Received: 5/13/2022 2:28 PM

IN THE
INDIANA COURT OF APPEALS

CAUSE NO. 22A-EX-00187

	) Appeal from Indiana Utility
NIPSCO INDUSTRIAL GROUP AND	) Regulatory Commission
OFFICE OF THE UTILITY CONSUMER	)
COUNSELOR,	) Cause No. 45557
	)
Appellants (Intervenor and Statutory	) The Hon. James F. Huston,
Party Below),	) Chair
	)
v.	) The Hon. Sarah E. Freeman,
	) The Hon. Stefanie Krevda,
	) The Hon. David L. Ober,
NORTHERN INDIANA PUBLIC SERVICE	) The Hon. David E. Ziegner,
COMPANY,	) Commissioners
	)
Appellee (Petitioner Below).	) The Hon. David Veleta,
	) Chief Administrative Law Judge

JOINT BRIEF OF APPELLANTS NIPSCO INDUSTRIAL GROUP AND INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR

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I. STATEMENT OF THE ISSUES

A statute allows regulated energy utilities like Northern Indiana Public Service Company ("NIPSCO") to receive special rate recovery for preapproved investments in transmission, distribution and storage infrastructure ("TDSIC" costs). To secure regulatory preapproval of a TDSIC plan, the utility must establish that "the estimated costs of the eligible improvements included in the plan are justified by incremental benefits attributable to the plan." In the proceeding under review, the Indiana Utility Regulatory Commission ("Commission") approved an Electric TDSIC Plan proposed by NIPSCO, over consumer party objections that the cost-justification prerequisite was not satisfied. The following three questions are raised on appeal:

1. Whether the Commission erred by finding the statutory cost-justification requirement was satisfied for the System Deliverability category of the Plan, where NIPSCO did not quantify any economic benefits arising from those projects or justify them by its risk reduction analysis, and instead the Commission deferred to NIPSCO's judgment in selecting projects with an assurance that NIPSCO kept cost-effectiveness in mind.

2. Whether the Commission misapplied the statutory requirement that "eligible improvements included in the plan" must be cost-justified, by finding it unnecessary for major projects and even entire categories to satisfy that standard so long as the plan as a whole is projected to produce net benefits.

3. Whether the Commission's cost-justification finding was based on an improper factor, specifically reliance on an Economic Impact Report analyzing the ripple effects of $1.636 billion in proposed utility spending without any account of the corresponding rate burden on the utility's captive customers.

II. STATEMENT OF THE CASE

This case arises from a statutory proceeding under the TDSIC Statute, Ind. Code ch. 8-1-39. In contrast to traditional ratemaking through occasional comprehensive rate cases, the TDSIC is a statutory "tracker" allowing rate adjustments in between general rate cases to recover a specified category of costs (here investments in transmission, distribution and storage infrastructure). See NIPSCO Industrial Group v. Northern Indiana Public Service Co., 100 N.E.3d 234, 238-39 (Ind. 2018).[1] The TDSIC Statute requires the utility first to secure regulatory preapproval of planned TDSIC investments, predicated on satisfaction of specified criteria (best estimate of costs, public interest, cost-justification, and reasonableness). See Ind. Code §8-1-39-10. Once a TDSIC Plan is approved, the utility is entitled to automatic rate adjustments at 6-month intervals to provide recovery of 80% of approved expenditures as they are incurred.

[1] In that decision, the Supreme Court reversed a Commission order that misapplied a provision of the TDSIC Statute. See 100 N.E.3d at 242-45. The particular provision at issue there was subsequently amended in 2019. See Ind. Code §8-1-39-2(b). In contrast, the cost-justification provision at issue in this case was emphasized by the Supreme Court in 2018 (see 100 N.E.3d at 239, 242-43), and was *not* amended subsequently. See Ind. Code §8-1-39-10(b)(3).

See id. §9(a). The other 20% are deferred with carrying costs for recovery in the utility's next general rate case. Id. §9(c).

The proceeding below was commenced on June 1, 2021 with a petition by NIPSCO, seeking Commission approval of an Electric TDSIC Plan pursuant to Ind. Code §8-1-39-10. See App. vol. II at 74-84. The proposed Plan involved $1.636 billion in capital investments from June 2021 through the end of 2026. See Order at 55 (App. vol. II at 60). NIPSCO supported its new TDSIC Plan with the written testimony and exhibits of five witnesses. Id. at 3-33 (App. vol. II at 8-38).

Consistent with Commission procedure, the consuming public was represented by a statutory agency, the Office of Utility Consumer Counselor ("OUCC," see Ind. Code ch. 8-1-1.1), and in addition a number of interested parties intervened. See Order at 1-2 (App. vol. II at 6-7). Two parties filed evidence opposing NIPSCO's petition: the OUCC and NIPSCO Industrial Group, consisting of large manufacturers served by NIPSCO. Id. at 33-41 (App. vol. II at 38-46). The OUCC and Industrial Group evidence focused on NIPSCO's failure to satisfy the statutory cost-justification requirement, both as an overall defect and in a number of specified particulars. Id.

Following submission of rebuttal by NIPSCO, the case went to hearing on October 5, 2021, and after post-hearing filings the Commission issued its final order on December 28, 2021. See Order (App. vol. II at 6-73). In that Order, the Commission granted approval for NIPSCO's Electric TDSIC Plan in its entirety, notwithstanding the objections asserted by the Industrial Group and OUCC. Id. at 53-68 (App. vol. II at 58-73). The Industrial Group timely commenced this appeal on January 27, 2022.

III. STATEMENT OF THE FACTS

The three issues presented in this appeal all relate to the statutory provision requiring the utility to show 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) ("Section 10(b)(3)"). This Statement of the Facts, then, will address the record and the Commission disposition for each of the three key respects in which the cost-justification standard is at issue here.

A. Justification for System Deliverability Projects

NIPSCO divided the proposed TDSIC Plan into three project categories: (1) Aging Infrastructure, accounting for 54% of the planned expenditures; (2) System Deliverability at 20% of the capital investments; and (3) Grid Modernization for the remaining 26%. See Order at 7-8 (App. vol. II at 12-13). NIPSCO offered distinct forms of evidence to support cost-justification for each category. For the Grid Modernization portion only, NIPSCO presented a "monetization" analysis designed to show net benefits on a dollar basis. Id. at 12 (App. vol. II at 17). NIPSCO indicated, however, that economic benefits from the Aging Infrastructure and System Deliverability categories could not be easily calculated in similar fashion. Id. Instead, for Aging

Infrastructure, NIPSCO presented a risk reduction analysis designed to show system reliability benefits. Id. at 9, 11 (App. vol. II at 14, 16).

The cost-justification rationale for the System Deliverability category, on the other hand, was more uncertain. The Commission described NIPSCO's evidence that the projects would support increased demand where customer load was growing. See Order at 8 (App. vol. II at 13) ("NIPSCO has realized an unexpected, sudden increase in electric demand in the eastern part of its service territory caused by the recent increase in new manufacturing facilities"); id. at 7 (App. vol. II at 12) (System Deliverability category "is focused on increasing the deliverability of power to meet customer load, which in turn maintains and improves reliability for customers, especially when load grows. These projects increase the system's ability to provide power to increasing customer demand, as well as providing versatility as load demands become more diverse").

The witnesses for both the Industrial Group and the OUCC opposed NIPSCO's position that the System Deliverability projects had been shown to be cost-justified for TDSIC purposes. The Industrial Group witness pointed out that increased customer demand also yields added revenue to NIPSCO, yet NIPSCO proposed to impose the costs of system upgrades to support load growth on customer rates while retaining for itself the incremental revenue thereby being realized. See Order at 39 (App. vol. II at 44). The OUCC witness classified projects outside the Grid Modernization category based on dollars per unit of risk reduction, and found twelve, including eight System Deliverability projects, that were outliers by that measure and hence not justified by a risk reduction rationale. Id. at 35-37 (App. vol. II at 40-42).

On rebuttal, then, NIPSCO confirmed that the System Deliverability projects were not being justified on the basis of either computed economic benefits or risk reduction. See Ex. vol. 2 at 43 (admitting there was no monetization analysis for System Deliverability or Aging Infrastructure categories); id. at 50 (System Deliverability projects had no risk ranking); id. at 51 (System Deliverability projects were "not selected primarily for risk reduction"). Rather, those projects were predominantly system investments to support increased sales to new customers. Id. at 43 ("meet the increasing demands"); id. at 51 ("areas of growth").

NIPSCO thus admitted to that reason for the category, and did not deny that increased sales yield added revenue to NIPSCO, but resisted recognizing those revenue benefits as a factor, stating the statute did not require an offset. See Ex. vol. 1 at 103-04. With the justification question framed in that way, NIPSCO emphasized the importance of "human input" and "real-world evaluation" in the selection of System Deliverability projects. See Ex. vol. 2 at 49-50.

On that record, the Commission approved NIPSCO's TDSIC Plan in its entirety, including the System Deliverability category. The Order noted System Deliverability projects "were not aimed at reducing risk," and NIPSCO emphasized the importance of "human input and real-world evaluation" when selecting projects. See Order at 61 (App. vol. II at 66). The Commission found it appropriate to rely on "the operational expertise of the utility in determining high priority projects." Id. The Order further stated that NIPSCO's witness "confirmed" that "NIPSCO kept cost-effectiveness in mind as it developed the Plan." Id. The quoted language was adopted by the Commission from the Proposed Order submitted by NIPSCO. See App. vol. II at 219.

B. Cost-Justification for All Proposed Projects

During the post-hearing briefing, a dispute arose concerning the correct application of the key provision in the TDSIC Statute, Section 10(b)(3), requiring the utility to show that "the estimated costs of the eligible improvements included in the plan are justified by incremental benefits attributable to the plan." NIPSCO, in its Proposed Order, asserted that the cost-justification standard applies only to the overall Plan, and need not be satisfied for each individual project. See App. vol. II at 218, 220. The Industrial Group and OUCC then responded, disagreeing with NIPSCO's contention and explaining why "if it is an eligible improvement and is included in the Plan, it must meet the cost-justification requirement." See App. vol. III at 119.

In the final Order, the Commission adopted NIPSCO's formulation of the statutory standard. See Order at 61 (App. vol. II at 66) (finding it would be "problematic" to "require NIPSCO to individually justify each project included in the Aging Infrastructure and System Deliverability categories": "NIPSCO is not and should not be required to justify each-and-every project on a project-by-project basis"); id. at 62 (App. vol. II at 67) ("The plain language of this section directs our determination to focus on NIPSCO's TDSIC Plan and its estimated costs and incremental benefits. It does not, for example, require an evaluation of or justification of each project or project category."). Compare App. vol. II at 218, 220. Given the issues regarding System Deliverability projects in particular, it is notable that the Commission adopted NIPSCO's position that an entire "project category" need not be cost-justified.

C. Reliance on Economic Impact Report

As part of its case-in-chief, NIPSCO included an Economic Impact Report designed to show economic ripple effects arising from the NIPSCO proposal to invest $1.636 billion in TDSIC projects from 2021 to 2026. See Ex. vol. 3 at 86-139. The Industrial Group moved to strike that exhibit, due to lack of personal knowledge by the sponsoring witness and immateriality to the statutory cost-justification requirement. See App. vol. II at 109-114.[2] The Commission denied that motion, finding it premature to rule on admissibility and stating the report "may aid the Commission" with "appropriate weight" if admitted into the record. Id. at 137-38.

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[2] NIPSCO included the Economic Impact Report with the direct testimony of one witness in its case-in-chief, but in light of the challenge to that's witness's personal knowledge NIPSCO then revised that testimony and offered the report instead through a different witness on rebuttal. See Ex. vol. 3 at 77 & n.1.

The Industrial Group submitted evidence challenging the Economic Impact Report, asserting that it treats the proposed TDSIC investments as a form of economic stimulus spending without accounting for the corresponding rate burden imposed on NIPSCO customers. See Ex. vol. 4 at 19-20. The Industrial Group asserted the required cost-justification should instead focus on the benefits achieved for NIPSCO customers through the system work that those customers will be forced to fund through utility rates. Id. at 20 (purpose of the TDSIC Statute is "to facilitate prudent system investment, but only to the extent that the resulting rate burden is justified by improvements in the reliability, efficiency or safety of the service being rendered to the ratepaying public").

In the final Order, the Commission expressly relied on the Economic Impact Report as "an important piece of evidence" supporting approval of the Plan. See Order at 60 (App. vol. II at 65). The Commission noted the Report does not measure net economic impact because it does not account for the rate burden on NIPSCO customers, but found it does indicate "significant impact on Indiana's economy, as well as the broader U.S." Id. The Order stated: "Although it was focused on the benefits of economic impact, while excluding attendant costs, such as the potential impact on NIPSCO's electric rates, the Economic Impact evidence is relevant to our consideration of the overall benefits attributable to the Plan, as well as how the Plan serves the public convenience and necessity." Id. Again, the quoted language was adopted from NIPSCO's Proposed Order. See App. vol. II at 217-18.

IV. SUMMARY OF ARGUMENT

The questions raised on appeal concern pure issues of law on which this Court may properly make independent determinations, without deference to the views of the Commission. The core controversy is whether NIPSCO satisfied the statutory cost-justification requirement, specifically for the System Deliverability category. The Order, adopting NIPSCO's rationale, improperly injects deference to utility expertise into the justification analysis, suggests entire categories of projects need not be cost-justified, and considers it important that the $1.636 billion in rate-funded TDSIC projects is massive enough to affect the national economy. Those efforts to excuse non-compliance with Section 10(b)(3) are erroneous as a matter of law.

A meaningful cost-benefit analysis is pivotal to the structure of the TDSIC Statute. Under traditional ratemaking, the utility would first make system investments and then seek rate recovery, under risk of disallowance for any expenditures found to be imprudent or excessive. The TDSIC mechanism shifts the risk to ratepayers through regulatory preapproval. The need to demonstrate cost-justification at the time of Plan approval thus stands in the place of prudence review under traditional ratemaking. Furthermore, a traditional rate case would address together both the added revenue and system costs associated with new customers and increased load, in contrast to

NIPSCO's proposal to retain all added revenue while forcing ratepayers to fund the system costs through the TDSIC tracker.

NIPSCO justified its Aging Infrastructure category with a risk reduction analysis, and the Grid Modernization category with a monetization analysis, but was clear that neither of those analyses was used to justify the System Deliverability category. That category was oriented on system upgrades to support new customers and increased load, but NIPSCO proposed to retain the added revenue from that load growth. Without further quantification of incremental benefits, NIPSCO persuaded the Commission to rely on the utility's operational expertise in selecting projects, subject to an assurance that NIPSCO kept cost-effectiveness in mind. By statute, cost-justification is NIPSCO's burden to prove. The Order improperly relieves NIPSCO of that burden.

Section 10(b)(3) requires cost-justification for "the eligible improvements included in the plan." At NIPSCO's instigation, however, the Order adopted the view that only the Plan as a whole must be cost-justified, and particular projects and even entire project categories need not be cost-justified. That is plainly a misreading of the statutory language and its basic function in the TDSIC Statute. The legislature did not intend to encourage utilities to treat TDSIC Plans as a repository for unnecessary or excessively costly projects, so long as the overall Plan produces a net benefit. Such expenditures would be subject to disallowance in a traditional prudence review, and are equally ineligible for rate recovery in the preapproval context.

Finally, the treatment of the Economic Impact Report as an "important" factor disorients the statutory cost-justification requirement. The NIPSCO concept is that utility spending of $1.636 billion in a 5-year period will have a ripple effect to the benefit of the regional and national economy, provided the economic burden on NIPSCO customers funding those investments through the TDSIC tracker is disregarded. Eligible TDSIC investments must be for transmission, distribution or storage system improvements, i.e., infrastructure for reliable, efficient and safe utility service. Those costs are paid for by customers through automatic TDSIC rate adjustments. The statutory cost-justification requirement, then, addresses the balance between the benefits of proposed system improvements and the corresponding cost burden imposed on ratepayers. The analysis is skewed if broad economic ripples from aggressive utility spending are treated as "important" when determining appropriate limits on costs flowing into monopoly utility rates, absent any expressed legislative intent to promote stimulus spending.

Separately, each error improperly dilutes or relaxes Section 10(b)(3)'s cost-justification requirement, undermining the statutory protection that ensures utility ratepayers pay only for prudent, reasonable, cost-effective improvements. Taken together, the three errors indicate a concerted effort to sidestep the statutory standard altogether, particularly for System Deliverability projects. According to NIPSCO and the Commission, it is appropriate to rely on the utility's expertise and discretion in selecting projects and to accept a utility assurance it kept cost-effectiveness in mind, and anyway particular projects and even the entire category may not need cost-justification at all, and in any event the high level of spending can be justified as a form of economic stimulus without regard to the value proposition for the customers being forced to pay for the work. The Order granted approval for the TDSIC Plan despite NIPSCO's failure to satisfy Section 10(b)(3), and therefore the Order should be reversed.

V. ARGUMENT

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)).

The standard of review was recently restated by the Supreme Court in Office of Utility Consumer Counselor v. Duke Energy Indiana, 183 N.E.3d 266, 268-69 (Ind. 2022), reh. pending (holding Commission erred by granting retroactive relief in deviation from the relevant statutory provision). The Court described the appeal issue there as "a legal question on which we owe the commission no deference." Id. at 268. The Court disagreed with efforts to categorize the dispute as a fact question or mixed issue of fact and law, and concluded: "This question – whether the commission's order was retroactive ratemaking under section 8-1-2-68 – is a question of law." Id. at 269. The Court held "we owe the commission no deference" on such issues of law, "when it comes to whether the commission acted within its legal guardrails – e.g., whether it acted within statutory limits." Id. Here, similarly, the appeal concerns a grant of relief by the Commission in deviation from the statutory cost-justification requirement, and that issue of law should be reviewed independently by the Court, without deference to the views of the Commission.

There is Indiana precedent holding that statutory interpretation is an issue of law reviewed *de novo* on appeal. See NIPSCO Industrial Group, 100 N.E.3d at 241; Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission, 715 N.E.2d 351, 354 (Ind. 1999). Other decisions have found the agency's reading of a statute entitled to great weight, unless unreasonable or contrary to the statutory terms. See Moriarty v. Indiana Dept. of Natural Resources, 113 N.E.3d 614, 619-20 (Ind. 2019). In either event, the errors of law here are attempts to excuse NIPSCO's failure to satisfy the statutory standard, not reasonable agency interpretation of the statutory terms. As in Duke, 183

N.E.3d at 268-69, the question is whether the relief granted by the Commission exceeded its authority under the controlling statute, and that is a matter of law on which deference is unnecessary and inappropriate.

A. The Cost-Justification Requirement Is a Critical Element of the Statutory TDSIC Mechanism

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. 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. Id.

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, therefore, stands in the place of a subsequent prudence review with potential disallowance of excessive or unreasonable costs under traditional ratemaking.

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"). The TDSIC Statute states the order "must" include a determination that the cost-justification requirement is satisfied. See Ind. Code §8-1-39-10(b). The Commission is not authorized to relax that statutory prerequisite when preapproving TDSIC costs for recovery in rates.

With regard to System Deliverability projects supporting added sales to new customers, the TDSIC context is distinct from traditional ratemaking in another significant respect. In between general rate cases, added sales from increased demand yield incremental revenue to the utility. Under traditional ratemaking, the utility would bear the costs of system expansions as well as the benefit of incremental revenue until the next rate case, when both the added revenue and the associated costs would be reflected in new base rates. Here, by contrast, NIPSCO proposed to retain all of the incremental revenue until the next rate case, while recovering the corresponding system costs from ratepayers through the TDSIC tracker.

One final point regarding compliance with the TDSIC Statute bears emphasis. A conclusion that a category or portion of NIPSCO's TDSIC Plan did not comply with the Section 10(b)(3) standard does *not* mean that NIPSCO should not proceed with the proposed work, nor that NIPSCO will be precluded from seeking rate recovery through a different mechanism. Indeed, NIPSCO is under a statutory obligation to provide reasonably adequate service and facilities, consistent with its duty to serve the public. See Ind. Code §8-1-2-4. If a given set of projects are excluded from NIPSCO's approved Plan, that only means the costs will not be subject to the special rate treatment available under the TDSIC Statute, but NIPSCO can still seek recovery in its next rate case.[3]

B. The Commission Improperly Deferred to NIPSCO's Expertise to Justify System Deliverability Projects

The System Deliverability category accounted for 20% of the $1.636 billion TDSIC Plan, or on the order of $325 million. See Order at 7, 55 (App. vol. II at 11, 59).[4] Once

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[3] See In Re NIPSCO, 2016 WL 1306030 (Ind. U.R.C. Mar. 30, 2016) at *38 ("Therefore, to the extent an investment is deemed appropriate to provide safe and reliable service, NIPSCO is expected to proceed whether tracker recovery under the TDSIC Statute is available or not. Any investments not included among the designated eligible improvements in an approved plan remain subject to cost recovery as authorized by other applicable laws.").

[4] The $1.636 billion in total Plan costs includes estimates of both direct and indirect capital, and also AFUDC and O&M expense. See Order at 55 (App. vol. II at 60). The

approved as part of a TDSIC Plan, that $325 million in costs is subject to automatic recovery in rates. See Ind. Code §8-1-39-9(a), (c). Because ratepayers are being forced to fund that system work, the burden is on NIPSCO to justify the investment. See Section 10(b)(3). Despite the hundreds of millions at issue, NIPSCO failed to show cost-justification for the System Deliverability category, and ultimately relied on deference to its operational expertise in selecting projects. Such reliance was error as a matter of law.

1. NIPSCO disclaimed economic and reliability benefits to justify System Deliverability projects

NIPSCO was clear that it was not relying on the cost-justification evidence supporting the other two categories of projects in its TDSIC Plan to support the System Deliverability category. The Grid Modernization category was justified with a "monetization" analysis, designed to show net economic benefits to NIPSCO customers arising from those improvements, as measured in dollars. See Ex. vol. 1 at 142-43. But NIPSCO did not present a monetization analysis for Aging Infrastructure or System Deliverability projects, or otherwise attempt to show net economic benefits to ratepayers for those two categories. Id. at 142 ("The benefit to NIPSCO's customers from Aging Infrastructure and System Deliverability investments cannot be easily calculated in an actuarial calculation."); Ex. vol. 4 at 33 (admitting "NIPSCO did not

direct capital portion of the System Deliverability category is estimated at $281 million, not including indirect capital, AFUDC and O&M. Id.

provide quantification in monetary terms of the asserted benefits associated with either Aging Infrastructure or System Deliverability.”).

The Aging Infrastructure category, on the other hand, was supported by a risk reduction analysis designed to show system reliability benefits. See Ex. vol. 1 at 132-33, 141-42. Notably, after a number of System Deliverability projects were challenged on a dollars-per-unit-of-risk-reduction basis (see Ex. vol. 4 at 177-83), NIPSCO clarified on rebuttal that it was *not* relying on a risk reduction rationale as justification for the System Deliverability category. See Ex. vol. 2 at 50 (such projects “have no ‘risk ranking’”); id. at 51-52 (“Deliverability projects were not selected primarily for risk reduction” and hence cannot be judged by value of risk reduction).

2. NIPSCO relied on deference to its judgment and discretion to justify System Deliverability projects

Having disclaimed reliance on the justification evidence supporting the other two Plan categories, and conceding System Deliverability projects were not justified either in monetary terms or on the basis of risk reduction, NIPSCO was left to explain how, then, the System Deliverability category satisfied the Section 10(b)(3) requirement that the estimated costs must be justified by incremental benefits. What NIPSCO put forward was the proposition that NIPSCO utilized its operational expertise and input from experienced personnel when selecting projects. See Ex. vol. 2 at 47-50. NIPSCO stated it relied on not only the Risk Model but also “human input.” Id. at 47-48.

NIPSCO asserted the importance of "human input and real-world evaluation" when determining whether a project should be included or excluded from the TDSIC Plan. Id. at 49-50.

On that basis, NIPSCO persuaded the Commission to defer to its expertise in finding the proposed System Deliverability projects cost-justified. Adopting language from NIPSCO's Proposed Order (see App. vol. II at 219), the Commission addressed the challenge to System Deliverability projects by emphasizing NIPSCO's evidence about the importance of "human input and real-world evaluation." See Order at 61 (App. vol. II at 66). The Order further stated NIPSCO "confirmed" that it "kept cost-effectiveness in mind as it developed the Plan." Id. The Commission then found "the operational expertise of the utility in determining high priority projects" should not be rejected. Id. Based on those findings, the Order concluded that NIPSCO sufficiently demonstrated the estimated costs were justified by incremental benefits, as required by Section 10(b)(3). Id.

This is a statutory proceeding in which NIPSCO is the petitioner. To establish entitlement to the statutory relief, NIPSCO had the burden to demonstrate satisfaction of the statutory prerequisites, including the cost-justification requirement. Instead of requiring NIPSCO to meet that burden, the Commission deferred to the expertise of the petitioner, both in selecting projects for inclusion in the Plan and in keeping cost-effectiveness in mind. That is the essence of the Section 10(b)(3) cost-justification standard: evaluating the relative benefits of potential projects and weighing those benefits against the expected costs. That was NIPSCO's burden to prove, and could not be assumed by reliance on its expertise.

A parallel issue was addressed in NIPSCO Industrial Group v. Northern Indiana Public Service Co., 31 N.E.3d 1 (Ind. App. 2015). There, the Court reversed a Commission order approving a TDSIC Plan in which only projects for the first year were identified, with a presumption of eligibility for general categories of projects to be identified in later updates. Id. at 6-9. Noting "the Commission may not create legal presumptions" (id. at 8), the Court held the effect of the presumption was to improperly shift the statutory burden of proof:

> We conclude that the Commission's order did establish a presumption of eligibility regarding the undefined projects for years two through seven. There does not appear to be any statutory support for establishing such a presumption. We agree with the Industrial Group that such a presumption inappropriately shifts the burden of showing a project's eligibility for TDSIC treatment from NIPSCO to other intervening parties.

Id. at 9.

Here, similarly, the Commission found the System Deliverability category cost-justified based on NIPSCO's judgment in selecting projects and NIPSCO's assurance it kept cost-effectiveness in mind, effectively presuming such projects satisfied the statutory standard simply by virtue of being chosen by NIPSCO. See Order at 61 (App. vol. II at 66). As in NIPSCO Industrial Group, 31 N.E.3d at 9, the effect of the

Commission's deference to NIPSCO's judgment is to shift the statutory burden of proof – NIPSCO's burden as petitioner to demonstrate compliance with Section 10(b)(3) – to opposing parties who are then burdened with contradicting NIPSCO's choices.

The Commission's statutory authority under the TDSIC Statute is conditioned on a required finding that the cost-justification requirement has been satisfied. The statute does not authorize the Commission to excuse a material failure of proof, by simply assuming the utility made the required determination.

3. System Deliverability projects were not justified based on the economic benefits of increased load

The purpose of System Deliverability work, as explained by NIPSCO, was to support load growth and added electricity sales to new customers. See Ex. vol. 1 at 119 ("increasing customer demand"); id. at 124 ("NIPSCO has realized an unexpected, sudden increase in electric demand in the eastern part of its service territory caused by the recent increase in new manufacturing facilities."); Ex. vol. 2 at 43 ("increasing demands"); id. at 51 ("areas of growth"). NIPSCO did not, however, rely on the additional rate revenue from added sales and new customers to justify the costs of System Deliverability projects. NIPSCO was explicit in conceding that it "did not provide quantification in monetary terms of the asserted benefits" of the System Deliverability category. See Ex. vol. 4 at 33.

For NIPSCO customers being forced to fund System Deliverability expenditures through TDSIC rate adjustments every six months, the value proposition is hardly self-evident. System work associated with increases in load and new customers essentially pays for itself, by providing added revenue along with added costs. See Ex. vol. 4 at 18. But NIPSCO was insistent that the added revenue from new load should be excluded from consideration. See Ex. vol. 1 at 103-04. In response to Industrial Group testimony challenging the failure to account for that revenue impact, NIPSCO stated "there is nothing in the TDSIC Statute that requires such an offset." Id. at 103.

NIPSCO's position that the statute does not require an offset, however, does not answer the question whether the System Deliverability portion of the TDSIC Plan is cost-justified and reasonable. NIPSCO's proposal, ultimately granted by the Commission, was to retain for itself the incremental revenue from the increased sales supported by System Deliverability projects, while ratepayers pay for the associated costs through TDSIC increases. See Ex. vol. 4 at 18.

In connection with its distinct *Gas* TDSIC Plan, NIPSCO has long recognized both revenue as well as costs in a parallel context. A portion of the Gas TDSIC Plan involves the extension of gas infrastructure to new customers in rural regions. See Ind. Code §8-1-39-11(c). When implementing that program in 2015, NIPSCO agreed to credit 80% of the incremental margin from new rural customers in the TDSIC rate adjustment calculation. See Ex. vol. 4 at 18; In Re NIPSCO, 2015 WL 429990 (Ind. U.R.C.

Jan. 28, 2015) at *27-28. The cost-justification analysis here, on the other hand, did not include any balancing recognition of the increased revenues enjoyed by NIPSCO from the load growth that is driving the System Deliverability investments.

Under traditional ratemaking, in between general rate cases, the utility would bear the expense of system investments to support new customers and added load, and would also benefit from the incremental revenue and added sales. See NIPSCO Industrial Group, 100 N.E.3d at 238-39 (explaining differences between traditional ratemaking and the TDSIC mechanism). Then, in the next rate case, both the costs and the revenue would be considered together as part of the utility's current operations, and hence both elements would be reflected at the same point in new rates. NIPSCO's proposal for recovery of System Deliverability costs, by contrast, disconnects the revenue stream from the associated cost responsibility, by claiming the full revenue benefit for itself while ratepayers cover the costs through the TDSIC tracker.

In its rebuttal, NIPSCO suggested the System Deliverability category advances the policy of encouraging economic development. See Ex. vol. 1 at 103. The TDSIC Statute specifically contemplates two categories of economic development investments, neither of which is involved here. First, a TDSIC Plan may include a "targeted economic development project," the costs of which must first be approved by the Indiana Economic Development Corporation ("IEDC"). See Ind. Code §§8-1-39-5, -10(c), -11(a) & (b). NIPSCO does not contend that any of the System Deliverability costs have been approved by the IEDC for treatment as a targeted economic development project. See Ex. vol. 1 at 200-01 (stating Plan "provides for targeted economic development projects in the future, although none are proposed at this time").

Second, a *gas* utility may include in a TDSIC Plan the *gas* infrastructure costs to extend service to new customers in rural areas. See Ind. Code §8-1-39-11(c). This case involves electric service, not gas, and in any event NIPSCO has not contended the new customers and increased load are in rural regions. In contrast to this case, NIPSCO's *Gas* TDSIC Plan has a rural extensions program under the statutory provision, and there NIPSCO credits the revenue benefits against the tracked costs. See Ex. vol. 4 at 18.

The statutory provisions governing inclusion of economic development projects in TDSIC Plans thus have a defined scope. The System Deliverability portion of NIPSCO's Plan falls outside that scope, yet NIPSCO sought the benefit of TDSIC rate treatment anyway. Insofar as NIPSCO did not demonstrate justification in monetary terms or on the basis of risk reduction, and did not reflect the added revenue from new customers in the TDSIC calculation, the late reference to economic development, unsupported by the statutory terms, cannot supply the missing cost-justification required by Section 10(b)(3).

4. The one System Deliverability project cited as an example was justified only as an Aging Infrastructure investment

One of the objections asserted against NIPSCO's cost-justification evidence focused on the ratio of investment cost to risk reduction for Aging Infrastructure and System Deliverability projects, the two categories not justified in terms of asserted monetary benefits. See Ex. vol. 4 at 177-83. Of the twelve projects identified as outliers on the basis of dollars per unit of risk reduction, eight were System Deliverability projects. That led NIPSCO, on rebuttal, to clarify that System Deliverability projects were not selected for the purpose of achieving risk reduction, and therefore should not be evaluated on those terms. See Ex. vol. 2 at 50-52. Instead, those projects were selected on the basis of "human input and real-world evaluation." Id. at 47-50.

Significantly, NIPSCO did not deny that the System Deliverability category involved system investments to support new customers and added load. In its case-in-chief, NIPSCO explained it had "realized an unexpected, sudden increase in electric demand in the eastern part of its service territory caused by the recent increase in new manufacturing facilities," and described the System Deliverability category as "focused on increasing the deliverability of power" to meet that increase in demand. See Ex. vol. 1 at 118-19, 124. On rebuttal, too, NIPSCO reiterated again that System Deliverability projects were chosen to address "increasing demands" and "areas of growth." See Ex. vol. 2 at 43, 51.

Nevertheless, in arguing that it selected worthy projects, NIPSCO focused on one specific "example" involving a new Marktown Substation. See Ex. vol. 2 at 52-53. The problem with holding out that particular project as a representative example of the System Deliverability category, however, is that NIPSCO framed the explanation of its importance entirely using the rationale of the distinct Aging Infrastructure category. The one example discussed by NIPSCO did *not* feature new customers or increases in demand, which NIPSCO elsewhere identified repeatedly as the driving characteristic of the System Deliverability category as a whole.

NIPSCO described the Marktown Substation as "one of the most important substations in NIPSCO's entire system" because it serves several large manufacturing facilities that are vital to the region. See Ex. vol. 2 at 52-53. NIPSCO's witness stated:

> The Marktown substation was constructed over 90 years ago and the average asset age is 37 years old. The planned work is intended to address significant challenges that exist with the aging, antiquated assets, such as difficulty in obtaining clearances, the inability to take certain assets out of service, the lack of redundancy, and the absence of modern breaker schemes and relaying capabilities.

Id. at 53. The Order adopted language proposed by NIPSCO, stating NIPSCO's position regarding the importance of human input and real-world evaluation was "best illustrated" by the Marktown Substation project because "this is one of the most important substations in NIPSCO's system, feeding multiple, large industrial facilities, and it was constructed more than 90 years ago and has an average asset age of 37 years." See Order at 61 (App. vol. II at 66); App. vol. II at 219.

Notably, there was no suggestion that the Marktown Substation project was needed to support added sales to new customers.[5] The entire rationale, rather, was that the Marktown Substation is both important and old, raising significant challenges arising from the "aging" and "antiquated" equipment. See Ex. vol. 2 at 53. That is precisely the analysis used by NIPSCO to justify Aging Infrastructure projects. See Ex. vol. 1 at 117-18 (for Aging Infrastructure category, NIPSCO "prioritize[d] the major assets" and considered "age, condition, and prioritization"); id. at 139 (noting that "proactive replacement of aging infrastructure" helps maintain system reliability, and the proposed Plan "targets the highest risk and consequence of failure assets").

In short, the one example raised by NIPSCO and cited by the Commission was actually justified as an Aging Infrastructure project, not as a System Deliverability project. The Marktown Substation rebuild involves a key system asset constructed 90 years ago, and its "aging" and "antiquated" condition raises significant operational challenges. See Ex. vol. 2 at 53. Those considerations are unrelated to the rationale of the System Deliverability category as a whole, which NIPSCO consistently identified as

[5] Indeed, NIPSCO's witness described a particular manufacturing facility served by the Marktown Substation, and cited a web page that also noted that facility had been in operation for some 132 years. See Ex. vol. 2 at 53 n.6.

being oriented on supporting increased load and new customers. See Ex. vol. 1 at 119, 124; id. vol. 2 at 43, 51. What remains entirely absent from NIPSCO's presentation, consequently, is a showing of cost-justification for projects designed to support added sales to new customers – the defining characteristic of the System Deliverability category with the exception of the Marktown Substation project.

C. All Projects Included in the Plan Must Be Cost-Justified, Not Just the Plan as a Whole

Section 10(b)(3) requires the utility to demonstrate that "the estimated costs of the eligible improvements included in the plan are justified by incremental benefits attributable to the plan." At NIPSCO's instigation (see App. vol. II at 218, 220), the Commission construed that provision as requiring only that the proposed Plan as a whole be cost-justified, but not particular projects. See Order at 61, 62 (App. vol. II at 66, 67). According to NIPSCO and the Commission, Section 10(b)(3) does not "require an evaluation of or justification of each project *or project category*." See App. vol. II at 67, 220 (emphasis added). Under that interpretation, then, the entire System Deliverability category could be approved without any showing of cost-justification, to the extent it is included in a Plan that altogether is projected to produce net benefits.

The theory that projects can be included in a TDSIC Plan without a showing of cost-justification is contrary to the language of the provision, would undermine its purpose in the statutory structure, and is unsupported by precedent. Section 10(b)(3) does not dilute the cost-justification requirement by saying “overall,” “as a whole,” “in its entirety” or other comparable phrase. To the contrary, the statute states the cost-justification requirement applies to “the eligible improvements included in the plan.” Undeniably, System Deliverability projects are “improvements” that NIPSCO “included in the plan.” By the statutory terms, then, those projects must be cost-justified in order to satisfy the standard for approval.

The purpose of Section 10(b)(3) is to protect ratepayers from excessive costs and wasteful spending by the utility, and to ensure the benefits of the proposed system work are valuable enough to make the investment worthwhile. That function would be subverted if utilities were at liberty to treat TDSIC Plans as a repository for unnecessary or overpriced projects, in themselves lacking cost-justification, but supposedly subject to approval merely by being packaged in a Plan with an aggregate net positive value. There is no language in the TDSIC Statute indicating the General Assembly meant to encourage utilities to pad TDSIC Plans with filler projects that are not cost-justified, such that beneficial projects can be offset by unjustified investments that customers are nevertheless obliged to fund through rates, so long as the overall Plan has a net value greater than zero. Any such implication runs directly counter to the express policy of cost discipline set forth in Section 10(b)(3).

Structurally, the cost-justification requirement operates in the TDSIC context as a replacement for the prudence review conducted under traditional ratemaking. In contrast to the TDSIC mechanism, where planned system investments are preapproved before being made, the Commission in a traditional rate case reviews system projects after they have been completed and placed in service. See NIPSCO Industrial Group, 100 N.E.3d at 238-39.[6] Once a TDSIC project is preapproved, on the other hand, the costs are tracked in rates at six-month intervals while the system work is ongoing. See Ind. Code §8-1-39-7 ("both while the improvements are under construction and post in service"). For preapproved investments under the TDSIC Statute, then, there is no after-the-fact prudence review. Instead, the cost-justification determination under Section 10(b)(3) is the juncture at which the Commission decides the merits of a given expenditure for purposes of rate recognition.

The key feature of a traditional prudence review is that, while the utility may incur whatever costs it chooses, the Commission has broad ratemaking discretion to disallow any expenditures that it finds to be unreasonable or excessive. See Indiana-American Water, 844 N.E.2d at 116. Fully 80% of preapproved TDSIC costs, in contrast, are recovered by the utility through "automatic" rate adjustments. See Ind. Code §8-1-

[6] 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) (under traditional ratemaking, utility asset must be "used and useful" to be reflected in regulated rates).

39-9(a). Hence, the only point at which unreasonable or excessive TDSIC investments may be excluded is when the Plan is presented for approval. In a traditional prudence review, the Commission unquestionably has full range to analyze each individual project when deciding which investments should be reflected in rates. By the NIPSCO theory adopted by the Commission here, however, imprudent expenditures that would be disallowed under traditional ratemaking can be preapproved for automatic rate recovery if bundled in a Plan with enough beneficial projects. It is unreasonable to assume the General Assembly intended to extend TDSIC recovery to costs that would not survive a traditional prudence review.

When NIPSCO proposed an interpretation of Section 10(b)(3) that would allow approval of unjustified projects and even unjustified categories, it did not cite any prior Commission order or appellate decision supporting that position. See App. vol. II at 218, 220. In response to that argument, the Industrial Group and OUCC pointed out the lack of a citation and noted the proposition had not been previously endorsed by the Commission. See App. vol. III at 119. NIPSCO filed a reply, but did not contest that status or add any cite. Id. at 125-45. The TDSIC Statute was enacted in 2013, and has been addressed in scores of Commission proceedings and several appellate decisions, but the construction of Section 10(b)(3) adopted here was novel and unprecedented.

Importantly, the System Deliverability category accounts for 20% of the $1.636 billion Plan, or roughly $325 million. See Order at 55 (App. vol. II at 60). By NIPSCO's theory, ratepayers can be forced to pay for that $325 million in TDSIC investment even if that work is not cost-justified, despite Section 10(b)(3). This is not a case involving a trivial expenditure at the margins of a Plan. Rather, the absence of justification here impacts a major component of the Plan, with consequences in the hundreds of millions of dollars. The reading of Section 10(b)(3) proposed by NIPSCO and endorsed by the Commission, therefore, would seriously undermine the effectiveness of the statutory protection.

D. It Was Error to Rely on the Economic Impact Report as Important Support for the Cost-Justification Finding

After NIPSCO filed its case-in-chief evidence, the Industrial Group moved to strike an Economic Impact Report that discussed the ripple effects of the proposed $1.636 billion in utility spending on the regional and national economy. See Ex. vol. 3 at 86-139; App. vol. II at 109-14. The motion to strike asserted the sponsoring witness lacked personal knowledge and the Report was not germane to the statutory cost-justification requirement. Id. The Commission denied the motion as premature, insofar as the Report had not yet been offered into evidence. See App. vol. II at 137-38. NIPSCO subsequently revised its direct testimony and offered the Report through a different witness on rebuttal. See Ex. vol. 3 at 77 & n.1.

In the meantime, the Industrial Group witness explained why the Economic Impact Report is immaterial to the required cost-justification finding. See Ex. vol. 4 at 19-20. He stated the Report treats the proposed TDSIC investment as a form of stimulus spending, but fails to account for the economic detriment of the corresponding rate increases imposed on NIPSCO customers. Id. For cost-justification under Section 10(b)(3), the relevant benefits relate to the reliability, efficiency or safety of the services provided by the utility, i.e., the reason for the infrastructure improvements covered by the statute. Id. at 20. "The purpose of rate regulation is to ensure reliable and efficient service, not to promote greater spending by the utility for the benefit of the construction industry and equipment vendors." Id.

In the Order, the Commission adopted NIPSCO's proposed language describing the Economic Impact Report as "an important piece of evidence" supporting approval of the proposed Plan. See Order at 60 (App. vol. II at 65); App. vol. II at 217-18. The Commission agreed the Report did not show the net economic impact because it focused on benefits to the economy in Indiana and beyond "while excluding attendant costs, such as the potential impact on NIPSCO's electric rates." Id. The Commission nevertheless found the Report "relevant to our consideration of the overall benefits attributable to the Plan, as well as how the Plan serves the public convenience and necessity." Id.

Nothing in the TDSIC Statute or Indiana utility law generally authorizes the Commission to promote higher levels of utility spending in an effort to stimulate the economy. The reason for regulation, after all, is to ensure the utility "is prudently investing its revenues in order to provide the best and most efficient service possible to the consumer." See NIPSCO Industrial Group, 100 N.E.3d at 238 (quoting United States Gypsum, Inc. v. Indiana Gas Co., 735 N.E.2d 790, 797 (Ind. 2000)). "Utilities are regulated in order to protect consumers from the abuses of monopoly i.e. artificially high prices." Citizens Action Coalition, 485 N.E.2d at 614. The Commission is not charged with responsibility to regulate the economy. It regulates public utilities like NIPSCO, the services they provide, and the rates paid by their customers. Section 10(b)(3) should be construed and applied consistent with that basic framework.

As a threshold problem, viewing the ripple effects to the broader economy as a benefit, without balancing the corresponding cost burden being imposed on NIPSCO's ratepayers, does not show justification. Section 10(b)(3) states the incremental benefits must justify the estimated costs. If the goal were to stimulate the economy with aggressive spending by public utilities, higher and higher spending would produce ever greater benefits. It is a theory with no ceiling. That is directly contrary to the interests of the NIPSCO customers being forced to pay the costs, for whose protection the General Assembly established the Section 10(b)(3) standard. It is supposed to be a check against excessive or imprudent expenditures, not an opportunity to provide a boost to the regional and national economy.

The purpose of the TDSIC Statute is to facilitate utility infrastructure improvements, by permitting preapproval of investments for automatic rate recovery. To be eligible for that special rate treatment, a project must be undertaken "for purposes of safety, reliability, system modernization, or economic development." See Ind. Code §8-1-39-2(a)(1). In other words, a TDSIC project must involve the utility's transmission, distribution or storage systems and, except for economic development as discussed below, must beneficially impact the utility's services. Once a TDSIC Plan is approved, cost recovery through rates is "automatic." See Ind. Code §8-1-39-9(a). In that context, the justification required by Section 10(b)(3) concerns the incremental benefits to ratepayers for the TDSIC costs they have to pay for in rates.

Furthermore, as explained supra Section B(3), the TDSIC Statute addresses two specific economic development scenarios, neither of which is at issue here. See Ind. Code §§8-1-39-5, -10(c), -11(a) & (b) (targeted economic development projects approved by IEDC); id. §11(c) (extension of gas facilities in rural areas). NIPSCO did not propose any economic development projects in its Plan. See Ex. vol. 1 at 24 ("At this time, I am not aware of any proposed Economic Development Projects that would be eligible for TDSIC recovery"). As delineated in the two specified scenarios, the reference to "economic development" in Ind. Code §8-1-39-2(a)(1) concerns two categories of new or added services to customers in the utility's territory. Significantly, that scope of "economic development" still focuses on services being provided by the utility in its territory. By contrast, attempting to justify expansive spending as a benefit to the broader economy introduces externalities to the Section 10(b)(3) standard, disassociated from the quality and price of NIPSCO's service to ratepayers in its monopoly territory. That is not "economic development" within the meaning of the TDSIC Statute.

The Commission referenced "public convenience and necessity" as well as cost-justification in connection with the Economic Impact Report. See Order at 60 (App. vol. II at 65). That standard is a separate statutory requirement for approval of a TDSIC Plan. See Ind. Code §8-1-39-10(b)(2). The "public convenience and necessity" standard is a conventional formulation in utility law[7] to denote the necessary determination required for regulatory approval that a proposed utility undertaking is no more ("convenience") and no less ("necessity") than warranted by the interests of the ratepaying public served by the utility. See General Telephone Co. v. Public Service Commission, 238 Ind. 646, 652, 150 N.E.2d 891, 894-95 (1958) (reversing grant of certificate; holding the statute requiring public utilities "to furnish reasonably adequate service and facilities"[8] should be construed *in pari materia* with the public convenience

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[7] See, e.g., Ind. Code §§8-1-2-5(b), 8-1-2-86(a), 8-1-2-87(c), 8-1-2-87.5(e), 8-1-2-89(c), 8-1-8.4-6, 8-1-8.5-2, 8-1-8.7-3, 8-1-13-5(a), 8-1-31.7-10.

[8] The statute quoted in General Telephone is now Ind. Code §8-1-2-4.

and necessity standard "in furnishing an additional standard for the guidance of the Commission"); V.I.P. Limousine Service, Inc. v. Herider-Sinders, Inc., 171 Ind. App. 109, 116-19, 355 N.E.2d 441, 445-47 (1976) (reversing grant of certificate; "primary consideration" is "public need for the service").

The relevant "public," therefore, is the one that makes NIPSCO a "public" utility: the customers it serves in its exclusive sales territory. That is the public for whom the proposed infrastructure improvements should provide incremental benefits, because that is also the particular public responsible for covering the costs once a Plan is approved. The broader public outside NIPSCO's service territory is not served by NIPSCO and is not being forced to fund the proposed investments. Economic ripples regionally or nationally are not material to the public convenience and necessity standard, which focuses on the needs and interests of the public served by the utility.

The Commission's reliance on the Economic Impact Report was a material factor in the cost-justification finding, and hence is reversible error. The Commission described the Report as an "important piece of evidence," and explicitly considered it notwithstanding vigorous objections. See Order at 60 (App. vol. II at 65). The Order found the "significant impact on Indiana's economy, as well as the broader U.S." was a relevant component of "the overall benefits attributable to the Plan." Id. Undeniably, the Report was weighed as a substantial factor supporting the Section 10(b)(3) finding. Erroneous reliance on an improper consideration, even if not the sole factor, is grounds for reversal. See Public Service Commission v. City of Indianapolis, 235 Ind. 70, 82, 131 N.E.2d 308, 312-13 (1956) (reliance on "some factor or element which it is apparent improperly influenced the result" is contrary to law).

Treating the Economic Impact Report as "important" when applying the cost-justification standard is a consequential departure from the purpose and terms of Section 10(b)(3). By requiring the estimated costs to be justified by incremental benefits, the statute is manifestly oriented on protecting ratepayers from excessive or unnecessary costs. The economic ripple interests of third parties not served by NIPSCO, however, are diametrically opposed to the relevant ratepayer interests, because maximizing spend produces the biggest ripples for those not forced to pay TDSIC costs. The ratepayer protection Section 10(b)(3) was designed to provide would be seriously eroded if external interests that benefit from the highest possible spend by the utility were weighed as "important" when determining what costs to preapprove for recovery in regulated rates.

E. The System Deliverability Projects Not Shown to Be Cost-Justified Should Be Excluded from the Approved Plan

The three errors raised on appeal all have a bearing on the Section 10(b)(3) deficiencies in NIPSCO's case as to the System Deliverability category in particular. It was in defending that category, after admitting System Deliverability projects were not justified in monetary terms or by a risk reduction rationale, that NIPSCO urged the

Commission to defer to its expertise in selecting projects and to accept an assurance it kept cost-effectiveness in mind. NIPSCO further persuaded the Commission to read Section 10(b)(3) as allowing approval of unjustified projects if included in a Plan with overall net benefits, and tellingly noted that avenue of approval could extend to an entire category of unjustified projects. Finally, NIPSCO justified the enormity of its Plan by emphasizing the importance of ripples to the broader economy from $1.636 billion in utility spending, because apparently the benefits to the ratepayers it serves are not enough to show cost-justification, at least for a substantial portion of the Plan.

Taken individually, each error is material and grounds for reversal, as in each instance the Commission misconstrued Section 10(b)(3) and hence did not make a valid cost-justification determination. Considered together, the three errors constitute an egregious curtailment of a critical ratepayer protection in the TDSIC Statute. When proposed investments in the billions are being preapproved for automatic recovery in monopoly utility rates, a meaningful cost-benefit analysis is essential. See NIPSCO Industrial Group, 100 N.E.3d at 242, 243. The modifications to the cost-justification requirement at issue here – deference to utility expertise, inclusion of unjustified projects or categories, reliance on economic stimulus effects to justify higher spending – impair the core function that Section 10(b)(3) was designed to serve: to protect ratepayers from being forced to pay excessive or unnecessary costs for system work that is not justified by sufficient incremental benefits.

The appropriate disposition of this appeal, accordingly, would be to reverse the Order and remand to the Commission with instructions. At a minimum, the System Deliverability category should be excluded from the approved Plan, with the exception of the Marktown Substation project.[9] For projects in the other two categories (Aging Infrastructure and Grid Modernization), the Commission should be required to revisit the Section 10(b)(3) findings in the Order, and confirm or revise those determinations based on a corrected interpretation of that provision – without any deference to utility decision-making, without exceptions to the cost-justification requirement, and with no weight being given to indirect benefits in the broader economy.

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[9] The Marktown Substation project specifically was justified for reasons distinct from the System Deliverability category generally. See Section B(4), supra.

VI. CONCLUSION

The Order does not adhere to the requirements of Section 10(b)(3) in three key respects, and therefore the grant of relief was erroneous because a statutory prerequisite was not satisfied. The Order should be reversed and the cause should be remanded to the Commission with instructions to: (1) exclude the System Deliverability category from the approved Plan, with the exception of the Marktown Substation project; and (2) for the other two categories, review the Section 10(b)(3) findings in the Order and revise or confirm based on a corrected interpretation of that provision.

Respectfully submitted[10],

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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 NIPSCO Industrial Group and Indiana Office of Utility Consumer Counselor* contains 9,845 words as calculated by the word count function of the word processing software used to prepare the Joint Brief.

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