from the Commission rule requiring administrative notice to be sought "at the same time" that the associated evidence is prefiled. See Order at 28-29 (App. vol. II at 34-35); 170 Ind. Admin. Code §1-1.1-21(j). In particular, the Commission did not comment on the procedural prejudice arising from IPL offering a voluminous mass of material evidence as the record was being closed, after the Consumer Parties had completed both their own evidentiary submissions as well as their cross-examination of the knowledgeable IPL witnesses. The Order, moreover, did not analyze the lack of foundation where the materials were admitted by notice even though they were not verified, self-authenticating, supported by any sworn statement, or offered through the testimony of a sponsoring witness.

The only rationale presented in the Order is the suggestion that IPL's request for administrative notice did not "blindside" the Consumer Parties insofar as the workpapers had been filed and served at the outset of the case. See Order at 29 (App. vol. II at 35). Despite the rule requiring administrative notice to be sought "at the same time" that the related evidence is prefiled, the Commission indicated that provision only protects against the surprise submission of "new, previously unknown factual matter." Id. (citing 170 Ind. Admin. Code §1-1.1-21(j)). However, the workpapers were admitted by notice here precisely because they were "previously filed with the Commission." Id. (citing 170 Ind. Admin. Code §1-1.1-

21(h)). If Section 21(j) only provides protection for "new, previously unknown" materials but Section 21(h) allows notice of anything "previously filed," then Section 21(j) would provide no protection at all because "previously filed" documents will not be "new" and "previously unknown."

More fundamentally, the relevant question is not whether the Consumer Parties were aware of the workpapers before IPL requested administrative notice. The question, rather, is whether IPL adequately offered the workpapers into evidence in a timely manner. Clearly, it did not. IPL offered no excuse whatsoever for its failure to include the workpapers in its case-in-chief and rebuttal evidentiary submissions. IPL made no attempt to place the opposing parties on notice that it would rely on those documents to sustain its burden of proof, at least not until it was too late for the Consumer Parties to respond to the radical reformation of the evidentiary record. The Consumer Parties were denied the opportunity to frame their own evidence in response to IPL's drastically revised case in chief, and were further prevented from cross-examining the knowledgeable IPL witnesses on the mass of documents that IPL belatedly designated as its evidence on the essential elements of its claim. Regardless of whether the Consumer Parties were blindsided as to the existence of the documents, they were blindsided on the evidence that IPL chose to present to support its case.

A misconstruction of the applicable evidentiary rules is an error of law. See Arlton, 936 N.E.2d at 836. See also VanPatten, 986 N.E.2d at 260-67 (finding admission of evidence erroneous absent adequate foundation); Reef, 43 N.E.3d at

653-54 (reversing grant of summary judgment where evidentiary materials lacked foundation). An abuse of discretion in an evidentiary ruling is reversible error where the determination is inconsistent with substantial justice. See Woodgett, 59 N.E.3d at 1093. Here, the volume of documents was enormous and the materiality was pivotal. Specifically, IPL had the burden of proving "best estimates," and IPL admitted the "best estimates" were in the workpapers, which contained "the actual cost estimates" and "the detailed cost estimates for the TDSIC Plan projects." See Tr. vol. 3 at 204; id. at 205; Order at 22 (App. vol. II at 28). The admission of the workpapers by administrative notice was erroneous, and that error was prejudicial, unfair, and inconsistent with substantial justice. The Order, therefore, must be reversed.

B. The Order Misinterpreted the Statutory Requirement that Incremental Benefits Must Justify the Estimated Costs

As an essential prerequisite to approval of a proposed TDSIC Plan, the utility must demonstrate that "the estimated costs of the eligible improvements included in the plan are justified by incremental benefits attributable to the plan." See Ind. Code §8-1-39-10(b)(3). In the Order, however, the Commission endorsed IPL's effort to rewrite the statutory standard, by substituting "risk reduction" for "incremental benefits." That revised formulation substantially altered the cost-justification requirement, because IPL's system is already highly reliable, with little risk to mitigate, yet IPL proposed an extremely expensive Plan targeting that small level of risk. IPL failed to show any projected impact at all on the reliability metrics it regularly monitors, and failed to account for the recent increase in rate funding it

already received to address the leading cause of outages. IPL's exclusive focus on "risk reduction" was a material deficiency under the statutory requirement, because IPL did not show that unquantified gains in reliability or service quality, if any, justified the very high level of expense.

1. The cost-justification standard is a fundamental statutory requirement for approval of a TDSIC plan

The TDSIC Statute establishes a "tracker" mechanism that is distinct in significant respects from traditional utility ratemaking. See NIPSCO Industrial Group, 100 N.E.3d at 238-39. Traditionally, rates have been set though a "rate case" involving comprehensive review of the utility's operations, with costs being reviewed by the Commission only after the system assets have been constructed and placed in service. Id. See also Citizens Action Coalition v. Northern Indiana Public Service Co., 485 N.E.2d 610, 614-15 (Ind. 1985), cert. denied, 476 U.S. 1137 (1986) (explaining rate recovery is available only for "used and useful" assets). By contrast, the TDSIC Statute and other trackers permit regulatory preapproval for defined categories of future expenses, which are then subject to recovery through tailored rate increases without scrutiny of the utility's entire operations. See NIPSCO Industrial Group, 100 N.E.3d at 238-39.

Notably, under traditional ratemaking, the Commission conducts an after-the-fact prudence review and has broad authority to disallow any expenditures that it finds to be unreasonable or excessive. See Indiana-American Water Co. v. Office of Utility Consumer Counselor, 844 N.E.2d 106, 116 (Ind. App. 2006). By contrast, once estimated costs have been preapproved under the TDSIC Statute, they are

subject to "automatic" recovery in rates. See Ind. Code §8-1-39-9(a). The need for cost justification at the time of Plan approval, accordingly, stands in the place of subsequent review under traditional ratemaking with potential disallowance of excessive or unreasonable costs. As the Supreme Court emphasized in NIPSCO Industrial Group, the cost-justification requirement is a critical protection where costs are being preapproved for automatic rate recovery. See 100 N.E.3d at 242 ("A meaningful cost-benefit analysis requires the Commission to determine whether the estimated costs of the designated improvements are justified by their incremental benefits."); id. at 243 (noting "the further requirement that the Commission meaningfully apply the Statute's cost-benefit guideposts during the Section 10 proceeding").

As petitioner, IPL had the burden to establish that the estimated costs were justified by incremental benefits attributable to the proposed Plan. Satisfaction of that statutory element could not be presumed, nor could the burden be shifted to opposing parties to negate that requirement. See NIPSCO Industrial Group, 31 N.E.3d at 8-9. IPL's effort to address a different standard using a "risk reduction" criterion was a failure of proof on an essential element.

2. The Commission erred by adopting IPL's proposed statutory revision

From its initial filing, IPL explained that the contents of its proposed Plan were determined through a "Risk Model" using a "risk-based assessment" that considered "risk score, risk reduction benefit, replacement cost, and other resource constraints." See Order at 3-4 (App. vol. II at 9-10). On rebuttal, after the

Consumer Parties challenged the focus on risk reduction as opposed to incremental benefits (id. at 9-12 (App. vol. II at 15-18)), IPL reiterated that it relied on a "risk-based approach," while stating that predicting any overall system reliability improvement is "difficult." Id. at 13 (App. vol. II at 19). Using the risk-based approach, assets were selected for replacement "based on their risk and location in the risk grid." Id. at 14 (App. vol. II at 20).

At the same time, IPL admitted it was not attempting to show incremental improvements. As IPL put it in a post-hearing submission, "IPL is not seeking to move its system reliability from one level to another level." See App. vol. II at 186-87. IPL regularly and routinely monitors its system performance and submits annual reports to the Commission showing results under several reliability metrics. See Non-Conf. Ex. vol. 4 at 115-19. IPL's evidentiary submission in this case, nevertheless, did not include any analysis of those established metrics or attempt to show that the proposed Plan would lead to any improvement in performance. Id. Tellingly, the Commission did not make any finding that the planned projects would provide any incremental benefit to reliability or service quality, and instead the Order spoke only using the disjunctive "maintain or improve." See Order at 23, 24 (App. vol. II at 29, 30).

The difference between "risk reduction" and "incremental benefits" is significant in this context, because IPL has consistently achieved a high level of reliability. IPL touts that status on its website: "IPL's reliability rate ranks high among investor-owned utilities nationwide." See Non-Conf. Ex. vol. 4 at 115. IPL

described itself in recent rate proceedings as a "top performer" in reliability in Indiana, with top quartile performance in a national analysis on three key performance metrics. Id. at 117. IPL also quoted a report indicating "first-decile performance" over a 5-year period and stating on that basis that "one might be expected to prefer to be an IPL customer than any other investor owned utility in Indiana or indeed most other states." Id. at 118. In its most recent reliability report to the Commission, IPL stated it "achieved another year of strong reliability performance," with a key metric "expected to be in the top quartile in the industry for 2018." Id. at 115, 134. A Commission report assessing reliability metrics for IPL and its peer electric utilities in Indiana for 17 years ending in 2018 showed IPL consistently had the best or second-best performance throughout that period. Id. at 117. The 2018 results were comparable to or better than IPL's 5-year and 10-year averages, indicating no recent deterioration in performance. Id.

That consistent history of reliable service by IPL through the most recent reports, furthermore, does not reflect additional reliability investment authorized in a Commission rate order in late 2018. See Non-Conf. Ex. vol. 4 at 118-19. In particular, the Commission approved an increase in rate revenue to support a near tripling of IPL's budget for tree-trimming expense, from $4.1 million to $11 million annually. Id. That element of the rate increase was responsive to IPL's evidence in the rate case that trees were by far the leading cause of outages on the IPL system, accounting for 40% of outages compared to the next highest cause at 15%. Id. Prior to any TDSIC investment, consequently, IPL was already receiving increased

ratepayer funding to target the leading cause of outages, further enhancing its existing status as a highly reliable utility.

In that light, a reduction in risk cannot be equated to an incremental benefit. IPL asserted that its Plan was designed to reduce system risk by 36.6% (see Order at 5 (App. vol. II at 11)), which sounds like a lot, but was only quantified in relation to a universe of existing risk, no matter how small. If, for example (and in the absence of IPL evidence one way or another), IPL has already achieved system reliability of, say, 99.99%, then the remaining risk would only be 0.01%. A 36.6% reduction in that risk would only take the 99.99% reliability up to 99.99366%, for an incremental benefit of only 0.00366%. Even a slight improvement has some value, of course, but the TDSIC Statute charges the Commission with balancing the "incremental benefits" against the estimated costs. Defining the benefit purely in terms of risk reduction, without regard to the level of existing risk, does not provide the necessary measure of incremental improvement needed for a meaningful cost-benefit analysis.

The analytical defect in relying exclusively on risk reduction to satisfy the statutory incremental benefits requirement can be illustrated by considering a hypothetical second IPL Plan once the first Plan is completed. Assuming the first Plan reduces risk by 36.6% as projected, the remaining system risk will be that much smaller by the time the second Plan is proposed. By the theory adopted below, however, IPL could propose another Plan at a comparable level of investment to achieve a 36.6% reduction in that reduced level of risk. According to IPL, it

would not matter that 36.6% of a smaller risk level yields less benefit, because it is still a 36.6% reduction in the updated risk. By that rationale, ratepayers would be obliged to maintain the same level of rate funding into perpetuity despite diminishing increments of system improvements.

The shift from assessing incremental benefits as required by statute to considering only reductions in what is already a low level of risk, moreover, is underscored by the other half of the cost-benefit equation: the extremely high budget proposed by IPL. As the Commission pointed out, "IPL's $1.2 billion TDSIC Plan is one of the largest ever proposed under the TDSIC Statute." See Order at 29 (App. vol. II at 35). The proposed costs are at a level commensurate with the approved Plans of much larger Indiana electric utilities that have consistently ranked below IPL in system reliability metrics. See Non-Conf. Ex. vol. 4 at 120. The ultimate rate impact of the TDSIC Plan, furthermore, will be extreme, on the order of twice the total revenue increase authorized in IPL's last two general rate cases combined. Id. at 114.

For such a high level of estimated costs subject to automatic recovery in rates, rigorous scrutiny is needed to determine whether those costs are "justified" by incremental benefits attributable to the Plan. See Ind. Code §8-1-39-10(b)(3). Instead of the careful weighing of costs against benefits as prescribed by the statute, however, the Commission deemed it sufficient that IPL proposed to reduce its already low level of risk, with unspecified effect in terms of incremental benefits. That alternative rationale did not satisfy the test required by the statute.

3. The misinterpretation of the incremental benefits standard is reversible error

Statutory construction is an issue of law reviewed *de novo*, without deference to the Commission. See NIPSCO Industrial Group, 100 N.E.3d at 241; Indiana Bell, 715 N.E.2d at 354. The Commission derives its authority from its enabling legislation, and consequently the misconstruction of a controlling statute renders a Commission order invalid. See NIPSCO Industrial Group, 100 N.E.3d at 241-44 (reversing order due to misinterpretation of TDSIC Statute); NIPSCO Industrial Group, 31 N.E.3d at 5-9 (same). The error here involved a misapplication of the statutory provision establishing an essential prerequisite to TDSIC Plan approval, specifically the cost-justification requirement. See Ind. Code §8-1-39-10(b)(3). Given the pivotal importance of that provision to the statutory framework, the error is consequential and requires reversal of the Order.

C. The Order Lacks Specific Findings on Important Issues

To be upheld on judicial review, a Commission order must contain specific findings on all material issues raised by the parties below. See NIPSCO, 907 N.E.2d at 1016; Citizens Action Coalition, 16 N.E.3d at 457-62; Hidden Valley Lake, 408 N.E.2d at 626; L.S. Ayres, 169 Ind. App. at 662, 351 N.E.2d at 822. In this case, satisfaction of the cost-justification requirement under Ind. Code §8-1-39-10(b)(3) was a vigorously contested issue and a primary focus of the party submissions. In the post-hearing briefing, the Consumer Parties submitted a separate brief devoted to that controversy (see App. vol. III at 79-94) and further offered 3-1/2 pages of proposed Commission findings on that subject (id. at 36-39). IPL responded by

submitting a lengthy reply brief primarily addressing the cost-justification criterion (id. at 129-78), as well as its own 3-plus pages of proposed Commission findings on that issue (id. at 212-215).

Despite that extensive debate on a key issue regarding an essential statutory requirement, the Commission announced its conclusion in only summary fashion with only half a page in the Order, reading in its entirety:

> **E. Incremental Benefits Attributable to the TDSIC Plan.** Ind. Code § 8-1-39-l0(b)(3) requires that an order on a petition for approval of a TDSIC plan must include "[a] determination whether the estimated costs of the eligible improvements included in the plan are justified by incremental benefits attributable to the plan."
>
> As shown in Table 3.3 of the TDSIC Plan, IPL monetized, from the customer experience perspective, the value of avoiding service outages associated with asset failure. IPL's analysis did not attempt to quantify all project benefits, but rather focused on projects that lend themselves to monetization. This supplemental monetization analysis showed that the projects analyzed, when viewed as part of a total portfolio, will provide a net benefit that exceeds the cost of the eligible improvements whether considered on a nominal or a present value basis.
>
> The record evidence demonstrates that the IPL Plan is proposed to reduce risk of asset failure and maintain service reliability. In doing so, the TDSIC Plan provides incremental benefits compared to how the future would otherwise unfold.
>
> Accordingly, based on the evidence presented, we find that IPL has sufficiently prioritized and optimized the incremental benefits of its Plan and otherwise shown a sound basis for the proposed projects and associated costs. Therefore, the Commission's determination is that the estimated costs of the IPL TDSIC Plan improvements are justified by incremental benefits attributable to the TDSIC Plan.

See Order at 24 (App. vol. II at 30). The first paragraph simply quotes the statutory language. The second paragraph adopts the "monetization" analysis presented by

IPL, without confronting the serious defects raised by the Consumer Parties. The third paragraph, in cursory terms, accepts IPL's contention that risk reduction is equivalent to incremental benefits. The last paragraph states the conclusion without additional analysis.

Faced with extensive submissions by the parties on a hotly contested issue of decisive importance, in other words, the Commission elected to sidestep the hard questions by truncating its assessment down to a bare recitation of the ultimate conclusion. IPL itself proposed over 3 pages of findings on this point, but the Order edited that down to only a few short sentences of summary determinations. Compare App. vol. III at 212-15 with Order at 24 (App. vol. II at 30). There was no discussion of the critical challenges raised by the Consumer Parties, and not even commentary on the proposed findings tendered by IPL. On the face of the Order, there is no indication whether the Commission actually disagreed with IPL's analysis or simply decided on an outcome and preferred to avoid an explanation. In either event, the Order is deficient in essential findings on a major disputed issue and that deficiency is reversible error.

1. The Order failed to confront the substance of the challenge under the incremental benefits standard

As explained in greater detail supra Section V(B), the Order misconstrued the cost-justification requirement by adopting IPL's position that "risk reduction" is equivalent to the statutory term "incremental benefits." That error in statutory interpretation is compounded here by a lack of specific findings on that disputed issue. Even though cost justification was a featured element of the evidentiary

submissions and post-hearing filings, the Order accepted IPL's reformulation of the standard with only two short sentences: "The record evidence demonstrates that the IPL Plan is proposed to reduce risk of asset failure and maintain service reliability. In doing so, the TDSIC Plan provides incremental benefits compared to how the future would otherwise unfold." See Order at 24 (App. vol. II at 30). As the only finding on a controversial issue, that recitation is deficient.

The lack of specific findings resolving the merits in this regard is apparent in light of what the Order does *not* address. Most notably, the Order does not account for the existing reliability of the IPL system, with the consequence that current system risk is small and hence reducing that small risk yields only negligible incremental benefits. See Non-Conf. Ex. vol. 4 at 115-19. The Commission did not evaluate the reliability metrics regularly monitored by IPL, nor did it acknowledge that IPL failed to present evidence projecting any improvement at all to the already strong level of system performance. Id. The Order did not note that IPL admitted it was "not seeking to move its system reliability from one level to another level." See App. vol. II at 186-87. In addition, the Commission did not account for the recent increase in rate funding already granted to IPL for tree-trimming purposes, addressing what IPL identified as by far the leading cause of outages on its system. See Non-Conf. Ex. vol. 4 at 118-19.

Even in the brief comments made in the Order, the Commission did not find there would be any actual improvements attributable to the planned TDSIC projects, instead stating only that the reduction in risk would "maintain" system

reliability. See Order at 24 (App. vol. II at 30). The Order then equated such risk reduction with "incremental benefits" by comparison to "how the future would otherwise unfold" (id.), while failing to recognize the existing risk is slight and hence the extremely expensive Plan designed to mitigate that risk is not cost-justified. The defects in IPL's "monetization" report are explained below, infra Section V(C)(2), but in this context the point is that the Commission uncritically adopted IPL's theory that risk reduction is equivalent to incremental benefits, despite uncontradicted evidence showing the level of risk is small and no evidence at all showing any projected improvement.

2. The Order lacks findings addressing the material deficiencies in IPL's monetization analysis

The "monetization" report submitted by IPL relied on a Department of Energy calculation tool to estimate the financial impact of projected outages over a 20-year period, which IPL then compared to the capital costs of the proposed TDSIC projects. See Non-Conf. Ex. vol. 2 at 51-64. Based on that analysis, IPL asserted that the computed benefits exceeded the estimated costs by some $939 million. See Order at 6 (App. vol. II at 12). The Order then relied on that analysis as support for the cost-justification finding, accepting the "monetization" report without critical scrutiny. See Order at 24 (App. vol. II at 30). However, the Commission failed to make specific findings concerning the serious defects identified by the Consumer Parties, in four significant respects.

First, the IPL analysis relied on a mismatch of time periods, comparing 20 years of computed benefits against only 7 years of estimated capital costs. See Non-

Conf. Ex. vol. 4 at 120-22. IPL did not contend, however, that infrastructure investment would end after 7 years. Indeed, IPL's theory is that risk reduction justifies a high level of spending on system projects, and according to IPL nearly two thirds of the existing risk will still remain once the TDSIC Plan has been completed. See Order at 5 (App. vol. II at 11) (projecting 36.6% risk reduction). For IPL, the highly advantageous TDSIC mechanism, supported by automatic rate increases, provides strong incentive for continued investment throughout the full 20-year period. At the planned cost level for the current TDSIC Plan, the total spend over two full decades would be some $3.5 billion. See Non-Conf. Ex. vol. 4 at 122. With the time periods aligned, therefore, the total costs exceed the computed benefits by billions of dollars.[3]

In the second place, while computing the monetized benefits from a "customer experience perspective" (see Order at 24 (App. vol. II at 30)), IPL failed to compute the corresponding costs from the customer perspective. The costs to which IPL compared the calculated benefits were measured by IPL's capital investment in TDSIC projects, but the rate impact on customers would be considerably greater. See Non-Conf. Ex. vol. 5 at 117-18. That is because regulated utility rates not only provide for a "return of" capital in the form of a depreciation component, but also include a "return on" investment to compensate shareholders for risk. See NIPSCO

[3] Conversely, if the costs and benefits were both viewed over the 7-year TDSIC Plan period instead of on a 20-year horizon, the costs would still exceed the benefits. The "break-even" point under IPL's analysis would not be reached until after the end of the 7-year period. See Non-Conf. Ex. vol. 4 at 122; id. vol. 2 at 62.

Industrial Group, 31 N.E.3d at 10-11. IPL included the "return of" portion in its comparison, but excluded the "return on" portion. See Non-Conf. Ex. vol. 5 at 117-18. The total rate burden on IPL customers over the 20-year period would involve about $772 million in additional costs beyond those included by IPL. Id.

The third defect is that the $939 million net benefit asserted by IPL was a computed accumulation reaching 20 years into the future, but the total was not discounted to present value. See Non-Conf. Ex. vol. 4 at 121. The claimed value came predominantly from late in the 20-year period, based on potential avoidance of projected outages well beyond the 7-year cost period to which those benefits were being compared. In response to that criticism, IPL offered a net present value alternative in its rebuttal case, which removed 75% of the asserted net benefit, from $939 million down to $242 million. See id. vol. 2 at 154. In combination with the two respects in which IPL greatly understated the costs – by failing to account both for continued system investment during years 8 to 20, and for the mounting rate impact to customers from funding shareholder returns on top of the amounts spent by IPL – the diminished benefit total with the net present value adjustment fell far short of the full costs faced by IPL customers.

Fourth and finally, the potential avoided outages that formed the basis for the computed benefits were projected only under a "do nothing" assumption that deviated from actual practice. Under the "do nothing" alternative, IPL assumed that all system components would be allowed to run until they failed, and hence by the end of the 20-year period more and more equipment would eventually break

down and cause outages. See Non-Conf. Ex. vol. 4 at 121-22. That "do nothing" approach, however, is contrary to standard utility practice featuring regular and ongoing measures to keep the system in sound working condition. Id. IPL admitted that "the industry as a whole is trending towards a more proactive approach" and "it is standard for utilities such as IPL to proactively replace assets." Id. vol. 2 at 146; id. vol. 5 at 84. IPL's existing system maintenance practices, prior to any TDSIC investment, has established consistently strong performance in the key reliability metrics for at least the past 17 years. Id. vol. 4 at 117, 145-46.

In other words, IPL inflated the computed benefits by comparing the TDSIC Plan to a "do nothing" alternative that is inconsistent with industry practice and sound system management. The hypothetical "do nothing" scenario results in many projected outages that regular system maintenance would prevent, especially over a 20-year period with an accumulation of assumed equipment failures. See Non-Conf. Ex. vol. 4 at 121-22. The statutory standard is "incremental benefits" (see Ind. Code §8-1-39-10(b)(3)), but comparisons against a fictional "do nothing" baseline lowers the floor and hence does not measure improvements to the status quo.

3. The lack of sufficient findings is reversible error

Notwithstanding those deficiencies, the Order accepted IPL's "monetization" analysis as sufficient to support the cost-justification requirement. See Order at 24 (App. vol. II at 30). There is no indication the Commission weighed or considered the identified defects, and certainly no explanation as to why the IPL report was nonetheless credited. On judicial review, the Court cannot presume there was some

unstated rationale supporting that result. The lack of specific findings, on a contested issue involving an essential statutory prerequisite, is reversible error. See Citizens Action Coalition, 16 N.E.3d at 457-62; Hidden Valley Lake, 408 N.E.2d at 626-29; L.S. Ayres, 169 Ind. App. at 683-85, 351 N.E.2d at 834-35.

VI. CONCLUSION

The Commission erred by admitting a mass of highly material evidence into the record at essentially the end of the hearing, contrary to the rules of notice and evidence. The Commission further erred by misconstruing the governing statute and adopting a significant revision to the key statutory standard. Finally, the Commission failed to make adequate findings resolving disputed issues of central importance to the case. The Order, accordingly, should be reversed.

Respectfully submitted,[4]

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[4] Counsel for the Industrial Group has been authorized by counsel for the other Consumer Parties to file this Joint Brief of the Appellants and the Joint Appendix on behalf of all the Consumer Parties.

WORD COUNT CERTIFICATE

The undersigned counsel hereby verifies, in accordance with Ind. Appellate Rules 44 and 46, that except for those portions of the brief excluded from the word count, the foregoing *Joint Brief of Appellants: IPL Industrial Group, Indiana Office of Utility Consumer Counselor, City of Indianapolis, and Citizens Action Coalition of Indiana, Inc.* contains 13,930 words as calculated by the word count function of the word processing software used to prepare the Brief.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on July 1, 2020 copies of the foregoing *Joint Brief of Appellants: IPL Industrial Group, Indiana Office of Utility Consumer Counselor, City of Indianapolis, and Citizens Action Coalition of Indiana, Inc.* were served on the following Public Service Contacts through E-Service using the IEFS:

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