



IN THE  
**Indiana Supreme Court**

Supreme Court Case No. 21S-EX-432

Indiana Office of Utility Consumer Counselor, et al.,  
*Appellants,*

–v–

Duke Energy Indiana, LLC, et al.,  
*Appellees.*

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Argued: November 16, 2021 | Decided: March 10, 2022

Appeal from the Indiana Utility Regulatory Commission  
Cause No. 45253

On Petition to Transfer from the Indiana Court of Appeals  
Case No. 20A-EX-1404

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**Opinion by Justice Slaughter**

Chief Justice Rush and Justices David and Massa concur.  
Justice Goff concurs in part and dissents in part with separate opinion.

## **Slaughter, Justice.**

An electric-utility company asked the utility regulatory commission to increase its rates, including costs the company had already incurred but was tracking as an asset retirement obligation. The commission approved the increased rates in part. As a matter of first impression, we must decide whether a utility can recover past costs, adjudicated under a prior rate order, by treating the costs as a capitalized asset. We hold that it cannot, at least not without statutory authorization. The commission's current order violates the statutory prohibition against retroactive ratemaking.

### I

Duke Energy produces electricity using coal. This process creates a toxic by-product known as coal ash. Duke had historically disposed of its coal ash in ash ponds or other ash-management areas on its production sites. In 2015, the Environmental Protection Agency enforced new rules for treating coal ash and remediating ash ponds. Sometime between 2010 and 2015, Duke also learned that some of its other ash-management areas violated Indiana's solid waste management rules. Duke began remediating these sites, meaning it tried to bring them into compliance with state and federal law. And it accounted for these efforts using "asset retirement obligation" accounting. Under governing federal and state regulations,

[a]n asset retirement obligation represents a liability for the legal obligation associated with the retirement of a tangible long-lived asset that a company is required to settle as a result of an existing or enacted law, statute, ordinance, or written or oral contract or by legal construction of a contract under the doctrine of promissory estoppel. An asset retirement cost represents the amount capitalized when the liability is recognized for the long-lived asset that gives rise to the legal obligation.

18 C.F.R. pt. 101(25)(A); see 170 Ind. Admin. Code 4-2-2 (adopting 18 C.F.R. pt. 101 by reference).

In 2019, Duke asked the commission to increase its rates for retail consumers. This “rate case” was Duke’s first since 2004. Relevant here, Duke sought to recover about \$212 million for coal-ash site closures, remediation, and financing costs it incurred from 2010 through 2018 and expected to incur during 2019 and 2020, with the bulk of these coal-ash costs having been incurred from 2015 to 2018. Duke proposed amortizing these costs over eighteen years. The utility consumer counselor responded on behalf of ratepayers, and several other parties intervened. After a hearing, the commission granted Duke’s petition in part in a June 2020 order that permitted Duke to recover its coal-ash costs.

On appeal, the court of appeals affirmed the commission’s order. *Indiana Off. of Util. Consumer Couns. v. Duke Energy Indiana, LLC*, 169 N.E.3d 417, 420 (Ind. Ct. App. 2021). The counselor and aggrieved intervenors then sought transfer, which we granted, *Indiana Off. of Util. Consumer Couns. v. Duke Energy Indiana, LLC*, 173 N.E.3d 1028 (Ind. 2021), thus vacating the appellate opinion.

## II

Under prevailing law, we apply three levels of review to an administrative ruling. *Indiana Gas Co. v. Indiana Fin. Auth.*, 999 N.E.2d 63, 66 (Ind. 2013). First, we uphold findings of fact supported by substantial evidence, which the court does not reweigh. *Ibid.* Second, we “review the conclusions of ultimate facts, or mixed questions of fact and law, for their reasonableness, with greater deference to matters within the [commission]’s expertise and jurisdiction.” *Ibid.* Third, we determine whether the commission’s decision is contrary to law. *Ibid.* This third category of review asks “whether the Commission stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision, ruling, or order.” *Ibid.*

Here, the counselor and other appellants present three issues, arguing the commission erred by (1) allocating cost responsibility based on Duke’s separation study; (2) allowing Duke to recover certain costs related to its Edwardsport plant; and (3) approving Duke’s recovery of coal-ash costs from 2010 to 2020. On the first two issues, we summarily affirm the court of appeals’ opinion. See *Duke Energy Indiana*, 169 N.E.3d at 427–29

(discussion sections D and E). We address only whether the commission’s 2020 approval of Duke’s attempt to recover coal-ash costs from 2010 through 2020 was retroactive ratemaking. We hold that it was insofar as it permitted Duke to recover the costs it incurred before the June 2020 order.

Indiana Code section 8-1-2-68 provides: “Whenever . . . the commission shall find any rates . . . to be unjust, unreasonable, [or] insufficient . . . , the commission shall determine and by order fix just and reasonable rates . . . to be imposed, observed, and **followed in the future**”. Ind. Code § 8-1-2-68 (emphasis added). The parties agree the commission cannot set rates retroactively under section 8-1-2-68. Our case law likewise holds that retroactive ratemaking is invalid. *Pub. Serv. Comm’n v. City of Indianapolis*, 235 Ind. 70, 88, 131 N.E.2d 308, 315 (Ind. 1956). The dispute here is whether the commission’s order is retroactive ratemaking instead of “reasonable rates . . . to be . . . followed in the future”.

As a threshold matter, before us is a legal question on which we owe the commission no deference. Duke argues that we should defer to the commission under our tiered standard of review because the question before us is one of fact. According to Duke, the question is whether it properly accounted for remediation costs as a regulatory asset—i.e., whether remediation costs are more like a capitalized cost or an expense with a past loss. Because this is a factual finding, Duke argues, we should defer to the commission. And our dissenting colleague believes we should defer to the commission because this is a mixed question of law and fact. *Post*, at 3. Under the dissent’s view, as long as the accounting decision is reasonable, we should defer to the commission.

We disagree with how both Duke and the dissent frame the issue. The issue here is not whether Duke used a proper accounting method to track its remediation costs in its balance sheet. The issue is whether the commission can approve reimbursement for a deferred asset, even one properly accounted for, without violating the statutory bar against retroactive ratemaking. This question—whether the commission’s order was retroactive ratemaking under section 8-1-2-68—is a question of law.

Although the dissent acknowledges that even under our tiered standard of review the Court owes no deference where the commission

has violated the law, the dissent argues that the commission order does not violate the law. *Post*, at 3–4. This is so, in its view, because our court of appeals held in *NIPSCO v. Indiana Office of Utility Consumer Counselor*, 826 N.E.2d 112, 119 (Ind. Ct. App. 2005), that accounting decisions fall within the commission’s discretion. *Post*, at 4. For starters, we are not bound by court-of-appeals precedent. But even assuming we agreed with the appellate decision, *NIPSCO* simply said that reasonable accounting practices are left to the commission’s discretion. *NIPSCO*, 826 N.E.2d at 118, 119. It did not say that anytime accounting is implicated in a commission order, a reviewing court cannot consider whether the order violates other laws. Here, we are not reviewing the commission’s finding that Duke used an acceptable form of accounting to track its coal-ash costs. See I.C. § 8-1-2-10 (allowing the commission latitude in considering systems of accounting). We are reviewing whether, by granting Duke’s petition to recover these costs, the commission violated the separate statutory prohibition against retroactive ratemaking. See *id.* § 8-1-2-68 (prohibiting the commission from retroactive ratemaking).

In *Public Service Commission v. City of Indianapolis*, we explained that whether “the Commission . . . conform[ed] to the statutory standards and legal principles involved” is “purely a legal question”. 131 N.E.2d at 313. Because we face a question of law here, we owe the commission no deference: “[T]he order of the Commission should be set aside . . . if it is found to be contrary to law”. *Id.* at 314. When it comes to technical expertise, the commission is entitled to great deference, and we will not substitute our judgment for its: “So long as the experts act within the limits of the discretion given them by . . . statute, their decision is final.” *Id.* at 311. But when it comes to whether the commission acted within its legal guardrails—e.g., whether it acted within statutory limits—we are presented with a “matter in[to] which [we] may **always** properly inquire”. *Id.* at 312 (emphasis added). Such inquiry is not only within our prerogative and competence; it is our constitutional duty. *Ibid.*

On whether Duke’s past costs violate section 8-1-2-68, we turn to our precedent on retroactive ratemaking. In *City of Indianapolis*, we said that “[p]ast losses of a utility cannot be recovered from consumers nor can consumers claim a return of profits and earnings which may appear

excessive.” *Id.* at 315 (citation omitted). There we held that since a 1951 rate order had already been adjudicated, Indianapolis could not challenge that order as setting unreasonable rates in a 1954 proceeding. *Id.* at 309, 315. Relying in part on this precedent, the court of appeals explained in *City of Muncie v. Public Service Commission* that retroactive ratemaking includes “recoupment of actual operating losses not foreseen in the original rate-making process”. 396 N.E.2d 927, 929 (Ind. Ct. App. 1979).

Applying here the principle that a utility cannot recover unforeseen past losses, we hold that the commission’s order is retroactive ratemaking. This is so because the commission established Duke’s rate in 2004, which governed the period from 2010 until the current order in June 2020. Duke acknowledges that the commission already adjudicated depreciation rates for the cost of decommissioning its plant assets, including coal-ash costs, in its 2004 rate order. The actual costs turned out to be more than Duke expected. Duke then sought re-adjudication through its 2019 rate case. But we have already held that utilities may not re-adjudicate costs for a time period governed by a prior order. This is why, in *City of Indianapolis*, the city could not re-adjudicate in 1956 rates that had been set in 1951. Here the commission violated the bar against retroactive ratemaking by re-adjudicating in 2020 coal-ash costs governed by its 2004 rate order. Thus, the commission exceeded its statutory authority. We note that the commission’s June 2020 order also permitted Duke to recover forecasted expenses through the end of December 2020. Appellants do not argue, and we do not hold, that reimbursement of forecasted expenses is retroactive ratemaking. Our order pertains only to coal-ash costs that Duke incurred before the commission’s June 2020 order.

We note that the parties raise various arguments pertaining to pre-authorization. It is true that some statutes expressly permit a utility to recoup certain expenses **after** incurring them—when there is pre-authorization to track the expenses for future rate cases. For instance, had Duke properly sought recourse under Indiana’s federal mandate statute, I.C. ch. 8-1-8.4, the result may have been different, at least for the costs Duke incurred to comply with the EPA’s 2015 rulemaking. This statute permits utilities to recover costs incurred due to changes in federal regulations. Although we have not yet interpreted the statute, we note it is

framed in the future tense and speaks of “projected” costs for “proposed” projects, see *id.* §§ 8-1-8.4-6(a), 6(b), 6(b)(1), 7(b)(1), 7(b)(2), which would seem to require commission approval **before** a utility incurs the cost. Where another statute authorizes the commission’s action, and specifically contemplates prior approval of certain types of expenses, the general statutory prohibition against retroactive ratemaking may not apply. Here, however, Duke did not seek prior approval of its coal-ash costs. Thus, what governs here is not the federal mandate statute but the prohibition against retroactive ratemaking.

Because the commission acted without statutory authority to re-adjudicate expenses already governed by a prior rate order, it violated the statutory prohibition against retroactive ratemaking under section 8-1-2-68. Thus, the portion of the commission’s June 2020 order relating to coal-ash costs incurred before its order is unlawful.

\* \* \*

We summarily affirm the court of appeals on the separation-study and Edwardsport-plant issues. As for retroactive ratemaking, we hold that, absent specific statutory authorization, a utility cannot recoup its past costs adjudicated under a prior rate case. We reverse the portion of the commission’s June 2020 order that approves these costs and remand to the commission for proceedings consistent with this opinion.

Rush, C.J., and David and Massa, JJ., concur.

Goff, J., concurs in part and dissents in part with separate opinion.

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**Goff, J., concurring in part and dissenting in part.**

I concur with the Court’s summary affirmance of the IURC’s allocation of revenue and costs based on Duke’s separation study and the IURC’s approval of Duke’s recovery of operating and maintenance (or O&M) costs for its Edwardsport generating plant. *See ante*, at 3–4. However, I part ways with the Court on the question of whether the IURC’s approval of Duke’s request to recover environmental-remediation costs amounted to retroactive ratemaking.

Because the IURC enjoys the statutory discretion to approve a utility’s accounting practices, and because Duke’s accounting method, in my opinion, was reasonable under the circumstances, I would defer to the IURC’s expertise and ultimately affirm its order.

## **Discussion**

As with other public utilities, Duke’s retail rates are typically set or adjusted through, what is known as, a “general ratemaking case” before the IURC. *NIPSCO Indus. Grp. v. N. Indiana Pub. Serv. Co.*, 125 N.E.3d 617, 620 (Ind. 2019). A general ratemaking case (or, simply, a rate case) involves a comprehensive examination by the IURC of “every aspect of the utility’s operations and the economic environment in which the utility functions.” *Id.* (cleaned up). This thorough analysis permits the IURC “to ensure that utility rates are fair to both the utility and its customers.” *Id.*

In 2019, Duke initiated a rate case, asking the IURC to increase its retail rates for electricity—the first time since 2004. Among other things, Duke sought to recover from its ratepayers, over an eighteen-year period, a total of \$211 million in environmental-remediation costs. Duke had incurred most of these costs between 2015 and 2018 to comply with new state and federal environmental rules. In its rate case before the IURC, Duke presented evidence that it had tracked these remediation costs using a method of deferred accounting known as Asset Retirement Obligation (or ARO) accounting. In granting Duke’s request, the IURC concluded that its remediation costs “were properly deferred” and recoverable as an ARO “regulatory asset” rather than as an operating expense. Order at 48.

In appealing this order, the Indiana Office of Utility Consumer Counselor (OUCC) and other interested parties (whom I'll refer to collectively as Consumers) argue that, by permitting Duke to recover its remediation costs, the IURC sanctioned an impermissible form of retroactive ratemaking. The Court agrees, holding that, as a pure question of law "on which we owe the commission no deference," the IURC's "order violates the statutory prohibition against retroactive ratemaking." *Ante*, at 4, 2 (citing I.C. § 8-1-2-68).

I respectfully disagree.

The rule against retroactive ratemaking requires a public utility to "bear the loss" or enjoy the gain "after a rate is fixed." *Pub. Serv. Comm'n v. City of Indianapolis*, 235 Ind. 70, 88, 131 N.E.2d 308, 315 (1956) (emphasis added). See also I.C. § 8-1-2-68 (permitting the IURC, when it finds rates to be unreasonable, insufficient, or unjust, to set new rates to be "followed in the future") (emphasis added). Were it otherwise, "a premium would be placed upon inefficiency, waste and negligence in management." *City of Indianapolis*, 235 Ind. at 88, 131 N.E.2d at 315. The rule works both ways, as it prohibits utility customers from seeking a refund on grounds that the established rate was too excessive. *Id.*

But just as "the grant of a refund does not necessarily amount to retroactive ratemaking," *Airco Indus. Gases v. Indiana Michigan Power Co.*, 614 N.E.2d 951, 953 (Ind. Ct. App. 1993), neither does IURC approval of a utility's request to recover certain costs.

## **I. Consumers failed to show that the Commission's order stands contrary to law.**

As the Court correctly points out, we apply a three-tiered approach when reviewing an administrative decision on appeal. *Ante*, at 3 (citing *Indiana Gas Co., Inc. v. Indiana Fin. Auth.*, 999 N.E.2d 63, 66 (Ind. 2013)). First, we review an agency's findings of fact by considering "only the evidence most favorable" to those findings, not by reweighing the evidence or assessing the credibility of witnesses. *Indiana Gas Co.*, 999 N.E.2d at 66. We will uphold agency findings so long as they rest on

“substantial evidence in the record.” *Id.* Second, we examine the agency’s decision for specific factual findings that are “material to its ultimate conclusions.” *Id.* We review these “conclusions of ultimate facts, or mixed questions of fact and law, for their reasonableness,” applying “greater deference to matters within the [agency’s] expertise and jurisdiction.” *Id.* Third and finally, our review of whether an agency decision is contrary to law is “limited to whether the Commission stayed within its jurisdiction and conformed to the statutory standards and legal principles involved.” *Id.*

The burden of proving legal error rests on the party challenging the agency decision. *Citizens Action Coal. of Indiana, Inc. v. Duke Energy Indiana, Inc.*, 44 N.E.3d 98, 105 (Ind. Ct. App. 2015). In my view, Consumers failed to meet this burden.

To begin with, while Consumers characterize the issue on transfer as “a matter of law,” Pet. to Trans. at 21, they presented it before the Court of Appeals as a mixed question of law and fact, arguing that the “IURC’s ultimate conclusion lacked sufficient findings of fact” and that its reasons for permitting the recovery of costs were “vague and unsupported by facts or precedent,” Appellant OUCC’s Br. at 17, 25. *See NIPSCO Indus. Grp.*, 125 N.E.3d at 627 (“An appeal based on an alleged lack of specific findings presents a mixed question of law and fact.”). And, to reiterate, this Court reviews a mixed question of law and fact for its reasonableness, ultimately deferring on matters within the agency’s “expertise and jurisdiction.” *Indiana Gas Co.*, 999 N.E.2d at 66.

To be sure, a court’s deference to an agency’s decision under this standard is appropriate only “if no proposition of law is contravened or ignored by the agency conclusions.” *McClain v. Review Bd. of Indiana Dep’t of Workforce Dev.*, 693 N.E.2d 1314, 1318 (Ind. 1998). When “the agency proceeds under an incorrect view of the law,” its decision, we’ve held, “requires reversal,” even on matters within the agency’s expertise. *Id.* In other words, if the agency’s decision violates “any statute, any legal principle,” or any “rule of substantive or procedural law,” that decision simply “cannot stand.” *City of Indianapolis*, 235 Ind. at 86, 131 N.E.2d at 314.

Here, however, the IURC's order violates **no** proposition of law. To the contrary, decisions involving the "accounting practices followed by public utilities are policy determinations committed to the sound discretion of the Commission." *NIPSCO v. Office of Util. Consumer Couns.*, 826 N.E.2d 112, 119 (Ind. Ct. App. 2005). What's more, the Commission's authority to determine a utility's accounting practices ascends from the legislature itself. *Boone Cty. Rural Elec. Membership Corp. v. Pub. Serv. Comm'n*, 239 Ind. 525, 536, 159 N.E.2d 121, 126 (1959). When the IURC prescribes "a system of accounting" for a public utility, our utilities-regulation code instructs—indeed mandates—the agency to "consider **any system of accounting** established by any federal law, commission or department and any system authorized by a national association of such utilities." I.C. § 8-1-2-10 (emphasis added).<sup>1</sup> And so long as the IURC-approved accounting practice stands "within reason and prudence, **courts may not interfere.**" *Ind. Gas Co. Inc. v. Off. of the Util. Consumer Couns.*, 675 N.E.2d 739, 747 (Ind. Ct. App. 1997) (emphasis added). In other words, deference to the Commission's decision does not, as Consumers contend, constitute "a surrender of the judiciary's essential function" of preserving "adherence to the rule of law." *See* Pet. to Trans. at 12.

Critically, Consumers make no argument that ARO accounting itself violates the ban on retroactive ratemaking. In fact, they acknowledge the IURC's authority to approve such an accounting method under "extraordinary" circumstances. *Id.* at 20 (citing *Verified Joint Petition of Duke Energy Indiana, LLC, et al.*, 2020 WL 3630517 (Ind. U.R.C. June 29, 2020)). Consumers argue instead that regulatory **preapproval** is necessary for a utility to defer its costs. *Id.* "With preapproval," they submit, "subsequent rate recovery is *prospective*" and, thus, permissible. *Id.* The lack of preapproval, they contend, "contravenes the prohibition on

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<sup>1</sup> As the Court points out, the ARO system of accounting used by the IURC enjoys sanction by both state and federal law. *Ante*, at 2. *See* 18 C.F.R. Pt. 101(25)(A) (defining ARO accounting under the Uniform System of Accounts for Public Utilities); 170 Ind. Admin. Code 4-2-2 (adopting by reference the Uniform System of Accounts for Public Utilities).

retroactive ratemaking,” as it effectively permits a “utility to unilaterally declare a category of costs eligible for future rate recovery.” *Id.*

This argument, in my view, is devoid of merit. To begin with, the precedent on which Consumers rely offers no support for their position. In the first of these cases, *Duke Energy Indiana, Inc. v. OUCC*, a public utility petitioned the IURC for approval to defer its cost accounting for repairs resulting from recent storm damage. 983 N.E.2d 160, 163 (Ind. Ct. App. 2012). The IURC initially approved this request but, upon reopening the case to receive new evidence, denied the utility’s entreaty on grounds that the storm wasn’t “extraordinary” enough to warrant an exception to the prohibition on retroactive ratemaking. *Id.* at 165, 169. The Court of Appeals affirmed, finding the IURC justified in rescinding its initial approval. *Id.* at 172. The panel made no determination on whether the IURC engaged in retroactive ratemaking, let alone whether regulatory preapproval is necessary for a utility to defer its costs.

In the second case on which Consumers rely, *Citizens Action Coalition of Indiana, Inc. v. Duke Energy Indiana, Inc.*, a public utility requested approval to defer certain project-related property-tax expenses, depreciation costs, and O&M costs for inclusion in subsequent retail electric rates. 16 N.E.3d 449, 451 (Ind. Ct. App. 2014). After the IURC approved this request, the intervenors appealed, arguing that the agency’s order rested on deficient findings of fact. *Id.* at 450. The Court of Appeals agreed, remanding the case to the IURC “for a clear statement of the policy and evidentiary considerations underlying its determination.” *Id.* at 462. As with its 2012 *Duke Energy* decision, the court’s 2014 decision made no determination on whether the IURC engaged in retroactive ratemaking or whether regulatory preapproval is necessary for a utility to defer its costs.

Other than the lack of pertinent caselaw, I find no applicable statute or administrative rule that requires IURC preapproval of regulatory assets.<sup>2</sup> In fact, when preapproval is required, the General Assembly has explicitly said so. *See, e.g.*, I.C. § 8-1-8.5-2 (requiring Commission preapproval of costs for the “construction, purchase, or lease of any steam, water, or other facility for the generation of electricity” by a public utility).<sup>3</sup>

Of course, by failing to seek preapproval, Duke risked the IURC’s denial of its request for recovery of remediation costs. But the lack of regulatory preapproval, at least under the facts and circumstances here, doesn’t permit a “utility to unilaterally declare a category of costs eligible for future rate recovery” and it certainly doesn’t violate the prohibition on retroactive ratemaking.<sup>4</sup> *See* Pet. to Trans. at 20.

In short, because Consumers challenged the IURC’s ultimate conclusion for insufficient findings of fact, because the IURC enjoys the statutory discretion to approve a utility’s accounting practices, and because no legal authority requires regulatory preapproval for Duke to recover its deferred costs, the Consumers, in my opinion, failed to show that the IURC’s order stands contrary to law.

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<sup>2</sup> I likewise find no published agency order to support Consumers’ argument. *See In Re S. Haven Sewer Works, Inc.*, No. 41903, 2002 WL 31107491 (Ind. U.R.C. June 5, 2002) (disapproving, without specifying the need for prior approval, a utility’s request for rate recovery for various cost deferrals it had made without prior approval).

<sup>3</sup> The Court itself acknowledges “that some statutes expressly permit a utility to recoup certain expenses **after** incurring them—when there is pre-authorization to track the expenses for future rate cases.” *Ante*, at 6 (citing I.C. ch. 8-1-8.4).

<sup>4</sup> It’s worth noting that the OUCC has taken a different approach on the retroactivity question when the case involves **consumer refunds** rather than a utility’s request to recover costs. *See Indiana Gas Co. v. Office of Util. Consumer Couns.*, 575 N.E.2d 1044, 1053 (Ind. Ct. App. 1991) (rejecting utility’s argument that the Commission’s order setting rates subject to refund of future overearnings violated the rule against retroactive ratemaking).

## **II. The IURC’s conclusion that Duke’s remediation costs were “properly deferred” and recoverable was, in my opinion, a reasonable one entitled to deference.**

The IURC, as noted above, “has the authority to determine accounting practices for rate regulated companies” and, so long as these practices stand “within reason and prudence, courts may not interfere.” *Ind. Gas Co. Inc.*, 675 N.E.2d at 747. Here, the IURC’s conclusion that Duke’s remediation costs were “properly deferred” and recoverable was, in my opinion, a reasonable one entitled to deference.

A utility’s request for deferred regulatory accounting “is a request for extraordinary relief.” *Verified Joint Petition of Duke Energy Indiana*, 2020 WL 3630517, at \*6. When “considering such requests,” the IURC must “consider the balance struck between the utility and its ratepayers.” *Id.* Appropriate factors include “the gravity of the financial event involved and its impact upon the utility” and “the impact such accounting and/or ratemaking treatment will have upon the utility’s ratepayers.” *Id.* What’s more, “the utility requesting such extraordinary treatment [must] be able to demonstrate with convincing evidence that the financial event is in fact occurring, and that such financial impact is fixed, known and measurable.” *Id.* If a utility can establish this need, it “might receive approval for such an extraordinary request.” *Id.*

In cases where the IURC has permitted recovery of deferred costs, “the common traits are that the costs being amortized as deferred debits are infrequently incurred, involve assets with significant and long-lasting benefits, and involve significant cost, to the point that it is prudent to smooth the cost over a period of years.” *In Re S. Haven Sewer Works, Inc.*, No. 41903, 2002 WL 31107491 (Ind. U.R.C. June 5, 2002).

In approving Duke’s recovery of its remediation costs, the IURC expressly found that the utility’s tracking of deferred costs as a regulatory asset complied with accepted standards of accounting; that the costs “are significant and infrequent” and that recoupment “will provide long lasting benefits,” including “improved environmental footprints” and



Duke's continued ability to use the utility properties. App. Vol. II, p. 67. Cf. *Duke Energy*, 983 N.E.2d at 172 (affirming IURC's denial of utility's request to recover through deferred accounting nearly \$12 million in costs from storm damage where utility's existing rates already covered storm damage and where utility failed to show that the storm at issue was "extraordinary" enough to warrant an exception to the prohibition on retroactive ratemaking); *NIPSCO*, 826 N.E.2d at 119, 120 (holding that the IURC "properly rejected" a utility's request for deferred accounting of new costs because the proposed accounting method itself conflicted with the "terms and conditions" of an earlier settlement agreement freezing the utility's rates). What's more, the IURC found that historically "ongoing environmental regulations drive the costs associated" with energy supply and that "no party disputed the reasonableness or prudence of [Duke's] activities and costs incurred to date."<sup>5</sup> App. Vol. II, p. 67.

These findings, in my opinion, are more than reasonable, ultimately entitling the Commission's decision to deference by this Court. See *Ind. Gas Co. Inc.*, 675 N.E.2d at 747.

Finally, it's worth noting that environmental-remediation costs may run into the hundreds of millions of dollars, as the evidence here clearly shows. If Duke were forced to absorb such a significant cost alone, it could actually **hurt** consumers in the long run. It makes sense, then, in my view, to allocate those costs among thousands—if not millions—of customers over a period of years. See *In Re S. Haven Sewer Works*, No. 41903, 2002 WL 31107491 (observing that cases in which the IURC has permitted recovery of deferred costs often "involve significant cost" to the utility "to the point that it is prudent to smooth the cost over a period of years"). After all, the purpose of the IURC is to balance "the public's need for adequate, efficient, and reasonable service with the utility's need for sufficient revenue to meet the cost of furnishing service and to earn a reasonable

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<sup>5</sup> Indeed, while Consumers argue that the "size" or "frequency" of a cost are not necessarily proper "grounds for rate recovery," Appellant OUC's Br. at 25–26, they fail to explain how the IURC's ultimate-fact conclusions here were unreasonable.

profit.” *NIPSCO Indus. Grp. v. N. Indiana Pub. Serv. Co.*, 100 N.E.3d 234, 238 (Ind. 2018).

## **Conclusion**

For the reasons above, I dissent from the Court’s holding that the IURC’s order violates the rule against retroactive ratemaking. On all other issues, I concur with the Court.