IN THE INDIANA COURT OF APPEALS
CAUSE NO. 93A02-1301-EX-76

CITIZENS ACTION COALITION OF INDIANA, INC., et al.	)	Appeal from the Indiana Utility Regulatory Commission
Appellants,	)	**CAUSE NOS. 43114 IGCC-4, 43114 IGCC-4S1, 43114 IGCC-5, 43114 IGCC-6, 43114-IGCC-7, and 43114 IGCC-8**
v.	)	
	)	James D. Atterholt, Chairman
	)	Kari A.E. Bennett, Commissioner
DUKE ENERGY INDIANA, INC., et al.	)	Larry S. Landis, Commissioner
	)	Carolene Mays, Commissioner
Appellees,	)	David E. Ziegner, Commissioner
	)	David E. Veleta, Administrative Law Judge

JOINT APPELLANTS' BRIEF

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Due Process Issues

1. While the cases now on appeal were pending, Governor Mitch Daniels fired the Chairman of the Indiana Regulatory Commission ("IURC" or "Commission"), and Duke Energy Indiana ("Duke") fired two executives and a staff attorney – an attorney who had formerly been the Administrative Law Judge ("ALJ") presiding over some of the cases on appeal here. The reason for these firings was misconduct relating to the Commission's oversight of Duke's construction of a power plant in Edwardsport, Indiana (the "Plant" or "Project").

In light of these facts, did the Commission act properly in refusing to investigate – or even allow evidence on – whether misconduct by Duke, the Chairman, and the presiding ALJ may have compromised the fairness and impartiality of the Commission's initial approval or ongoing reviews of the Edwardsport Project?

2. Throughout the cases now on appeal, the Commissioners adjudicating them were given monthly, real-time reports, outside of the record of these cases, about Duke's progress on construction of the Edwardsport Plant. These reports were prepared, in cooperation with Duke, by an outside consultant who directly oversaw Duke's work on the Plant and who was paid by Duke (with ratepayer money). The parties to the cases now on appeal have never been allowed to see these reports.

Does the Commission's continuing refusal to let the parties know the contents of these reports violate the Commission's duty to be an impartial tribunal in these cases – cases in which the Commission pre-approved Duke's cost recovery for the Edwardsport Plant?

B. Issues Relating to Standard of Review

3. Did the Commission err in concluding that the settling parties in Cause No. 43114-IGCC-4S1 were not required to present any evidence showing that Duke's payment of $12.7 million in attorneys' fees and $900,000 in litigation expenses to the other settling parties was reasonable, and in further concluding that the Commission itself had no obligation to determine whether these amounts of attorneys' fees and costs were reasonable or in the public interest?

4. Did the Commission err by making no specific findings of fact on any of the allegations against Duke of fraud, concealment, and gross mismanagement raised by the non-Duke parties?

5. Did the Commission err, in Cause No. 43114-IGCC-4S1, in approving an extension of Duke's Certificate of Public Convenience and Necessity ("CPCN") for the Edwardsport Project without making any findings of fact or conclusions of law on the need for mitigation of the huge volumes of carbon dioxide to be emitted by the Plant during its lengthy expected operating life – an issue which was fairly and squarely raised by several parties on the record in that proceeding?

C. Issues Relating to Cost Recovery

6. In 43114-IGCC-5 and -6, did the Commission commit error in approving Duke's recovery of 100% of the Edwardsport construction costs incurred through September 30, 2010, while simultaneously finding in IGCC-4S1 that some of these same costs had been imprudently incurred?

7. In each of the orders on appeal, did the Commission act contrary to binding Indiana legal precedent by allowing Duke to earn a return on capital that was contributed by customers?

Specifically, in calculating the rate of return to be used in calculating the amount of capitalized financing costs (known as "AFUDC"), Duke did not account for funds Duke could collect from ratepayers for taxes that Duke could defer paying. Did the Commission err in approving Duke's calculation of AFUDC financing costs without requiring Duke to recognize the effect of these interest-free loans from customers?

8. Did the Commission act contrary to law by approving a settlement allowing Duke to recover $2.595 billion – plus most of Duke's capitalized financing costs incurred after July 1, 2012 – through retail rates for the Edwardsport Project simply because this amount fell "within the range of the evidence" presented, but without making any finding that this amount was actually the correct amount to charge ratepayers?

II. STATEMENT OF THE CASES

A. IURC Cause Nos. 43114-IGCC-4 and 43114-IGCC-4S1

On September 7, 2006, Duke filed its Verified Petition with the Commission in Cause No. 43114 seeking a Certificate of Public Convenience and Necessity ("CPCN" or "Certificate of Need") for the construction of a 618 MW Integrated Gasification Combined Cycle ("IGCC") power plant in Edwardsport, Indiana ("Edwardsport Project" or "Project"). On November 20, 2007, the Commission issued its final order in consolidated Cause Nos. 43114 and 43114-S1 ("CPCN Order") and made several determinations, which included: (1) approving the issuance of CPCNs for the Edwardsport Project under Ind. Code chapters 8-1-8.5 and 8-1-8.7; (2) approving, as reasonable, Duke's estimated cost to complete the Project of $1.985 billion; and, (3) as requested by Duke, directing that ongoing review of the construction of and cost recovery for the Project during construction be conducted in semi-annual "IGCC Rider" proceedings. *In re Duke Energy Indiana Energy, Inc.*, Cause No. 43114 and 43114-S1, 261 P.U.R.4th 165 (Ind.U.R.C.2007).

On May 1, 2008, Duke filed its first semi-annual IGCC Rider proceeding, designated as Cause No. 43114-IGCC- l ("IGCC-1"). In that proceeding, Duke requested several forms of relief, including approval of an increase to the cost estimate for the Project from $1.985 to $2.35 billion. The Commission approved this request in an order dated January 7, 2009 ("IGCC-1 Order"). *In re Duke Energy Indiana, Inc.*, Cause No. 43114 IGCC-1, 2009 WL 214580, 19 (Ind. U.R.C.2009)

In the course of IGCC-1, the Commission also ordered Duke to retain a professional engineering firm, Black & Veatch ("Black & Veatch" or "B&V"). Duke was ordered to hire Black & Veatch to observe construction of the Edwardsport Project and "independently report to the Commission and assist the Commission through active and continuing independent oversight

of the IGCC Project." *Id.* at 19.

On November 24, 2009, Duke submitted its Verified Petition to initiate its fourth IGCC Rider Proceeding, Cause No. 43114-IGCC-4 ("IGCC-4"). Duke included a "Motion for Subdocket" requesting review and approval for a new, yet-to-be filed cost estimate for the Project. In the Motion, Duke said that design modifications and scope growth had increased the capital costs of the Project. Duke estimated this would add $150 million to the Project's cost. (Appellants' App., 322.) On January 27, 2010, the Commission granted the motion for subdocket and opened Cause No. 43114-IGCC-4S1 ("IGCC-4S1"). (Appellants' App. 11.)

In written testimony filed in IGCC-4S1 on April 16, 2010, Duke asked the Commission to increase the approved cost estimate for the Project by $530 million – not $150 million – from $2.35 billion to $2.88 billion. (Appellants' App., 338-341.)

On July 28, 2010, the Commission issued its Interim Order in IGCC-4. (Appellants' App., 101.) This Order provisionally approved the costs of Edwardsport construction incurred for the six-month period between April 1 and October 31, 2010, pending the outcome of the investigation in Cause No. 43114-4S1. It also approved an increase in rates to permit Duke to recover a return on these additional costs, subject to refund depending on the outcome of this investigation. (Appellants' App., 121-122.).

Evidentiary hearings were scheduled to commence on September 16, 2010. Instead, on that day, some of the parties notified the Commission they had reached a settlement. On September 17, 2010, Duke filed the settlement agreement ("First Settlement") it had reached with the OUCC, Nucor, and the Industrial Group ("Settling Parties") – but not Citizens Action Coalition of Indiana, Inc., Save the Valley, Sierra Club, and Valley Watch ("Joint Intervenors"). (Appellants' App., 361-371.)

Less than a month later, on October 6, 2010, an article appeared on the front page of the Indianapolis Star headlined, "Ethics Controversy Erupts: Daniels fires utility regulatory chairman; Duke Energy puts 2 on leave." As discussed in greater detail below, the article cited "conflict-of-interest concerns" surrounding the IURC's chief ALJ Scott Storms who had allegedly failed to recuse himself from several Duke cases while simultaneously seeking a job with Duke. The article alleged that Storms was hired by Duke Energy Indiana President Mike Reed – himself the former Executive Director of the IURC. The article also alleged that then-IURC Chairman David Lott Hardy had been aware that Judge Storms had applied for a job with Duke. (Appelants' App., 411-412.)

On November 15, 2010, Joint Intervenors filed supplemental testimony and exhibits to address issues raised in the Star article. (Appellants' App, 372-685.)

On November 22, 2010, Joint Intervenors filed two motions seeking additional subdockets. First, Joint Intervenors requested leave to seek disallowance of costs attributable to "fraud, concealment or gross mismanagement" under Ind. Code § 8-1-8.5-6.5. This motion ("First Motion for Subdocket") – *which was unrelated to the ethics scandal* – was based on previously filed testimony from Joint Intervenors' expert witness David Schlissel which stated that Duke failed to consider or disclose known risks of cost overruns at the Edwardsport Plant. (Appellants' App., 686-691.)

On that same day, Joint Intervenors filed a *second* motion requesting another subdocket ("Second Motion for Subdocket"). This Second Motion for Subdocket *was* in response to the Star article detailing ethics violations by Duke, Judge Storms, and Chairman Hardy. Specifically, Joint Intervenors requested the Commission investigate this misconduct and any

effects the misconduct may have had on regulatory approvals for the Edwardsport Project up to that point. (Appellants' App., 692-699.)

On December 9, 2010, the Settling Parties notified the Commission that they were withdrawing their First Settlement because of the ethics scandal. (Appellants' App., 700-705.)

On January 28, 2011, in IGCC-4S1, Joint Intervenors filed a Motion requesting that the Commission file the monthly reports it had received from Black & Veatch as evidence in that case, or that the Commission otherwise make the reports available to the parties. The motion noted that Duke staff had numerous meetings with IURC staff and Black & Veatch personnel without the other parties being present. The Motion also noted that the Commission had refused to provide copies of the reports in response to a request under Indiana's Public Records Act. (Appellants' App., 749-760.)

On February 25, 2011, the Commission *denied* one of JIs' Motions for Subdocket – specifically, the Commission denied the request to investigate any impact of improper communications or ethics violations by Duke or by Commission members or staff on prior Edwardsport regulatory reviews and approvals. (Appellants' App., 776-777.)

In a separate docket entry that same day, the Commission *granted* Joint Intervenors other Motion for Subdocket – i.e., the Commission granted the request "to investigate questions of fraud, concealment and/or gross mismanagement in the planning, design, engineering and construction of the Edwardsport IGCC project." (Appellants' App, 778-782.) Again, these allegations of "fraud, concealment, and/or gross mismanagement" *were not related to the ethics scandal*.

In this Second Docket Entry, the Commission bifurcated the proceedings as follows: (1) in Phase I of the proceeding the Commission would address the review of Duke's progress

reports for the period April 1 through September 30, 2009, the proposed cost estimate increase, the continuing need for additional capacity, and the reasonableness of going forward with the Project; (2) in Phase II, the Commission would address the allegations of fraud, concealment and/or gross mismanagement. (Id.)

The Commission stated Duke had the burden of proof in Phase I (addressing (1) Duke's request for approval for the new cost *estimate* for the entire project and (2) Duke's request for final approval for *costs actually incurred* up through September 30, 2010).[1] The Commission also stated that the OUCC, the Industrial Group, Nucor, and Joint Intervenors had the burden of proof in Phase II (addressing claims of fraud, concealment, and gross mismanagement). (Id., FN6.)

Neither phase addressed allegations of improper communications between Duke Executives and the IURC, nor Duke's hiring of Scott Storms while he presided over this case. (Id.)

On April 4, 2011, the Commission entered a Docket Entry denying Joint Intervenors' request to disclose the reports the Commission had received from Black & Veatch regarding the Edwardsport Plant. (Appellants' App., 783-786.) The Commission stated that "Black & Veatch conveys its opinions concerning the progress of the Edwardsport Project to the Commission through its Reports." (Id., 784.) The Commission refused to disclose the reports because they were "deliberative materials," yet stated "[t]he Reports have never been used by the Commission in making findings of fact or conclusions of law." (Id., 784-785.)

[1] Initially, IGCC-4 addressed costs actually incurred up through September 30, 2009. However, in Docket Entries in IGCC-5 and 6, the Commission incorporated review of Duke's progress reports in IGCC-5 and 6 (for the time period of October 1, 2009 through September 30, 2010) into Phase 1 of IGCC-4S1. (App., 1573-1574 and 1586-1589.) In other words, the Commission decided to address the prudency of Duke's costs *actually incurred* – not simply the cost *estimates* – up through September 30, 2010, in Phase I of IGCC-4S1.

On August 30, 2011, the Commission entered a Docket Entry denying a request by Duke to make the Black & Veatch reports part of the record in Phase I of IGCC-4S1. In that Docket Entry, the Commission further stated that the Black & Veatch reports would not be admitted into the record of Phase II, either. (Appellants' App., 809-811.)

On September 29, 2011, Joint Intervenors filed a Motion seeking certification of this ruling for interlocutory appeal. (Appellants' App., 812-836.) This Motion was denied on October 24, 2011.

On November 21, 2011, Joint Intervenors renewed their joint motion for an investigation into the due process implications of the misconduct of Duke and Commission officials. (Appellants' App., 943-952.) However, on March 23, 2012, the Commission once again denied this motion. (Appellants' App., 1130-1131.)

Joint Intervenors moved to have this decision certified for interlocutory appeal, as well. (Appellants' App., 1132-1160.) This motion was denied on May 24, 2012. (Appellants' App., 1190.)

A protracted evidentiary hearing was held for Phases I and II of IGCC-4S1 on the following 22 days: October 26, 28 and 31, 2011; November 1, 3, 4, 7, 9, 10, 17, 21, 22 and 23, 2011; December 12, 13, 15, 16, 21 and 22, 2011; and January 9, 12 and 13, 2012.

Generally speaking, in Phase I, the Company took the position that its CPCNs should be amended to increase the authorized cost to complete the Project from $2.35 billion to $2.72 billion in direct construction costs, plus the total amount of financing costs ("AFUDC") which would accrue during construction, whatever that amount ultimately turned out to be. (Appellants' App., 131-139.) The non-Duke parties all took the position in Phase I that no

increase in the authorized cost to complete the Project above the previously approved $2.35 billion was justified. (Id., 139-153.)

Generally speaking, in Phase II, the non-Duke parties' position was that the Company had engaged in conduct which constituted gross mismanagement and concealment (if not outright fraud) adversely affecting the Project to an extent sufficient to warrant a reduction in the authorized cost to complete the Project. (Appellants' App., 159-180.) In particular, the OUCC and the Industrial Group sponsored testimony which called for the Commission to limit the authorized cost for the Project to the $1.985 billion approved in the Commission's original CPCN order. (Id., 160, 163.) Joint Intervenors, by contrast, sponsored testimony which stated that this was the minimum action which the Commission should take, arguing that the extent of gross mismanagement and concealment (if not outright fraud) justified complete revocation of the CPCNs for the Project. (Id., 175-176.) In response, the Company denied the Project had been tainted in any way by gross mismanagement, concealment or fraud. (Id.., 180-196.)

In Phase II, Joint Intervenors also attempted to introduce evidence of Duke's hiring of Judge Storms while he was still presiding over this case and evidence of Duke's improper ex parte communications with former Chairman Hardy while he was presiding over this and earlier Edwardsport subdockets. However, the Commission struck the evidence, to the extent it was offered purely for the purpose of showing Duke had attempted to improperly influence any Commission action. (Appellants' App., 978-1129.)[2]

[2]Joint Intervenors' Phase II Direct Testimony of Kerwin Olson was originally filed on July 14, 2011. The Commission subsequently struck references to Duke's hiring of Scott Storms and any references to "improper" or "ex parte" communications. Joint Intervenors resubmitted the testimony with all such references marked out, but still visible, on January 17, 2012. This is the version of the testimony that begins on page 978 of Appellants' Appendix and continues, with exhibits, through page 1129.)

After the close of evidence, on April 30, 2012, Duke, the OUCC, Nucor, and the Industrial Group filed a second Settlement Agreement ("Settlement"), along with a Verified Joint Petition seeking to reopen the record. Under the terms of the Settlement, Duke would be permitted to include $2.595 billion in Edwardsport costs in Duke's rate base. On top of this "Hard Cap," Duke would also be permitted to include, in its rate base, 100% of its capitalized financing costs from July 1, 2012, through November 30, 2012, and 85% of the capitalized financing costs thereafter. In addition, Duke would immediately begin collecting certain other financing costs from ratepayers on the $2.595 billion cost of the Plant. (Appellants' App., 1161-1177.)

On May 7, 2012, Joint Intervenors filed a verified response, objecting to the settlement and to reopening the record. (Appellants' App., 1178-1186.)

The Settling Parties' Motion to Reopen the Record was granted, and a hearing on the proposed Settlement commenced on July 16, 2012. (Appellants' App., 1187-1189.)

At the start of the hearing, Joint Intervenors submitted a written Motion to Dismiss for Insufficiency of Evidence. The basis for the Motion was that nothing in the Settling Parties' prefiled evidence explained a provision in the settlement in which Duke agreed to pay $12.3 million in attorneys' fees and costs to the law firm of Lewis & Kappes and $1 million to Nucor Steel. (Tr. v.159, 034058-034069[3]; Appellants' App., 1329-1350.) Joint Intervenors renewed this Motion at the close of evidence. (Tr. v.162, 034730-034731.)

This Motion to Dismiss was denied, both at the opening and closing of evidence. (Tr. v.159, 034068-034069; Tr. v.162, 034730-034731.)

[3] All references to the "Transcript" in this Brief are to the transcript in IGCC-4S1.

After the parties submitted Proposed Orders and Exceptions, the Commission issued its Final Order on December 27, 2012. This Order approved the Settlement with some modifications. On December 28, 2012, the Settling Parties filed a Notice of Acceptance, agreeing to the modifications made by the Commission. (Appellants' App., 1545-1549.)

B. IURC Cause No. 43114-IGCC-5 and IGCC-6

On June 2, 2010, Duke filed its fifth petition in the ongoing review of the construction of the Edwardsport Plant. In this petition, Duke sought approval of its costs *actually incurred* for the Edwardsport Project during the six-month period beginning October 1, 2009, and ending March 31, 2010. (Appellants' App., 1563-1572.) On November 5, 2010, Duke filed its sixth petition in this ongoing review, seeking approval of Edwardsport costs incurred during the six-month period beginning April 1, 2010, and ending September 30, 2010. (Appellants' App., 1576-1585.)

However, on March 7, 2011, the Commission issued Docket Entries in both IGCC-5 and IGCC-6, incorporating the Commission's review of Duke's progress reports into Phase I of IGCC-4S1. As a result, the Commission's review of the Edwardsport costs actually incurred during the IGCC-5 and IGCC-6 time periods (October 1, 2009, through September 30, 2010) was actually conducted in Phase I of IGCC-4S1. (Appellants' App., 1573-1574 and 1586-1587.)

Hearings on all remaining issues in both IGCC-5 and IGCC-6 were commenced on April 24, 2012. (Appellants' App., 1575 and 1588.)

On December 27, 2012, the Commission issued its Final Orders in these cases – the same day as the IGCC-4S1 Order. (Appellants' App., 257-266 and 267-279.) In these Orders, the Commission approved all of Duke's costs incurred up through September 30, 2010, as "reasonable" and approved them for ratemaking purposes. (Appellants' App., 266, 278.)

C. IURC Cause No. 43114-IGCC-7

On May 31, 2011, Duke filed its seventh petition in the ongoing review of the construction of the Edwardsport Plant. In this petition, Duke sought approval of its costs *actually incurred* for the Edwardsport Project during the six-month period beginning October 1, 2010, and ending March 31, 2011. (Appellants' App., 1589-1599.)

Following the submission of testimony and evidentiary hearings, the Commission entered its Final Order on December 27, 2012. (Appellants' App., 280-295.) Again, this was the same day the Commission issued the IGCC-4S1 Final Order. In the IGCC-7 Final Order, the Commission approved, as "reasonable," all of Duke's costs up through March 31, 2011, for ratemaking purposes. (Appellants' App., 295.)

D. IURC Cause No. 43114-IGCC-8

On November 30, 2011, Duke filed its eighth petition in the ongoing review of the construction of the Edwardsport Plant. In this petition, Duke sought approval of its costs *actually incurred* for the Edwardsport Project during the six-month period beginning April 1, 2011, and ending September 30, 2011. In addition, the Company sought approval of new rates which would recover a return on the costs of construction for Edwardsport incurred through September 30, 2011, to the extent consistent with the Second Settlement Agreement in Cause No. 43114-4S1. (Appellants' App., 1600-1611.)

Following the submission of testimony and evidentiary hearings, the Commission entered its Final Order on December 27, 2012. (Appellants' App., 296-321.) Again, this was the same day the Commission issued the IGCC-4S1 Final Order. In the IGCC-8 Final Order, the Commission approved all of Duke's costs up through September 30, 2011, as "reasonable." In

addition, the Commission approved the new rates sought by Duke to implement the Second Settlement Agreement as modified by the Commission in its Final Order in Cause No. 43114-4S1. (Appellants' App., 321.)

III. STATEMENT OF FACTS RELEVANT TO THE ISSUES

A. Facts Relevant to Issue #1: Commission's Refusal to Consider Effects of Conflicts of Interest and Improper Ex Parte Communications that Violated Due Process

Duke filed its petition requesting a CPCN for the construction of the Edwardsport Plant in Cause Nos. 43114 and 43114-S1 on September 7, 2006.

Unbeknownst to the non-Duke Parties to this case, from at least the Spring of 2007 through September of 2010, Duke executives had numerous ex parte communications with then-IURC Chairman David Lott Hardy ("Chairman Hardy") regarding the Project and the Commission's review of the Project. (Appellants' App., 982-994, 996-1008, and 1013-1129.)

In May of 2007, Duke executives invited then-IURC Chairman David Lott Hardy ("Chairman Hardy") to attend Duke's Strategic Board Retreat in North Carolina, to meet for dinner and drinks, and to stay overnight at the "Duke Mansion." (Appellants' App., 982-984 and 998-1001.)

On November 7, 2007, then-Duke Franchised & Electric Group President James Turner had a direct communication with then-IURC Chairman Hardy in which Hardy provided advance information about the date on which the Commission would issue its order in consolidated Cause Nos. 43114 and 43114 S1, November 20, 2007. (Appellants' App., 1550 (exhibit offered but not admitted).)

On November 16, 2007, the Commission held a closed door, executive session to discuss the final orders in 43114 and 43114 S1. At that time, Scott Storms ("Judge Storms") was the

Administrative Law Judge ("ALJ") presiding over the case and Michael Reed was then the Executive Director of the IURC. (Appellants' App., 390 and 683.)

Both attended that executive session. (Appellants' App., 390 and 683.) Both would later be hired by Duke – Reed as President of Duke Energy Indiana ("DEI") and Judge Storms as in-house counsel.

On the date Chairman Hardy had predicted to Duke (November 20, 2007), the Commission entered final orders in Cause Nos. 43114 and 43114 S1. In these Orders, the Commission granted Duke Certificates of Public Convenience and Necessity for the Edwardsport Project and approved Duke's cost estimate for the Project of $1.985 billion. *In re Duke Energy Indiana Energy, Inc.*, 261 P.U.R.4th 165.

At Duke's request, the Commission then initiated an ongoing review of the Project, conducted in separate proceedings (or "IGCC proceedings") reviewing Duke's progress on the Project in 6-month increments.

While these proceedings were pending, on March 17, 2008, Duke's then-Franchised & Electric Group President James Turner and then-DEI President James Stanley met privately with then-Commission Chairman Hardy at a conference in Santa Fe, New Mexico. In that meeting, they communicated to him that the projected cost of the Project would be increasing from $1.985 to $2.35 billion. (Appellants' App., 1015-1017 and 1045-1047.) This $365 million cost increase was not disclosed publicly until May 1, 2008, when Duke filed its Verified Petition in IGCC-1 requesting approval for this new cost estimate – i.e., 44 days after Hardy had been given advance notice by Turner and Stanley.

On November 24, 2009, Duke filed its Petition in its fourth IGCC Rider case, Cause No. 43114-IGCC-4 ("IGCC-4"). In addition to requesting approval of the progress and costs of the

Project through September 30, 2009, Duke requested another increase to its total project cost estimate by an amount then unknown, but to be later determined. (Appellants' App., 322-333.) In response to Duke's request, the Commission opened a new subdocket, 43114-IGCC-4S1, by Order dated January 27, 2010, to review the new cost estimate for the Project, once it was determined. (Appellants' App., 334-337.)

Then, on February 24, 2010, with no accompanying public filing, Duke CEO James Rogers, Franchised Electric & Gas Group President James Turner, and Duke Energy Indiana President James Stanley held a private meeting with then-Chairman Hardy in Indianapolis, Indiana. At this meeting, they communicated to Hardy that the Project's cost would be increasing to $2.88 billion and also discussed: (a) the reasons for the increase, (b) how it could best be explained, and (c) what regulatory issues it might pose for the Commission. (Appellants' App., 874-879, 891-893, and 990-992.)

However, the Company's public filing announcing this $530 million rate increase, explaining the reasons for it, and requesting the Commission to approve it, was not made until April 16, 2010 – 51 days after Rogers, Turner and Stanley had briefed then-Chairman Hardy on these issues. (Appellants' App., 338-341.)

Between the Hardy meeting of February 24 and the Duke public filing on April 16, 2010, Stanley was promoted by Duke and the position of Duke Energy Indiana ("DEI") President became vacant. Hardy urged former Commission Executive Director Reed (then serving as Commissioner of the Indiana Department of Transportation) to apply, and Hardy actively lobbied Duke to hire Reed. (See e.g., Appellants' App., 1036 and 1039.) Subsequently, in June 2010, Duke announced it had hired Reed to be President of DEI. (Appellants' App., 694-695.)

In the same period between February 24 and April 16, 2010, then-Chief ALJ Storms also initiated employment discussions with DEI. He did so with encouragement from Hardy and, after Reed had become DEI President, support from him as well. (Appellants' App., 444, 461, 470-472, 970-973, 1070-1071, 1082,1088, 1091-1092, 1102-1104, and 1153, ¶10.) On July 27, 2010, Reed – as DEI President – sent Judge Storms an e-mail confirming that Judge Storms had *also* secured a position with Duke. Then-IURC Chairman Hardy was copied on the e-mail, and Judge Storms acknowledged receipt of the e-mail at 8:40 a.m. on July 28, 2010. (Id., 1153, ¶10)

The same day Storms acknowledged receipt of his job offer, July 28, 2010, the Commission issued its Interim Order in IGCC-4 ("Interim Order"), approving Duke's Edwardsport costs up through IGCC-4 of almost $1 billion on an interim basis, pending the outcome of the IGCC-4S1 subdocket. (Id., 1153, ¶11.) Judge Storms was the presiding ALJ that issued this Interim Order. (Appellants' App., 101.) Then-Chairman Hardy approved the Order. (Id., 122.)

Former Judge Storms then reported to work for Duke in September 2010. (Appellants' App., 440 and 694.)

On September 17, 2010 – the day scheduled for the hearing in IGCC-4S1 – Duke filed a last-minute settlement ("First Settlement") it had reached in that case with the OUCC and the Industrial Group ("Settling Parties"). (Appellants' App., 15.)

Subsequently, it was learned that then DEI President and former Commission Executive Director Reed had engaged in an ongoing series of ex parte communications with Chairman Hardy during the course of the negotiations which led to the First Settlement. (Appellants' App., 1123, 1127-1129.) Moreover, on September 16, 2010, and September 17, 2010, then-Chairman Hardy, then-DEI President Reed, and then-Franchised Electric & Gas President Turner

exchanged a series of e-mails discussing this First Settlement. Chairman Hardy advised Turner about what had occurred internally at the Commission and offered advice to Turner on what to say on the record of this case about how they had arrived at First Settlement. (Appellants' App., 1117-1118 and 1120.)

On October 12, 2010, an article appeared on the front page of the Indianapolis Star headlined, "Ethics Controversy Erupts: Daniels fires utility regulatory chairman; Duke Energy puts 2 on leave." The article stated that Chairman Hardy had been fired by Governor Daniels, and Messrs. Reed and Storms had been fired by Duke. The article also publicly disclosed, for the first time, many of the ex parte communications set forth above. In particular, the article noted that Judge Storms had been negotiating with Duke for a job at least a month prior to signing off on the IGCC-4 Interim Order. (Appellants' App, 411-415.)

On November 22, 2010, Joint Intervenors filed a motion requesting a subdocket to investigate misconduct by Duke, Judge Storms, and Chairman Hardy and any effects that misconduct may have had on prior Edwardsport regulatory reviews and approvals issued *at any point* in the CPCN process. (Appellants' App., 692-699.)

On December 9, 2010, the Settling Parties notified the Commission that they were withdrawing their settlement because of the ethics scandal involving Duke, Judge Storms, and Chairman Hardy, stating:

> Recently released e-mails between and among Mr. Turner, Mr. Reed and then-IURC Chairman Hardy raise questions on the part of the non-Duke Energy Settling Parties as to the relationships between and among those individuals, Duke Energy, and the former Chairman of the Commission during the period of time that the Settlement Agreement was being negotiated and submitted.

(Appellants' App, 700-701.)

On February 25, 2011, the Commission denied JIs' motion to investigate any impact these improper communications and other ethics violations may have had on prior Edwardsport

regulatory reviews and approvals. Although JIs' motion was requesting a Commission investigation into how misconduct may have affected Commission *decision making* – and *was not* requesting the Commission prosecute any misconduct – the Commission nonetheless refused to investigate on the basis that the Commission "lacks jurisdiction to prosecute allegations of criminal or ethical misconduct." (Appellants' App., 777.)

On May 12, 2011, the Indiana Ethics Commission ("IEC") issued a Final Report in its investigation of alleged ethics violations by Judge Storms for allegedly negotiating for employment with Duke while presiding over this case. The IEC report found that Judge Storms violated Ind. Code § 4-2-6-9(a), I.C. § 4-2-6-9, and I.C. § 4-2-6-9(b) and ordered him to pay a fine of $12,120.00. (Appellants' App., 1154-1155.)

On July 14, 2011, the non-Duke parties filed their testimony in Phase II of this case. In their testimony, JIs cited specific examples of the ex parte communications between Duke executives and Chairman Hardy, beginning in 2007 and continuing until Chairman Hardy's firing. (These communications between Chairman Hardy and Duke can be found in mostly chronological order at Appellants' App., 996-1127.)

On August 10, 2011, Duke filed a motion to strike portions of this testimony. Specifically, Duke asked that the following categories of testimony, filed by the OUCC, Industrial Group, and JIs, be stricken from the record:

> [any testimony] that alleges, relates to, or incorporates any allegations of undue influence, ex parte communications, or communications between Duke energy Indiana and ex-Chairman Hardy concerning: (a) the Scott Storms hiring and/or the settlement agreement between the parties, as unrelated and irrelevant to any issue in this proceeding; and/or (b) that in any manner, is intended to inject the issue of alleged undue influence or alleged ex parte communications into this Proceeding under the guise of concealment or gross mismanagement.

(Appellants' App., 790-807.)

On October 18, 2011, the Commission granted Duke's Motion to Strike, in large part. In doing so, the Commission stated, "With regard to the testimony concerning Duke's hiring of Scott Storms, the Commission has previously found that matter to *not be relevant to the subject matter of this proceeding*." (Appellants' App., 941 (emphasis added).)

The Commission went on to state that evidence of ex parte communications between former Chairman Hardy and Duke executives regarding the Edwardsport Project were also not relevant. The Commission held the Parties could offer evidence of those Communications, but only if relevant for purposes *other than* showing fraud on the Commission or due process violations. (Id.)

On November 21, 2011, JIs filed another request for the Commission to initiate a third phase of Cause No. 43114 IGCC-4S1 to investigate allegations of misconduct by Duke and Commission staff and any impact that misconduct might have had on the regulatory review of the Project. (Appellants' App., 943-952.)

On December 12, 2011, former Chairman Hardy was indicted on three felony counts of official misconduct. All three counts were based on improper communications between Duke and Chairman Hardy regarding *this case, specifically*, or the *Edwardsport Project, generally*. (Appellants' App., 977.)

On March 23, 2012, the Commission issued a Docket Entry denying JIs' Renewed Motion for Investigation. The Commission stated that it "is not the appropriate venue for the investigation or review of whether a former Commission member is alleged to have unduly influenced or sought to influence other Commission members." (Appellants' App., 1131.)

On April 18, 2012, JIs filed a motion requesting the Commission certify its March 23, 2012, Docket Entry for interlocutory appeal. The basis for this motion was the Commission's

refusal to conduct any formal investigation of JIs' allegations that Duke had improperly attempted to influence the regulatory process in the Commission's review of the Edwardsport Project and thereby violated JIs' due process rights. (Appellants' App., 1132-1148.) The Commission denied this Motion on May 24, 2012. (Appellants' App., 1190-1191.)

On December 27, 2012, the Commission issued its Final Order in IGCC-4S1. (Appellants' App., 123-256.) In its 134-page Final Order, the Commission addressed these due process issues in only two sentences:

> Throughout this proceeding Joint Intervenors have maintained its position that the Commission open a subdocket to take evidence with respect to ex parte communications, improper conduct, and undue influence as they relate to the regulatory oversight of the IGCC Project. However, the Commission has stated repeatedly that it is not the appropriate venue for the investigation or view [sic] of these particular issues.

(Appellants' App., 243.)

B. Facts Relevant to Issue #2: Commission's Refusal to Reveal Information Obtained from a Third Party, Black & Veatch, Regarding Duke's Management of the Edwardsport Project

As noted above, Duke opted for "ongoing review" of the Project in six-month intervals under to Ind. Code § 8-1-8.7-7. In the first such case, designated as subdocket "IGCC-1," the Commission entered a Docket Entry ordering Duke to retain Black & Veatch Corporation ("Black & Veatch" or "B&V"), a professional engineering firm selected by the Commission to oversee the Edwardsport Project. The Commission stated that Black & Veatch would "independently report to the Commission and assist the Commission through active and continuing independent oversight of the IGCC Project." *In re Duke Energy Indiana, Inc.*, Cause No. 43114 IGCC-1, 2009 WL 214580, 19 (Ind. U.R.C.) (In.U.R.C.2009). The Order required Duke to enter into a contract with and pay the fees of B&V – fees which the Commission ultimately decided would be paid by ratepayers through a rate rider. *Id.*

In their Motion requesting the Commission to disclose the contents of the reports it received from Black & Veatch, Joint Intervenors quoted, at length, from a discovery response from Duke detailing the regular meetings and frequent communications that took place between Duke, B&V, and Commission staff as part of B&V's Commission-ordered oversight of the Project between August 2008 and August 2010. Specifically, Duke's discovery request stated, as follows:

> 1. An initial meeting was held in Duke Energy Indiana's Plainfield offices on August 4, 2008. The meeting lasted most of the day. Duke Energy's project team, including Mike Womack, Dennis Zupan, Doug Pickering, and Rob Burch presented an overview of the project scope to a group of Black & Veatch personnel, including Lynn Bertuglia and answered their initial questions. IURC staff member's Jerry Webb and George Stevens may also have been in attendance.
>
> 2. From August 12, 2008 through June 9, 2009 Black & Veatch and IURC staff personnel attended monthly project status meetings in Bechtel's offices in Houston, Texas. These meetings were generally held on the second Tuesday of each month. The typical agenda was as follows:
>
> Session 1 8:30 am – 10:15 am Review GE Monthly Report
> Session 2 10:30 am – 12:00 noon Discuss GE/Bechtel interface issues
> Lunch Noon – 1:00 pm
> Session 3 1:00 pm – 2:30 pm Review Bechtel Monthly Report
>
> Typically attending the meetings were Duke Energy Project personnel including Mike Womack, Dennis Zupan, Rex Sears, Doug Pickering, Rob Burch, Kathy Lilly, Rick Hargrave, Baxter Sohn, and Jeff McNelly. GE project personnel who typically attended the meeting included Jeff Parks, Phil DiNovo, Mike Dubayeh, Serhat Alpar, Dean Castaldo, David Sundstrum, and Jim Nabors. Bechtel project personnel who typically attended the meeting included Marty Surabian, Dennis Lear, George Lehn, Brian Hartman, Lyle Osadchuk, and Rich Marl. Black & Veatch personnel who attended the meeting have varied over time, but typically included Lynn Bertuglia, Robert Slettehaugh, and Robin Winslett. IURC staff who typically attended the meeting included Jerry Webb and George Stevens. Bechtel personnel did not attend session 1 and GE personnel did not attend session 3. All personnel attended session 2.
>
> During the October 2008, February 2009, and May 2009 meetings, additional attendees included Rick Haviland (Duke Energy Senior Vice

President, Major Projects), Ron Reising (Duke Energy Senior Vice President, Supply Chain), John Lavelle (GE executive for projects), Monte Atwell (GE executive for gasification technology), Bill Brock (GE Account Executive), Jack Futcher (Bechtel executive for power projects), and Ian Copeland (Bechtel executive for new technologies).

3. On July 13, 2009 from 9 AM to 4 PM, a meeting was held between DEI project personnel and Black & Veatch and IUC staff personnel. Those attending included Mike Womack, Dennis Zupan, Rick Hargrave, Burt Durstock, Jeff McNeely, Kathy Lilly, Himansu Bhaumik, Linda Walton, Doug Pickering, Rick Baute, and Mark Foster for DEI; Lynn Bertuglia, Stanley Armbrister, Dennis Ozman, and Lee Bruss for Black & Veatch; and Jerry Webb and George Stevens for the IURC staff. The following was the agenda for the meeting:

9 AM – Overview of Site Execution Concept and Organization
10 AM – Cost Control Processes
12 Noon – Lunch
1 PM – Material Management Processes
3 PM – How Does our Integrated Supplier Program work?

4. From July 14, 2009 to September 8, 2009, Black & Veatch and IURC staff personnel attended monthly project status meetings at the Project site in Edwardsport, IN. These meetings were generally held on the second Tuesday of each month. The typical agenda was as follows:

Session 1 8:30 am – 10:15 am Review GE Monthly Report
Session 2 10:30 am – 12:00 noon Discuss GE/Bechtel interface issues
Lunch Noon – 1:00 pm
Session 3 1:00 pm – 2:30 pm Review Bechtel Monthly Report
Session 4 2:30 pm – 5:00 pm DEI discussion with B&V and IURC staff

To guide the DEI discussion with the B&V personnel and the IURC staff, the following checklist was used:

- General status of construction and major accomplishments achieved during reporting period
- Major milestones planned but not achieved during reporting period
- Overall construction schedule status
- Critical path analysis
- Commodities installation status
- Construction contract award status
- Equipment & materials procurement status
- Remaining procurement purchase orders to be issued

- Procurement manufacturing status and delivery issues (if any)
- Engineering issues impacting construction progress
- Startup & commissioning status
- Quality control issues
- Safety statistics
- Project offsite construction activities
  - Gas pipe line
  - Rail road
  - Electrical tie-in
- Project budget status

Typically attending the meetings were Duke Energy Project personnel including Mike Womack, Dennis Zupan, Rex Sears, Doug Pickering, Rob Burch, Kathy Lilly, Rick Hargrave, Baxter Sohn, and Jeff McNelly, Greg Lilly, Chris Hillebrand, and Mark Foster. GE project personnel who typically attended the meeting included Jeff Parks, Phil DiNovo, Mike Dubayeh, Dean Castaldo, David Sundstrum, Joe Rogers, and Jim Nabors. Bechtel project personnel who typically attended the meeting included Marty Surabian, Dennis Lear, George Lehn, Brian Hartman, Lyle Osadchuk, and Rich Mar. Black & Veatch personnel who attended the meeting have varied over time, but typically included Lynn Bertuglia, Stanley Armbrister, and Lee Ozman. IURC staff who typically attended the meeting included Jerry Webb and George Stevens. Bechtel personnel did not attend session 1 and GE personnel did not attend session 3. Neither Bechtel nor GE personnel attended session 4. All personnel attended session 2.

During the August 2009 meeting, additional attendees included Jim Turner (DEI's Group Executive), Rick Haviland (Duke Energy Senior Vice President, Major Projects), Ron Reising (Duke Energy Senior Vice President, Supply Chain), John Lavelle (GE executive for projects), Monte Atwell (GE executive for gasification technology), Jim Suciu (GE National sales executive), Bill Brock (GE Account Executive), Bill Dudley (Bechtel President), Jack Futcher (Bechtel executive for power projects), and Ian Copeland (Bechtel executive for new technologies).

5. From October 13, 2009 to August 10, 2010, Black & Veatch and IURC staff personnel attended monthly project status meetings at the Project site in Edwardsport, IN. These meetings were generally held on the second Tuesday of each month. The typical agenda was as follows:

Lunch 11:30 am – Noon
Session 1 Noon – 2:15 pm Review Bechtel Monthly Report
Session 2 2:30 pm – 3:15 pm Review GE Monthly Report
Session 3 3:30 pm – 5:00 pm DEI discussion with B&V and IURC staff

To guide the DEI discussion with the B&V personnel and the IURC staff, the following checklist was used:

- General status of construction and major accomplishments achieved during reporting period
- Major milestones planned but not achieved during reporting period
- Overall construction schedule status
- Critical path analysis
- Commodities installation status
- Construction contract award status
- Equipment & materials procurement status
- Remaining procurement purchase orders to be issued
- Procurement manufacturing status and delivery issues (if any)
- Engineering issues impacting construction progress
- Startup commissioning status
- Quality control issues
- Safety statistics
- Project offsite construction activities
    - Gas Pipe line
    - Rail road
    - Electrical tie-in
- Project budget status

Typically attending the meetings were DEI Project personnel including Mike Womack, Dennis Zupan, Rex Sears, Doug Pickering, Rob Burch, Kathy Lilly, Rick Hargrave, Baxter Sohn, Jeff McNeely, Greg Lilly, Chris Hillebrand, and Mark Foster. GE Project personnel who typically attended the meeting included Jeff Parks, Phil DiNovo, Mike Dubayeh, Dean Castaldo, David Sundstrum, Joe Rogers, and Jim Nabors. Bechtel project personnel who typically attended the meeting included Marty Surabian, Dennis Lear, George Lehn, Brian Hartman, Lyle Osadchuk, and Rich Marl. Black & Veatch personnel who attended the meeting have varied over time, but typically included Lynn Bertuglia, Stanley Armbrister, and Lee Ozman. IURC staff who typically attended the meeting included Jerry Webb and George Stevens. GE personnel did not attend session 1 and Bechtel personnel did not attend session 2. Neither GE or Bechtel personnel attended session 3. Otherwise, all personnel attended all sessions.

During the November 2009 meeting, additional attendees may have included Monte Atwell (GE executive for gasification technology) and Bill Brock (GE Account Executive).

6. On May 6, 2009, Duke Energy Indiana and Black & Veatch project personnel participated in a conference phone call to discuss the status of environmental permits. Beginning on approximately November 19, 2009 and continuing to November 16, 2010 and occurring generally monthly on the

> 4th Friday of each month, additional phone calls were held to discuss the status of environmental permits. The calls lasted approximately 30 to 60 minutes each. Attending for DEI typically were Project personnel and environmental department personnel including Rob Burch, Mark Foster, Julie Ezell, Steve Pearl, and Debbie Nispel. Representing Black & Veatch was Sarah Howard and occasionally Robin Winslett and Vincent Como.
>
> 7. On March 11, 2010, Black & Veatch and IURC staff personnel attended an all day meeting at the Project site in Edwardsport, IN. The purpose of the meeting was to review the revised Project estimate of $2.88 billion. Attending the meeting were Mike Womack, Dennis Zupan, Doug Pickering, Jeff McNeely, Himansu Bhamik, and Bill Gielniak for DEI; Lynn Bertuglia, Stanley Armbrister, and Dennis Ozman for B&V; and Jerry Webb and George Stevens for the IURC staff.
>
> 8. On October 19, 2010 and again on November 16, 2010, Black & Veatch and IURC staff personnel attended monthly project status meetings at the Project site in Edwardsport, IN. There was no prepared agenda for these meetings. The meetings consisted of DEI staff answering questions from B&V and the IURC staff regarding the Project. The meetings started with lunch at 11:30 am and concluded by 3:00 pm. Attendees were Mike Womack, Doug Pickering, Mark Foster, Rich Marl, Himansu Bhaumik, and Maneesh Bhalla for DEI; Lynn Bertuglia, Stanley Armbrister, and Dennis Ozman for B&V; and Jerry Webb and George Stevens for the IURC staff.

(Appellants' App. 751-755.)

The full scope of the information B&V learned from these meetings and other communications with Duke and the contents of the monthly reports and other communications B&V, in turn, made to the IURC Commissioners and staff is still unknown to the parties. However, the following e-mail exchanges between Duke employees, Commission staff, and Commissioners provide some glimpses into some of the information that ultimately went to the IURC Commissioners:

- On December 27, 2009, and December 28, 2009, the following e-mails were exchanged between: IURC staff members Jerry Webb and Robert Veneck; IURC Commissioners David Ziegner and Chairman David Lott Hardy; and Duke Franchised Electric and Gas Group President Jim Turner:

Hardy (to Webb, Veneck, and Ziegner at the IURC): "Hear they 'dropped a vessel' @ Eport. You hear anything?

Webb (to Hardy, Ziegner, and Veneck at the IURC): "No rumor, I am afraid it is true. The lifting lug on a 40,000 lb, 100 ft column failed as column being raised from horizontal to vertical. Nobody hurt. It is in heat recovery steam generator area on critical path so will not help their schedule. We are at site today how about i [sic] drop in for briefiing [sic] wed thurs, fri [sic] at your convience [sic]?"

Hardy (forwarding e-mail to Turner at Duke): "Construction fun."

Turner (to Hardy): "Our chairman knows stuff before I do . . ."

(Appellants' App., 720.)

- On August 12, 2010, the following e-mails were exchanged between then-Chairman Hardy to Mike Reed, then with Duke. After discussing Duke's hiring of Scott Storms and the IURC's promotion of Lorraine Seyfried, *Chairman Hardy explains the status of Edwardsport to DEI President Mike Reed*:

  Hardy: "The generating tour is on – you should do it even if its without me."

  Reed: "Ok. Can you do IGCC that close to hearing?"

  Hardy: "This is after the hearing and, if flags go up, you and Richard can still go and I won't. Assume you heard they dropped the LP turbine shell."

  Reed: "I will. Not sure what turbine shell is?"

  Hardy: "Turbines convert the heat of the steam into rotary motion and the turbine shaft is connected to the generator where the iron rotates in the magnetic field. (To make electricity) The shell surrounds all these bits."

  Reed: "Understand. Thanks. But do not understand who "they" is and what turbine shell was dropped? Are you trying to tell me something of significance was damaged at DEI? Sorry to be dense . . ."

  Hardy: "Sorry, too. I forget the compartmentalized nature – this is an Eport event: GE dropped the shell unloading it."

  (Appellants' App., 1102-1104.)

- On September 6, 2009, Chairman Hardy sent an e-mail to Duke Group President Turner, stating: "Odd observation and not a conclusion but with the oversight of Eport and our

emphasis on schedule and cost - I am beginning to think that has a benefit - only a glimmer at this stage, difficult to prove and harder to quantify but I will be curious to see if it gets any clearer."

Turner replied to this e-mail, stating, "I think the IURC's oversight is adding value and helps drive an attention to disciplined cost management – not just with the Duke team but with our 'friends' at Bechtel." (Appellants' App., 829.)

On November 23, 2010, the Commission denied a request by Citizens Action Coalition under the Access to Public Records Act for copies of reports the Commission obtained from B&V. The Commission stated it was "withholding the requested records because they consist of both trade secrets *and deliberative information*." (Emphasis added.) The Commission stated it had discretion, under Ind. Code § 5-14-3-4(b)(6), to withhold documents obtained from a third party contractor "*that are communicated for the purpose of decision making*." Furthermore, the Commission advised the Public Access Counselor that:

> the Reports are deliberative material because they consist of opinionated material developed by Black and Veatch, which is IURC's contractor, concerning the IGCC Project. *Black and Veatch provided the Reports to the IURC so that the IURC could decide whether or not action was needed with respect to the IGCC Project.*

(Appellants' App., 769 (emphasis added).)

On January 28, 2011, JIs filed a Joint Motion requesting that the B&V reports – again, by which unknown information about Duke's management of the Edwardsport was being conveyed to the Commission – be disclosed to the Parties and made part of the record of the 4S1 subdocket. (Appellants' App., 749-760.)

The Commission denied this motion by docket entry dated April 4, 2011. (Appellants' App., 783-786.) The Commission's stated rationale was that the Commission had never "relied" in the IGCC proceedings on information obtained from reports from B&V – nor on information

the Commission obtained through the numerous meetings and innumerable other communications between Duke, B&V, and Commission staff. (Id.)

In response to arguments that the Parties should have access to the same information provided to the Commission, the Commission stated, "the Commission's knowledge is not relevant to this proceeding." (Id., 786.)

The Commission also explained why, in its view, these reports and other communications conveying information about construction progress and problems at the Edwardsport Plant did not constitute ex parte communications: "[E]x parte communication is not an issue in this instance because while B&V is a Commission contractor, it is not assigned to the IGCC Rider proceedings and does not assist in making findings of fact or conclusions of law." (Id., 785)

On June 27, 2011, the Commission entered a docket entry prohibiting the introduction of evidence regarding B&V in Phase I of this proceeding. (Appellants' App., 787-789.) In a docket entry dated August 30, 2011, the Commission prohibited introduction of evidence regarding B&V in Phase II of this proceeding, as well, stating, "[W]hether information was conveyed or not conveyed to the Commission by Black & Veatch as part of the Commission's independent oversight of the IGCC Project is irrelevant to any allegations of concealment, fraud and/or gross mismanagement." (Appellants' App., 809-811.)

On September 29, 2011, JIs filed a motion seeking interlocutory appeal of the Commission's August 30, 2011, Docket Entry. In this Motion, Joint Intervenors argued that the Commission's continuing concealment of information it obtained from B&V about progress and problems on the Edwardsport Project violated basic principles of due process. (Appellants' App., 812-836.) The Commission denied this motion.

At the hearings in this case, the Commission issued a standing order that no party should make any reference in testimony to "Black & Veatch." (Appellants' App., 787-789.) At several points in the hearings, the proceedings were halted while parties were directed to black out the words "Black & Veatch" where they appeared in exhibits. (Tr. vol.11, 002025 and 002032-002034; Tr. vol.12, 002270-002272 and 002280-2298; Tr. vol.77, 016312-016313.)

Phase I, pp. G1-G3; Phase II, pp. L11 –L12; Phase I, pp. I-83-101; and Phase I, pp. I-73-75.)

At one point, Duke witness Richard Haviland made reference to IURC staff attending meetings with Duke and Black & Veatch personnel regarding the Edwardsport Project, stating:

> The monthly meetings were attended by the IURC staff and Black & Veatch, and they had apparently – the IURC folks, after going to one of the meetings, I guess it must have been the one before this – the month before this, or it could have been this month in April, told Mr. Hardy [IURC Chairman] a concern about the [Edwardsport] schedule. He then, apparently, called Mr. Turner [of Duke]. I don't know what their communication method was, but Mr. Turner then asked me to put together a response to [IURC Chairman] Mr. Hardy, which I did, and you can see that down below here.

(Tr. vol.77, 016292.)

At that point, the ALJ presiding over the case struck this statement from the record and directed Mr. Haviland not to mention Black & Veatch on the record again. (Tr. vol.77, 016292-016298.)

And, at another point, Duke witness W. Michael Womack was admonished by the bench for making references, on the stand, to "Black & Veatch" in answer to a question. This exchange concluded with Commissioner David Ziegner reminding Duke's counsel of the Commission's standing rule, stating, "But Mr. DuMond, they [the witnesses] have been instructed not to talk about Black & Veatch." (Tr. Vol.77, 016399-016405.)

In Joint Intervenors' post-hearing Exceptions to the Settling Parties' Proposed Order, Joint Intervenors included over twelve (12) pages of argument, explaining why the Commission

had erred in refusing to disclose the B&V Reports to the parties or permit them to be made part of the record. (Appellants' App., 1503-1515.)

The Commission's Final Order made no mention of this issue, whatsoever. (Appellants' App., 123-256.)

C. Facts Relevant to Issue #3: Commission's Erroneous Conclusion that the Settling Parties Had No Obligation to Present Any Evidence That the Payment of $13.6 Million in Attorneys' Fees and Costs under the Settlement Was Reasonable Or in the Public Interest

On April 30, 2012, the Settling Parties submitted a proposed settlement ("Settlement Agreement") of IGCC-4S1 for Commission Approval. (Appellants' App., 53.) The Settlement Agreement provided that Duke would pay the other Settling Parties for attorneys' fees and litigation expenses, as follows: $11.7 million in attorneys' fees and $600,000 in expenses to the law firm of Lewis & Kappes; up to $1 million in fees and expenses to Nucor Steel and its attorneys; and $300,000 in expenses to the OUCC. (Appellants' App., 251.)

The Settlement Agreement did not explain how these fee and expense awards to the Industrial Group and Nucor were calculated, nor of why fees in this amount might be deemed reasonable or in the public interest. (Id.)

There is no testimony or other evidence in the record showing how these fee awards were calculated, nor of why fees in this amount might be deemed reasonable or in the public interest. In particular, there are no time sheets for attorneys or paralegals documenting time worked or activities performed, no information regarding the hourly rates charged by attorneys and paralegals, and no itemization of expenses incurred.

Joint Intervenors objected several times to approval of these attorneys' fees with no evidence in support. (Appellants' App., 1329-1354; Tr. Vol.159, 034058-034069; Tr. Vol.162, 034730-034731.)

In its Final Order, the Commission stated the following regarding this attorneys' fee provision in the Settlement: "The Settling Parties agreed to this term, but it does not require Commission approval." (Appellants' App., 243.)

D. Facts Relevant to Issue #4: Commission's Failure to Make Findings of Fact, Based on Substantial Evidence, on Specific Allegations of Fraud, Concealment, and Gross Mismanagement

The IURC divided IGCC-4S1 into two "phases." In Phase I, the Commission addressed (a) Duke's request for approval of a revised cost estimate for the Project of $2.88 billion and (b) Duke's request for approval of its progress reports for the costs actually incurred on the Project through September 30, 2010. In Phase II, the Non-Duke Parties sought disallowance of some or all of Duke's costs on the basis of allegations of "fraud, concealment, or gross mismanagement" under I.C. § 8-1-8.5-6.5. (Second IURC Docket Entry, February 25, 2011.)

The non-Duke Parties presented expert testimony by numerous witnesses alleging that Duke had been grossly negligent in its management of the Project and had concealed critical information from the Commission. Joint Intervenors summarized their specific allegations of "fraud, concealment, or gross mismanagement" in their post-hearing filing. These were enumerated as eight (8) specific allegations which Joint Intervenors supported with specific citations to evidence in the record. (Appellants' App., 1411-1439.)

Without discussing the specific evidence cited by Joint Intervenors and without making findings of fact specific to any of these eight (8) allegations, the Commission concluded:

> The Non-Duke Parties have the burden of proving fraud, concealment and gross mismanagement. We find that, on the basis of the competing evidence presented in Phase II or this proceeding, the Non-Duke Parties have not met their burden of proof with regard to fraud, concealment or gross mismanagement.

(Appellants' App., 238.)

E. Facts Relevant to Issue #5: The Commission's Failure to Make Any Findings of Fact or Conclusions of Law on the Need for Mitigation of Carbon Dioxide Emissions from the Plant

In opposition to the Settlement Agreement proposed by Settling Parties in IGCC-4S1, Joint Intervenors submitted the testimony of Nachy Kanfer with the Beyond Coal Campaign for the Sierra Club. (Appellants' App., 1551.) In his testimony, Mr. Kanfer noted that one of the initial rationales Duke advanced for the Edwardsport Plant was that the Plant would be capable of Carbon Capture and Sequestration ("CCS") – i.e., the capture and storage of potentially harmful CO_2 emissions. However, despite this being a primary rationale for the Plant, the Settlement Agreement made no reference to CCS. (Appellants' App., 1555-1561.)

In addition, Mr. Kanfer noted that CO_2 emissions from the Plant pose both environmental risks and economic risks to both Duke and its customers. Specifically, he noted the potential for federal regulation mandating carbon reduction or carbon taxation. He also noted recent environmental litigation that had been filed against Duke and other power companies. Given that the Edwardsport Plant was expected to emit 4 million tons of CO_2 per year during its 30-year life, the potential financial impact to Duke and its ratepayers could be significant. (Id.)

In its Discussion and Findings in its Final Order in IGCC-4S1, the Commission made no reference whatsoever to Mr. Kanfer's factual assertions or arguments. The Commission simply

approved the Settlement Agreement without comment on these issues. (Appellants' App., 231-244.)

F. Facts Relevant to Issue #6: Commission's Approval of 100% Duke's Costs Through September of 2010 While Simultaneously Finding That Duke Failed to Meet Its' Burden of Proof That These Costs Were "Prudent"

In Cause No. 43114-IGCC-5, Duke requested "approval of an ongoing review progress report" for the Edwardsport Plant and "authority to add to the valuation of its utility property for ratemaking purposes the actual IGCC Project costs incurred through March 31, 2010." (Appellants' App., 258.) Similarly, in IGCC-6, Duke requested "approval of an ongoing review progress report" for the Edwardsport Plant and "authority to add to the valuation of its utility property for ratemaking purposes the actual IGCC Project costs incurred through September 30, 2010." (Appellants' App., 268.)

However, the Commission removed these issues from consideration in IGCC-5 and 6. Instead, the Commission decided that the issue of the prudency of costs incurred up through September 30, 2010, should be litigated in IGCC-4S1, rather than in IGCC-5 and 6. (Appellants' App., 258, 268.)

In its Final Order in IGCC-4S1, the Commission summarized the non-Duke parties' opposition to Duke recovering certain costs incurred prior to September 30, 2010, as follows:

> The Industrial Group, OUCC and Joint Intervenors argued that Duke's failure to properly manage its contractors led to the unexpected commodity quantity growth, and the increased costs of the IGCC Project. In response, Duke acknowledged that the commodity quantities reported by Bechtel began increasing over the budgeted quantities starting approximately May 2009. However, Duke argues that it could not have reasonably been aware of the magnitude of the increases until October 2009. The eventual large increases that came to light in October 2009 became known as the "October surprise."

(Appellants' App., 233.)

The Commission then reached the following conclusion regarding these costs:

> Duke effectively asked this Commission to charge the ratepayers for the commodity driven cost overruns and then allow it to pursue litigation of the contact terms with its primary contractors, pledging to provide compensation to the ratepayers once such litigation was complete. However, Duke was unwilling to sufficiently define its litigation strategy or even estimate the likely financial outcome of any litigation. The evidence of record in this proceeding does not support that Duke fulfilled its responsibility to hold its primary contractors accountable through the terms of its contract with them or the management of such terms. Therefore, Duke has not met its burden of showing that the management of its contractors was prudent.

(Appellants' App., 234.)

According to Duke's testimony in IGCC-6, "the jurisdictional balance of the Company's investment in the IGCC Project subject to Construction Work in Progress ("CWIP") ratemaking treatment per the Company's accounting books and records was $1,879,872,000 as of September 30, 2010." (Appellants' App., 271.)

Despite finding that Duke had not met its burden of proof, the Commission approved 100% of these costs in its Final Order in IGCC-5 and IGCC-6. (Appellants' App., 278 ("The costs and rates presented in Duke Energy Indiana's IGCC Rider (Standard Contract Rider No. 61) . . . including the actual IGCC Project costs incurred through September 30, 2010, are hereby approved as reasonable.").)

G. Facts Relevant to Issue #7: Commission's Approval of Duke's Calculation of AFUDC Rate of Return, Despite Duke's Failure to Account for Capital Contributed by Customers in the Form of Deferred Income Taxes

On June 29, Joint Intervenors submitted testimony in opposition to the Settlement in IGCC-4S1, including the testimony of Ralph C. Smith. In his testimony, Smith recommended adjustments to Duke's proposed financing costs – both capitalized financing costs known as AFUDC and financing costs recovered directly from ratepayers known as CWIP. Specifically, Smith stated that Duke's proposed financing costs failed to reflect the effect of interest-free loans

from customers in the form of taxes collected by Duke, but which Duke is permitted to defer paying.

He stated his recommendation for capitalized financing costs, AFUDC, as follows:

> To the extent that the AFUDC rate used or the amounts of AFUDC recorded for the project were increased because of the DTI [deferred tax incentive] treatment, the amount of incremental AFUDC accruals associated with the DTI impact made during the ongoing review periods of IGCC-5 through 8 should be reversed.

(Appellants' App., 1215-1216.)

After the hearings concluded, Joint Intervenors submitted Exceptions to the Proposed Order offered by the Settling Parties. On pages 108 to 115 of their Exceptions, Joint Intervenors argued that Duke's calculation of AFUDC was incorrect, as a matter of law, because it failed to account for deferred taxes. Joint Intervenors argued Duke therefore was earning a return on customer-contributed capital, in violation of Indiana law. (Appellants' App., 1462-1469.)

In its Final Order in IGCC-4S1, the Commission approved Duke's calculation of AFUDC. In its "Discussion and Findings," the Commission made no mention of Joint Intervenors' argument that deferred taxes should have been taken into account in calculating AFUDC. (Appellants' App., 241.)

H. Facts Relevant to Issue #8: Commission's Approval of Costs up to the So-Called "Hard Cost Cap" of $2.595 Billion for No Reason Other Than the Number Fell "Within the Range" of the Evidence Presented by the Parties

During Phase I and Phase II of IGCC-4S1, all of the non-Duke parties took positions adversarial to Duke. Duke requested approval of $2.72 billion in direct construction costs, plus all capitalized financing costs ("AFUDC"). The non-Duke parties asked for disallowance of some or all of these construction and financing costs. (Appellants' App., 130-214, generally.)

After conclusion of the hearings, Duke, the OUCC, the Industrial Group, and Nucor ("Settling Parties"), announced a settlement allowing Duke to recover $2.595 billion through June 30, 2012, plus most of Duke's financing costs incurred after July 1, 2012. (Appellants' App., 1161 and 1167-1169.) The Settling Parties submitted written testimony in support of the Settlement. However, no witness testified that $2.595 billion was an accurate calculation of Duke's prudent costs, nor provided any calculation or analysis demonstrating how this number was reached.

In its Final Order in IGCC-4S1, the Commission made no such calculation either. Instead, the Commission stated the following in support of its conclusion that Duke should be permitted to recover $2.595 billion, plus most of its financing costs incurred after July 1, 2012:

> The Settlement Agreement permits recovery of only approximately $94 million in direct construction costs above the previously approved amount of $2.225 billion, and requires Duke to shoulder at least $700 million in costs. This reduction in the amount of the requested approved cost estimate falls within the proposed ranges that could be supported by the evidentiary record[.]

(Appellants' App., 241.)

IV. SUMMARY OF THE ARGUMENTS

A. Due Process Issues

1. Misconduct in the Regulatory Process and Due Process Violations

Procedural due process requires a neutral, unbiased decision maker. *Rynerson v. City of Franklin*, 669 N.E.2d 964, 967 (Ind. 1996). This is true not only in trial courts, but in administrative proceedings, as well. *See e.g.*, *Warren v. Indiana Tel. Co.*, 217 Ind. 93, 105 (Ind. 1940); *and, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 542 (U.S. 1978).

In the present series of cases, Duke executives and representatives of the Commission engaged in two distinct patterns of misconduct that – if left unexamined – undermine the procedural due process of the Commission's pre-approval of Duke's recovery of roughly $3 billion in costs for the Plant.

First, Duke secretly interviewed Scott Storms, the Commission's Chief ALJ, for an in-house counsel position with Duke while Storms was still presiding over regulatory approvals for the Edwardsport Project. The Commission's Chairman was aware that Judge Storms was seeking a job with Duke but did not remove him from the Duke Edwardsport cases – including two of the cases now on appeal.

Second, from early 2007 until his firing by Gov. Daniels in 2010, IURC Chairman David Lott Hardy had numerous ex parte communications with several Duke executives about the Edwardsport Plant and the Commission's review of that Plant. These communications – which were intermingled with social outings with Duke executives in Indianapolis, IN, Charlotte, NC, Santa Fe, NM, and Chicago, IL – were referenced in numerous Duke and IURC emails, despite several internal Duke emails recommending that communications with Chairman Hardy not be memorialized in writing.

When both of these series of ethical violations came to light – appearing in an Indianapolis Star article in the fall of 2010 – Joint Intervenors immediately requested an investigation into what impact this misconduct might have had on the Commission's initial and ongoing approvals of the Edwardsport Project. However, the Commission refused to open an investigation, hold hearings, or allow the admission of any evidence offered for the purpose of raising these ethical issues. The Commission also denied a request to certify this issue for

interlocutory appeal, thereby postponing appellate review of the Commission's handling of the alleged misconduct for two-and-a-half years.

The Commission has consistently refused to allow the parties litigating the Edwardsport series of cases to present evidence and be heard – in any forum – on the ethics violations that were committed by Duke, the former Chairman, and former presiding ALJ relating to the Edwardsport Project. By refusing to confront the allegations of Duke's and the Commission's misconduct and consider the impact it may have had on the Commission's approval of the Edwardsport Project, the Commission has denied the non-Duke parties procedural due process.

2. Commission's Refusal to Disclose Information Obtained Ex Parte from a Third Party (Black & Veatch)#

In June of 2008 – during the Commission's first 6-month review of the Edwardsport Project – the Commission ordered Duke to hire the engineering firm Black & Veatch to act as the Commission's agent and to observe, first-hand, Duke's management of the Edwardsport Project. Beginning in 2008 and continuing through the present, Black & Veatch and Commission staff attended regular meetings with Duke personnel at the Project site, and Black & Veatch issued regular, monthly reports to the Commission on Duke's progress. No non-Duke parties participated in these meetings and none of the non-Duke parties were permitted to see the contents of Black & Veatch's reports to the Commission.

In the cases on appeal, the Joint Intervenors requested the Commission disclose the contents of these reports from Black & Veatch to the Commission and/or make them part of the record in the Edwardsport "ongoing review" subdockets – i.e., the cases on appeal here. The Commission refused, stating that the Commissioners – although privy to Black & Veatch's first-

hand accounts of Duke's management of the Edwardsport construction – nonetheless did not *rely* on this information in these cases adjudicating Duke's cost recovery for the Plant.

The Commission is required, by statute, to be "an impartial fact-finding body[.]" Ind. Code § 8-1-1-5(a). Under this statute, the Commission is not permitted to act on its own information, but must base its decisions on evidence that is presented and subject to cross-examination. *City of Evansville v. Southern Indiana Gas and Electric Co.*, 339 N.E.2d 562, 584 (Ind. Ct. App. 1975). In addition, under minimum standards of due process, a party is entitled to be apprised of all of the factual information presented to an agency decision-maker. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 289 (U.S. 1974).

In the present cases, the Commission had access to first-hand accounts of the facts on the ground at Edwardsport, while they were occurring. The non-Duke parties did not – indeed, still do not – have access to this same information. The Commission's access to secret information about the facts underlying the cases now on appeal violated the Commission's obligation to be an independent fact-finding body under both Indiana law and under basic principles of due process.

B. Issues Relating to Standard of Review

3. Settling Parties' Failure to Submit Evidence on – and Commission's Failure to Review Reasonableness of – $12.7 Million in Settlement Attorneys' Fees and $900,000 in Expenses

The cases now on appeal were ultimately resolved by a Settlement Agreement by fewer than all the parties. This Settlement was approved by the Commission over Joint Intervenors' objections. One term of the Settlement required Duke to pay the Indiana Office of Utility Consumer Counselor $300,000 for litigation expenses, pay the law firm of Lewis & Kappes (representing the Industrial Group) $11.7 million in legal fees and $600,000 in litigation

expenses, and pay Nucor Steel $1 million for legal fees and expenses – a total of $13.6 million in legal fees and expenses which Duke agreed to pay to the Settling Parties' attorneys.

In support of the Settlement, the Settling Parties presented no evidence to explain how this figure was calculated, nor why it was reasonable or in the public interest. Joint Intervenors moved for judgment on the evidence on this issue, but the Commission denied this motion. In its Final Order in IGCC-4S1, the Commission approved these payments, stating simply, "The Settling Parties agreed to this term, but it does not require Commission approval."

Attorneys' fee provisions of settlements of cases before the IURC must be reasonable in amount and supported by sufficient evidence. *Citizens Action Coalition v. PSI Energy*, 664 N.E.2d 401, 406 (Ind. Ct. App. 1996). By approving this term of the Settlement without any evidence in support, the Commission failed in this basic obligation.

4. Commission's Failure to Make Findings of Fact, Based on Substantial Evidence, on Specific Allegations of Fraud, Concealment, and Gross Mismanagement

In Phase II of IGCC-4S1, the non-Duke parties sought disallowance of some or all of Duke's Edwardsport construction costs under I.C. § 8-1-8.5-6.5 because of "fraud, concealment, [and/]or gross mismanagement." The non-Duke parties raised eight specific actions and oversights by Duke that allegedly met that statutory standard.

In its Final Order, the Commission held that Duke had not committed "fraud, concealment, or gross mismanagement" but made no specific findings of fact on any of the eight allegations, nor did the Commission cite the evidence on which it relied. Instead, the Commission simply stated that Joint Intervenors "[had] not met their burden of proof with regard

to fraud, concealment or gross mismanagement." The Commission stated it was basing this conclusion on unspecified "competing evidence."

An order of the IURC must be based on "substantial evidence" and "must contain specific findings on all the factual determinations material to its ultimate conclusions." *N. Ind. Pub. Serv. Co. v. United States Steel Corp.*, 907 N.E.2d 1012, 1016 (Ind. 2009). The Commission's broadly stated conclusion on the issue of "fraud, concealment, and gross mismanagement" in this case was insufficient to meet this standard.

5. Commission's Failure to Make Any Findings of Fact or Conclusions of Law, Whatsoever, Regarding Mitigation of Carbon Dioxide Emissions

In IGCC-4S1, Joint Intervenors presented testimony and argument that the proposed Settlement Agreement resolving the case should not be approved without considering ways to mitigate the four million tons of CO_2 the Plant would emit each year. Joint Intervenors argued that the Settlement should not be approved without addressing the issue of CO_2 emissions because (a) part of the initial justification for a Certificate of Need for the Plant in 43114 was that it might be capable of carbon capture and storage, and (b) anticipated environmental regulations in the coming years could significantly increase the costs to ratepayers for Duke's operation of the Plant.

In its discussion and findings in its Final Order in IGCC-4S1 the Commission made no reference to this argument whatsoever. By simply ignoring this issue, the Commission failed to meet the requirement that its orders "must contain specific findings on all the factual determinations material to its ultimate conclusions." *Id.*

C. Issues Relating to Cost Recovery

6. The Commission Found That Some of Duke's Costs Incurred Prior to September of 2010 Were Not "Prudent," Yet Approved Duke's Recovery of 100% of These Costs

In Phase I of IGCC-4S1, the non-Duke parties argued that Duke failed to prudently manage its contractors, and that ratepayers should not, therefore, be required bear the costs associated with massive increases to the quantities of materials required to construct the Edwardsport Plant which occurred in the fall of 2009. In its Final Order in IGCC-4S1, the Commission agreed that Duke failed to meet its burden of proving it had adequately managed its contractors during that time. The Commission also suggested that it would be unfair to require ratepayers to bear those costs.

Despite this finding, the Commission approved cost recovery from ratepayers of 100% of Duke's construction costs up through September 30, 2010.

This conclusion by the Commission was not supported by "substantial evidence." In fact, this conclusion was contradicted by the Commission's own findings of fact. *See, id.*

7. The Commission Allowed Duke to Earn a Return on Customer-Contributed Capital by Accepting Duke's Calculation of AFUDC Without Accounting for Deferred Taxes

Under Indiana law, a public utility is not permitted to earn a return on capital that is contributed by utility customers, rather than investors. *Evansville v. Southern Indiana Gas & Electric Co.*, 167 Ind. App. 472, 509 (Ind. Ct. App. 1975). Further, this principle applies to funds a utility collects from ratepayers for deferred taxes – a source of capital which "clearly constitute[s] consumer contributed capital." *Id.* at 510.

In this case, Duke calculated what it considered to be a "fair rate of return" for purposes of computing its necessary financing costs, but without taking deferred taxes into account. Joint Intervenors argued this was a violation of binding precedent. Specifically, Joint Intervenors objected to Duke's proposed rate of return used in calculating capitalized financing costs known as "Allowance for Funds Used During Construction" or "AFUDC."

In its Final Order, the IURC approved Duke's calculation of AFUDC without addressing Joint Intervenors' objection or arguments. Not only did this violate the prohibition on a utility earning a return on customer-contributed capital, *id*, the Commission failed to meet its obligation to make findings of fact and conclusions of law on all material issues. *NIPSCO*, 907 N.E.2d at 1016.

8. Commission Approved Settlement Without Specific Finding that Amount of Cost Recovery Was Proper

The Settlement Agreement the Commission approved in IGCC-4S1 resolved all issues in all five cases now on appeal. Under this Settlement, Duke was pre-approved to recover all costs of building the Edwardsport Plant up to $2.595 billion, plus nearly all of Duke's financing costs incurred after July 1, 2012. None of the Settling Parties presented evidence explaining how they arrived at this figure. No witness testified that this figure represented an accurate calculation of Duke's prudently-incurred costs.

The Commission nonetheless pre-approved Duke for cost recovery of this full amount. The Commission offered no justification other than stating that this figure "falls within the proposed ranges that could be supported by the evidentiary record[.]" This broad conclusion on an ultimate issue, with no factual support, does not satisfy the Commission's obligation to base

its decision on "substantial evidence" with "specific findings on all the factual determinations material to its ultimate conclusions." *NIPSCO*, 907 N.E.2d at 1016.

V. ARGUMENT

A. STATUTORY FRAMEWORK AND STANDARD OF REVIEW

The IURC is principally a fact-finding body, implementing a utility regulatory regime created by the General Assembly and exercising powers conferred upon it by statute. *N. Ind. Pub. Serv. Co. v. United States Steel Corp.*, 907 N.E.2d 1012, 1015 (Ind. 2009). This case primarily revolves around two statutes: (1) the Utility Powerplant Construction Act, Ind. Code § 8-1-8.5, and (2) the Clean Coal Technology Act, Ind. Code § 8-1-8.7.

Both statutes require IURC approval before a utility may begin constructing an electricity generation project – in other words, a power plant. Ind. Code § 8-1-8.5-2 and Ind. Code § 8-1-8.7-3. Both statutes also provide a means for the utility to get conditional, preliminary approval for recovery of its costs through rates.

Specifically, under both statutes, an electric utility first gets approval – in the form of a "certificate of public convenience and necessity" or "CPCN" – to construct the project at a certain estimated cost. Ind. Code § 8-1-8.5-5 and Ind. Code § 8-1-8.7-4. Under both statutes, the Commission also reviews the costs of construction again *after* construction occurs. However, the utility can choose to have this post-hoc review done *at the conclusion of the entire project*, or *periodically during construct*ion. Ind. Code § 8-1-8.5-6 and I.C. § 8-1-8.7-7.

Under the Powerplant Construction Act, once these costs have been actually incurred and approved by the Commission, the utility is entitled to recover them through rates "[a]bsent fraud, concealment, or gross mismanagement[.]" I.C. § 8-1-8.5-6.5. In addition, under the Clean Coal Technology Act, a utility can recover from ratepayers – during construction – the utility's

depreciation, tax costs, financing costs and other costs associated with a clean energy project. Ind. Code § 8-1-8.7-5 and Ind. Code § 8-1-8.8-12.

In the present case, Duke chose to have its costs reviewed *during construction* and approved every six months. Under the Powerplant Construction Act, approved costs for each six month period were therefore pre-approved for inclusion in rates in Duke's next rate case. *See,* I.C. § 8-1-8.5-6.5. And, under the Clean Coal Technology Act, certain financing and other costs were approved for immediate recovery from ratepayers. *See,* I.C. § 8-1-8.7-5 and I.C. § 8-1-8.8-12.

The Commission's determinations in each of these six-month "IGCC" reviews are subject to appellate review. For each IGCC order, this involves a multi-tiered review. First, the appellate court must determine "whether there is substantial evidence in light of the whole record to support the Commission's findings of basic fact." *N. Ind. Pub. Serv. Co. v. United States Steel Corp.*, 907 N.E.2d 1012, 1016 (Ind. 2009). Second, "the order must contain specific findings on all the factual determinations material to its ultimate conclusions." *Id.*

In addition to determining whether an IURC order is supported by sufficient evidence and specific findings of fact, an appellate court must also determine whether the order is contrary to law. *Citizens Action Coalition, Inc. v. Public Service Co.*, 582 N.E.2d 330, 333 (Ind. 1991). "In other words, did the Commission stay within its jurisdiction and conform to the statutory standards and legal principles involved in producing its decision, ruling or order." *Id.*

B. DUE PROCESS ISSUES

The process by which the Commission conducted its regulatory reviews and issued its orders in this series of cases was fundamentally flawed. Joint Intervenors first address two

dispositive Due Process issues which mandate that the Commission's orders be vacated as being "contrary to law." *See, id.*

1. Misconduct in the Regulatory Process and Due Process Violations

a. Introduction

In *Duke Energy Ind., Inc. v. Office of Util. Consumer Counselor*, 983 N.E.2d 160, 162 (Ind. Ct. App. 2012), this Court addressed the appeal of a case the IURC had adjudicated amid an ethics scandal. This scandal involved improper conduct by and between Duke executives, on the one hand, and the Commission's chief ALJ and the Commission's Chairman, on the other. Because of the possible appearance of impropriety, the Commission had reopened that case, ultimately reversing its original decision. *Id*.

The Court of Appeals described the ethics scandal that surrounded Duke and the Commission at the time that case was initially heard, as follows:

> On October 5, 2010, Governor Mitch Daniels fired Indiana Utility Regulatory Commission ("IURC" or "Commission") Chairman David Lott Hardy. Hardy was aware that one of his administrative law judges ("ALJ"), Scott R. Storms, had been communicating with Duke Energy Indiana ("Duke") regarding a position with the company *while Storms was presiding over administrative proceedings involving Duke,* yet Hardy did not remove Storms from matters involving Duke. *This was **one** such case[.]*

Id. at 162 (emphasis added).

And this is ***another*** such case.

Here, Chairman Hardy actively lobbied Duke to hire Judge Storms while Storms simultaneously presided over two of the cases now on appeal here. In addition, evidence Joint Intervenors attempted to offer in this case showed that Chairman Hardy himself enjoyed a cozy relationship with several Duke executives with whom he engaged in numerous ex parte

discussions about these cases. However, the Commission refused to allow any evidence offered for the purpose of showing improper ex parte communications.

Despite Joint Intervenors' repeated requests for hearings on these issues, the Commission refused to even consider whether any improper conduct by Duke or the Commission may have prejudiced the non-Duke parties. At a minimum, the cases on appeal should never have been concluded without allowing Joint Intervenors to present evidence and have a hearing on whether this undeniable misconduct affected any step of the IURC's review and approval process for Duke's Edwardsport Plant.

b. Legal Standard

Traditional concepts of procedural due process apply with full force to administrative proceedings. *Standard Oil Co. v. F.T.C.*, 475 F.Supp. 1261, 1273 (N.D. Ind. 1979). Due process requires a neutral, unbiased decision maker. *Rynerson v. City of Franklin*, 669 N.E.2d 964, 967 (Ind. 1996). The Indiana Supreme Court has said it is "imperative that a strict test of impartiality be applied to the fact-finding process." *Id.* Due process requires that administrative bodies not reach their decisions on the basis of preconceived bias or prejudice. *City of Hobart Common Council v. Behavioral Institute of Indiana*, 785 N.E.2d 238, 253 (Ind. Ct. App. 2003). Moreover, due process principles are violated when a tribunal has a potential conflict of interest that creates even an *appearance* of impropriety. *Mishawaka v. Stewart*, 261 Ind. 670, 680 (Ind. 1974) ("Any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias.")

c. Duke's Hiring of Judge Storms

The history of Commission approval of the Edwardsport Project involves several clear conflicts of interest that call the Commission's impartiality into question. The most obvious is Judge Storms negotiating for employment with Duke while simultaneously presiding over two of the cases now on appeal. Indeed, he issued the Interim Order in IGCC-4 *after* Duke confirmed with him that he would be offered a job.

This is not mere conjecture. The Indiana Ethics Commission found that Judge Storms' conduct in handling ***this case*** constituted ethical misconduct that warranted fines. Specifically, in its findings of fact, the Ethics Commission stated,

> The communications between [DEI President] Reed and Storms regarding Storms' prospective employment with Duke culminated with an e-mail Reed sent to Storms and Hardy on July 27, 2010, confirming that Storms would be securing the open attorney position for Duke. Storms acknowledged the e-mail on July 28, 2010 at 8:40 a.m. . . .
>
> Later that day, Storms conducted a hearing on July 28, 2010 in his position as ALJ for the IURC involving a Duke Edwardsport case, Cause No. 43114 IGCC 4.

(Appellants' App., 1153, ¶¶10-11.)

The Indiana Ethics Commission then concluded as follows:

> Based upon a preponderance of the evidence, the Commission finds and concludes that Storms violated I.C. 4-2-6-9(a) when he participated in the Duke Edwardsport case, Cause No. 43114 IGC [sic] 4 when he had knowledge that he had a financial interest, arising from his employment or prospective employment at Duke for which negotiations had begun, and Duke, an organization with whom Storms was negotiating or had an arrangement concerning prospective employment, had a financial interest in the outcome of the Duke Edwarsport case, Cause No. 43114 IGC [sic] 4.

(Id., 1154, ¶2)

The very day that Judge Storms acknowledged that he had secured his new job at Duke, July 28, 2010, he issued the Interim Order in IGCC-4. Again, this Interim Order is ***one of the orders currently on appeal here***.

Moreover, the Ethics Commission's final report makes clear that Chairman Hardy – who was one of the Commissioners who approved the IGCC-4 Interim Order – *was aware at the time* that Judge Storms had been offered a job at Duke. Indeed, Chairman Hardy had been copied on the e-mail confirming the job was going to be offered to Storms. In fact, emails between Chairman Hardy and DEI President Mike Reed showed that in July and August of 2010, Chairman Hardy was actively encouraging Duke's hiring of Judge Storms. (Appellants' App., 444, 461, 470-472, 970-973, 1070-1071, 1082,1088, 1091-1092, and 1102-1104.)

However, Chairman Hardy nonetheless approved the Interim Order bearing Judge Storms' name, apparently without raising any concern or objection.

d. Relationship Between Chairman Hardy and Duke Executives

In addition to (and independent from) Judge Storms' misconduct relating to his job application to Duke, e-mails obtained through discovery and public records requests show an ongoing and improper relationship between Duke executives and then-Chairman Hardy.

Specifically, Chairman Hardy had an active social relationship with several Duke executives, and he often discussed Commission business during these interactions. Indeed, the Edwardsport Project – which was then at issue in docketed proceedings before the Commission – was a frequent topic of conversation.

The following are examples:

- In May of 2007 – while the Commission proceeding in which the Edwardsport CPCNs were originally approved was still pending – then-IURC Chairman Hardy exchanged a number of e-mails with Jim Stanley (then President of Cinergy, then Duke's Indiana operating company), Mike Reed (then Executive Director of the

IURC), and Lana Horner of Cinergy. These e-mails mixed discussion of meeting for dinner at the Capital Grill in Indianapolis with discussion of Chairman Hardy attending Duke's Strategic Board Retreat in North Carolina. Chairman Hardy ultimately accepted Duke's invitation to attend the Company's June, 2007, Strategic Board Retreat in North Carolina. While there, he was invited to meet for dinner and drinks and to stay, overnight, at the "Duke Mansion." (Appellants' App., 998-1001.)

- Jim Turner, Duke's President of US Franchised Electric & Gas, sent another Duke executive an e-mail on December 3, 2007, in which Mr. Turner stated, "I had a very nice conversation with Rick Haviland yesterday before he left for Paris. I mentioned to him that I had just gotten off the phone with the ***chairman of the Indiana Utility Regulatory Commission, with whom I had been discussing our hiring of Rick in the context of the appropriate framework for the IURC's ongoing review of costs on our Edwardsport IGCC project.*** (Appellants' App., 1003.)
- At a conference in Sante Fe, New Mexico, on March 17, 2008, Chairman Hardy met with then-President of Duke's regulated utilities group, Jim Turner, and then-President of DEI, Jim Stanley. Stanley and Turner provided then-IURC Chairman Hardy with advance notice of the magnitude and basis for the impending increase in the Edwardsport cost estimate from $1.985 billion to $2.35 billion. This cost increase was not disclosed on the record until May of 2008. Chairman Hardy also exchanged numerous e-mails with Turner and Stanley about

meeting for drinks and dinner, while in Santa Fe. (Appellants' App., 1015-1017 , 1027-1042, and 1045-1047.)

- The day after this meeting, on March 18, 2008, Jim Turner sent Duke Energy President Jim Rogers an email with the subject line, "Need to brief you on a couple things." The email listed only two items, the first of which was "***Conversation with Hardy re Edport.***" Turner then stated, "[I]s there a good time for me to talk by phone?" (Appellants' App., 1006.)
- On December 22, 2008, Jim Turner sent Jim Rogers an e-mail stating, "FYI ***– I decided not to memorialize with [Duke attorney] Kelley [Karn] et al that Hardy and I discussed timing of the Eport order at your event the other night***. Looks like Jan 5 most likely. ***We agreed a holiday order didn't have great optics.***" (Appellants' App., 1008.)
- On April 26, 2009, Michael Womack (the Duke employee managing Edwardsport) received an e-mail from his boss, Richard Haviland, stating, "***Jim asked me to send him something in writing he could discuss with [Chairman] Hardy***—pls comment[.]" And "he also asked that we shoot him a note ***whenever we hear something that Hardy is doing on the project—I have already updated him on the Hardy/B&V [Black & Veatch] episode…***" These statements were followed by a draft e-mail to Chairman Hardy explaining the integrated project schedule for the Edwardsport Project. (Appellants' App., 1013.)
- On January 17, 2010, Jim Rogers forwarded an e-mail exchange between himself and Chairman Hardy to Jim Turner with the comment, "FYI." In this e-mail chain, Rogers and then-Chairman Hardy discuss meeting socially at a conference

in Santa Fe. In response, Jim Turner wrote, "One of my top priorities this year is to reduce the regulatory risk associated with Edwardsport[.]" (Appellants' App., 1028-1029.)

- On February 24, 2010, then-Chairman Hardy had breakfast with Franchised Electric & Gas Group President James Turner, Duke CEO James Rogers, and Duke Energy Indiana President James Stanley. As Mr. Turner admitted in his deposition testimony, they told Hardy that the Project's cost would be increasing to $2.88 billion, discussed the reasons for the increase, how it could best be explained, and, what regulatory issues it might pose for the Commission. (Appellants' App., 1045-1047.)

  In fact, the transcript of Mr. Turner's deposition showed the topics of conversation between Duke executives and the then-Chairman were wide-ranging:

  > Q: Mr. Turner, in any of the conversations or meetings you had with the chairman, did you discuss the quality of work of Bechtel or GE during the planning, design, engineering, procurement, or construction of the project?
  >
  > A: Though I don't recall specifically, Jerry, what the conversation was, I am fairly certain that in February of 2010 we would have identified the sources of what was impacting the cost of the project and the quality of work by Bechtel and the estimating, in particular by Bechtel and GE, would have probably been identified.
  >
  > * * *
  >
  > Q: In the February 2010 meeting, did you discuss regulatory treatment of the project with Chairman Hardy?
  >
  > A: I did not.
  >
  > Q: Who did?
  >
  > A: Well, I think Mr. Rogers in the meeting outlined things we were looking at, as a company, to mitigate rate impact to consumers. And so there may have

been some things identified along the lines that you described briefly, but not in depth, but just to let the chairman know we were looking at and evaluating rate impact measures.

Q: Were there any measures specifically identified?

A: I think there may have been. I think stopping CWIP might have been identified on the cost overrun piece, the 500 million. Deferred taxes may have been identified as an item. Reducing the amount requested may have been identified as an item. I can't specifically recall, but I think those may have been identified.

Q: How about a cost cap?

A: That also may have been identified. Again, I don't remember specifically. I know the focus was on conveying our intention to try to do what we could to mitigate the impact to consumers.

Q: How about seeking commitments or clawbacks from investment partners? I'm sorry, let me -- how about seeking out new investment partners?

A: I don't recall if that was specifically discussed at that meeting.

Q: How about DOE funding?

A: Again, I don't know if that was specifically discussed.

Q: What about actions against vendors to, such as GE or Bechtel, to get them to make up for the cost overruns?

A: It is possible that was discussed in the context of making it clear that we would -- we thought for the project to proceed and get completed, it was important not to do battle or begin litigation with our construction partners, Bechtel and General Electric, and that we needed to work together to try to get the project done as efficiently as we could from that point forward and that we would deal with matters affecting litigation over the project later.

(Appellants' App., 874-879.)

- On February 26, 2010 – 2 days after the meeting with Hardy – Duke executives Jim Rogers and Jim Turner had the following e-mail exchange:

  Rogers: "Jim, please write several paragraphs describing our meeting with the Chair [Chairman Hardy] and Gov. [Governor Daniels] Also, describing our reg strategy in Indiana—technical conference. Etc"

  Turner: "***I don't think it's a good idea to put chmn mtg in writing***. Happy to do gov mtg"

Rogers: "I agree."

(Appellants' App., 1025.)

- On July 20, 2010, Michael Reed – having been hired by Duke and no longer with the Commission – wrote to Jim Turner of Duke, "***Dinner with DLH [David Lott Hardy]***, Sherry [Hardy] and [Standard & Poor's Managing Director of Utility and Infrastructure Rating Services Richard] Cortright tonite. [Redacted] Recommend you call him tomorrow, re (he is expecting a call) [Redacted] – ***If mood right, set the "what if" on Eport***" (Appellants' App., 1086.)
- On August 20 and 21, 2010 – less than a month before the originally-scheduled evidentiary hearing in IGCC-4S1 – Duke executives Michael Reed and Jim Turner had the following e-mail exchange about communications with Chairman Hardy:

  Reed: "I had refreshments with DLH [David Lott Hardy] Thurs eve. Informed him that Hoosier and WVPA will be withdrawing their interventions and why. He was OK with it.

  "He asked if we were having settlement discussions [in the Edwardsport case] with the parties. I acknowledged we were. ***He asked if a cap was on the table***. I said not at this time."

  Turner: "Thanks Mike. Did Chairman's question lead you to believe he thinks one needs to be on the table? Sounds like he might have been aware of what [OUCC attorney] Abbe [Gray]'s response was?"

  Reed: "Perhaps ***or signaling me. I'd like to poke at it a bit via panda acres [Hardy's personal e-mail account]. OK***? Also got addl intel re his plans. Appears to be longer than first planned. Will fill you in at west baden."

  Turner: ***"Might try to keep these procedural conversations oral rather than written. Just a thought."***

  (Appellants' App., 1123.)

- Then, on September 9, 2010 – one week prior to the scheduled evidentiary hearing in IGCC-4S1 – Jim Turner sent Jim Rogers an e-mail stating, ***"Mike R[eed] thinks, based on late breaking intel, that [in the Edwardsport case] we're going to get a soft cap at some level well below 2.88 [billion] (possibly Oucc's number of 2.45 [billion]) and a hartd [sic] cap at 2.88.***" (Appellants' App., 1127.)

  Less than a week later, Duke reached a last-minute settlement with the OUCC and the industrial intervenors.

- On September 16, 2010 – the first scheduled day of evidentiary hearings in IGCC-4S1 – the OUCC, Duke, Nucor Steel and the Industrial Group announced they had reached a settlement the night before. That surprise announcement prompted the following e-mail exchange between DEI President Mike Reed and then-Chairman Hardy, who had not attended that hearing:

  > Hardy: "How's [Commissioner] David [Ziegner] do – seems to take about 5 years for a spine transplant. [Judge] Loraine [Seyfried] was so ticked she almost swore."
  >
  > Reed: "Z[iegner] and Lorainne both did well (although out of character). Good trip to wood shed for all. Everyone weighed in except [Commissioner] atterholt [sic]."
  >
  > Hardy: "the issue goes a little deeper. Loraine was up to midnite [sic] working on this instead of IWC and the entire staff has been sluffing other things in favor of this – fundamentally, your actions have been taken as disrespect of the Commission and the staff. Loraine asked her mother to change the date of her Grandmother's funeral so this case could go.
  >
  > "You have all stapled your Dicks on this one."

  (Appellants' App., 1117-1118.)

- This was followed by another e-mail exchange regarding the handling of the last-minute settlement – this time, between Duke's Jim Turner and Chairman Hardy.

> Turner asked Chairman Hardy whether it would be appropriate to send Judge Seyfreid a note of apology for the last-minute settlement. Chairman Hardy – noting that Judge Seyfreid was one member of a "too small" group of hard-working IURC employees – suggested Turner begin that day's hearing by apologizing on the record: "Don't say it in too many words, only say it once and be sincere. At this stage, that about all you can do." (Appellants' App., 1120.)

As this sample of documented communications shows, Chairman Hardy's improper communications with Duke executives dated back *to before the Commission first granted Duke a Certificate of Need for the Edwardsport Plant in the fall of 2007* and continued until Chairman Hardy was fired in the fall of 2010. These emails also suggest that in 2010 Duke reached a last-minute settlement with the OUCC and industrial customers because of ex parte information Chairman Hardy had given Duke, warning about the Commission's likely decision.

e. Commission's Refusal to Investigate

Judge Storms' conflict of interest and a few of these other improper communications first came to light as a result of an Indianapolis Star article printed on October 6, 2010. Shortly after that article was published, Joint Intervenors filed their first motion requesting this Commission initiate hearings to investigate the improper conduct by Duke, Judge Storms, Chairman Hardy, and any other members of the Commission, and assess any impact this conduct might have had on the regulatory review and approval process for the Edwardsport Plant.

The Commission denied this request. Indeed, even after all of these clear ethical violations directly relating to the Edwardsport series of cases came to light, the IURC has consistently refused to formally review ***any*** of its decisions relating to the Edwardsport Project.

While the Commission's refusal to consider these issues has been consistent, its reasoning has not. The Commission denied Joint Intervenors' first request "without prejudice," claiming that the Commission could not review its prior decisions until other agencies had concluded their criminal and ethics investigations. (Appellants' App., 777.) However, after the Indiana Ethics Commission concluded that ethical violations had, in fact, taken place during the Edwardsport review process, the Commission changed its rationale for denying an investigation – stating that it "lacked jurisdiction" to conduct such a review. (Appellants' App., 1131.) In its Final Order, the Commission eschewed any explanation for its decision, stating simply that this case "was not the appropriate venue" for an investigation. (Appellants' App., 243.)

This is incorrect. Administrative agencies have not only the *right* – but the *duty* – to investigate when presented with evidence of alleged improper communications, undue influence, conflicts of interest or other misconduct constituting violations of administrative due process. *See. e.g. Professional Air Traffic Controllers Org. ("PATCO") v. Federal Labor Relations Auth. ("FLRA")*, 672 F.2d 109, 113 (D.C. Cir. 1982) (per curiam).

In *PATCO*, the D.C. Circuit Court of Appeals ordered the FLRA "to hold, with the aid of a specially-appointed administrative law judge, an evidentiary hearing to determine the nature, extent, source and effect of any and all ex parte communications and other approaches that may have been made to any member or members of the FLRA while the PATCO case was pending before it." The Court expressed concern "about the suggestion that attempts had been made to influence the Authority improperly and about the possible inference that the Authority's decision might have been affected by these attempts." *Id.* The Court stated that protecting the integrity of the administrative and judicial decision making processes extended beyond determination of possible criminal wrongdoing. *Id.* So, the Court "was not prepared to rely solely on the decision

of the Criminal Division to close its investigation as proof that no improper influence had been exercised." *Id. See also, In re Minnesota Pub. Utilities Comm'n,* 417 N.W.2d 274, 279-81 (Minn.Ct.App.1987), cert. denied, 488 U.S. 849, 109 S.Ct. 130, 102 L.Ed.2d 103 (1988). (P.U.C. ordered to initiate investigation similar to that in *PATCO*).

Moreover, the Indiana Utility Regulatory Commission clearly has authority to initiate such proceedings – despite its protestations to the contrary. Ind. Code § 8-1-2-58 states, "Whenever the commission shall believe . . . that an investigation of any matters relating to any public utility should for any reason be made, it may, on its own motion, summarily investigate the same, with or without notice."

Indeed, the Commission has exercised this authority previously to investigate some of the same administrative due process violations involved here. *In fact, as noted above, the Commission vacated a final order in another Duke case because of the mere appearance of impropriety created by the very same actions at issue in this case.*

This is clearly shown by the Indiana Court of Appeal opinion in the *Duke Energy* case cited above. 983 N.E.2d 160. As the Court of Appeals noted, because of the appearance created by the ethics scandal, the IURC reopened that case "for further review and consideration of the evidence presented." *Id*. at 162.

Joint Intervenors have repeatedly asked the Commission to reexamine its decisions in the Edwardsport series of cases – i.e., Cause No. 43114 and the related subdockets – in light of the ethical violations involving these cases. The Commission has already exercised its authority to reopen one Duke case in light of the very same conflicts of interest by former Judge Storms and Chairman Hardy which are at issue in this case. The Commission cannot now claim it lacks the same authority here.

f. Prejudice to Joint Intervenors

Duke and the Settling Parties have argued at various procedural stages – including in opposition to Joint Intervenors' Motion to Bifurcate this appeal – that Joint Intervenors have failed to show they were harmed by the undeniably improper conduct by Duke executives and the IURC Chairman and Chief ALJ. (*See*, Duke Energy Indiana's Opposition to Joint Intervenors' Motion to Bifurcate, p.10.) This argument entirely misses the point, for several reasons.

First, in their motions in the case below, Joint Intervenors asked the Commission to investigate whether the improper conduct contributed to the Edwardsport Project receiving initial or continuing approval. This, the Commission refused to do. Without an inquiry, it is impossible to know the full extent of the corruption or its effect on earlier rulings.

Second, a party "alleging a procedural due process violation need not demonstrate that it would prevail had it been accorded adequate process." *Multistar Indus., Inc. v. U.S. Dep't of Transp.*, 707 F.3d 1045, 1054 (9th Cir. 2013). Rather, "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions." *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

Indeed, where an agency decision appears regular on its face but where "there is a subsequent showing of impropriety in the process, that impropriety creates an appearance of irregularity which the agency must then show to be harmless." *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1548 (9th Cir., 1993). For example, in a utility rate case, the Supreme Court of Utah found that the Utah Public Service Commission had a duty to reopen a utility rate case – after the final order – when evidence subsequently came to light of misconduct by the utility in the course of the case. *MCI Telecommunications Corp. v. Public*

Service Commission of Utah, 840 P.2d 765 (Utah 1992). In that case, the Court found that allegations that improper conduct by the utility may have influenced the Commission's decision were "substantiated, at least to some degree[.]" *Id*. at 775. The Court therefore held that "the Commission's failure to hold a factual hearing on the issue of utility misconduct was arbitrary and capricious." *Id*

That is the case here. The Indiana Utility Regulatory Commission has refused to hold a factual hearing on the issue of misconduct. This is error.

Third, in this case, there is clear evidence tending to show bias on the part of the Chairman and staff that deliberated on the Edwardsport series of cases. First and foremost is the fact that Judge Storms was offered a job while presiding over two of the cases now on appeal. Similarly, Chairman Hardy – who deliberated and voted on every one of the Edwardsport cases prior to his firing – actively advocated, during the Edwardsport cases, for Duke's hiring of both Mike Reed and Judge Storms.

Moreover, the substance of the communications between Chairman Hardy and Duke executives show evidence of bias – and not simply because Chairman Hardy actively socialized with those executives. As an example, Chairman Hardy made reference in an email to Duke about the Edwardsport case to another Commissioner needing a "spine transplant." Also, in response to an angry email from Duke's Jim Turner about comments he had heard that then-Chairman Hardy made that were critical of Duke's performance in constructing the Edwardsport Plant, Chairman Hardy – apparently without intentional irony – "If I had said that you would correctly be upset and I would resign as a violation of my ethics." (Appellants' App., 1048-1050.) Perhaps more telling are the numerous internal Duke communications *in which Duke*

personnel were advised not to memorialize their communications with then-Chairman Hardy in writing. (Appellants' App., 1008, 1025, and 1123.)

It should be reiterated that the Commission refused to allow evidence of these communications into the record of this case for the purpose of showing improper conduct by either Duke or the Commission, nor would the Commission initiate a separate investigation to consider the impact of any improper conduct.

g. Conclusion on Due Process Violations Resulting from Improper Commission Conduct

Due process principles are violated when a tribunal has a potential conflict of interest that creates even an *appearance* of impropriety. *Mishawaka v. Stewart*, 261 Ind. 670, 680 (Ind. 1974) ("Any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias.")

To say that the interactions between Judge Storms, Chairman Hardy, and various Duke executives created "an appearance of impropriety" would be an understatement. Because of this perceptible bias, Joint Intervenors repeatedly requested that the Commission "initiate and appoint an agent or agents to conduct an investigation . . . [and] order any appropriate relief[.]" (Appellants' App., 697.) The Commission repeatedly refused.

The Commission's repeated refusals to permit an independent inquiry – or indeed *any* transparent inquiry – into the Commission's regulatory oversight of the Edwardsport Project were error. The orders at issue in IGCC-4 and 4S1 should, therefore, be vacated.

Moreover, the cases should be remanded with directions to the Commission to appoint a disinterested decision-maker to conduct a formal investigation to determine (1) whether the misconduct of DEI executives and Commission officials relating to the regulatory review of the Edwardsport Project constitute violations of administrative due process and, (2) if so, whether

the Project's Certificate of Need should be revoked or whether other past orders should be vacated.

As Duke noted in its Motion to Consolidate the cases now on appeal, the Commission's IGCC-4S1 Order *approved* the Edwardsport Settlement, and then the IGCC-5, 6, 7, and 8 Orders *implemented* that settlement. (Motion to Consolidate, ¶ 1.) So, the Commission's orders in IGCC-4 and 4-S1 were the foundation of the orders in IGCC-5, 6, 7 and 8. Therefore, those orders must also be vacated and their dockets remanded pending the outcome of the independent investigation.

2. Commission's Refusal to Disclose Information Obtained Ex Parte from Third Party (Black & Veatch)

In IGCC-1, the Commission ordered Duke to hire – at ratepayer expense – the engineering firm Black & Veatch to serve as the Commission's eyes and ears at the Edwardsport Project site. As discussed in great detail in the Statement of Facts, above, Black & Veatch and IURC personnel attended regular meetings with Duke personnel and contractors, informally questioned Duke about the progress of the Project, then reported the information back to the IURC Commissioners in regular written reports and other communications, directly or through Commission staff.

At these meetings – which were not attended by OUCC staff or representatives of other parties to this case – Commission staff was briefed on issues currently in dispute in the cases now on appeal. These issues included: the "General status of construction," the "Overall construction schedule status," "Startup and commissioning status," "Quality control issues" and "Project budget status." (Appellants' App., 751-755.) In addition, information was conveyed to the Commission informally through Black & Veatch, at one point prompting Duke Franchised

Electric and Gas Group President Jim Turner to quip in an email, "Our chairman knows stuff before I do . . ." (Appellants' App., 720.)

Despite JIs' formal requests, the specific factual information Black & Veatch conveyed to the Commissioners has never been disclosed to the parties to the Edwardsport cases. The Commission has refused both public records requests and Joint Intervenors' motion to have the Black & Veatch reports made a part of the official record in the cases now on appeal.

In denying the parties access to these reports, the Commission argued two logically inconsistent bases. First, in response to the public records request, the Commission argued that the reports were privileged "deliberative materials" on which the Commission relied in "decision making." Then, in denying Joint Intervenors' request that the Edwardsport reports be made part of the Edwardsport case record, the Commission stated, "Information provided to the Commission by Black & Veatch has never been relied upon as evidence in any of the IGCC Rider proceedings."

Under both Indiana statutory law and basic principles of due process, the parties have a right to know what information Black & Veatch communicated to the Commissioners about the progress of the Edwardsport Project while those Commissioners were simultaneously adjudicating Duke's management of that same Project in the cases now on appeal.

a. <u>The Commission violated its statutory duty to serve as an "impartial fact-finding body" by independently obtaining its own factual information about the Edwardsport Plant, then withholding that information from the Parties.</u>

It is contrary to Indiana law for the Commission to have access to information regarding Duke's management of the Edwardsport Project without granting the parties the opportunity to review the evidence and cross-examine witnesses thereon. I.C. § 8-1-1-5(a) states:

> The commission shall in all controversial proceedings heard by it be an impartial fact-finding body and shall make its orders in such cases upon the facts impartially found by it. The commission shall in no such proceeding, during the hearing, act in the role either of a proponent or opponent on any issue to be decided by it. All evidence given in any such proceeding shall be offered on behalf of the respective parties to, or appearing in, the proceeding and not in the name or behalf of the commission itself.

Id.

In interpreting this statute, the Indiana Court of Appeals in *City of Evansville v. SIGECO* held "the Commission cannot act on its own independent information, but must base its findings upon evidence presented in the case, with an opportunity to cross-examine witnesses, to inspect documents or exhibits, and to offer evidence in explanation or rebuttal and nothing can be treated as evidence which has not been introduced." 339 N.E.2d at 584 (citing *Public Serv. Comm. v. Ft. Wayne U. Ry. Co.*, 232 Ind. 82, 96 (Ind. 1953)).

In the five cases now on appeal, IGCC-4 through IGCC-8, the IURC was reviewing the progress on the Edwardsport Plant during the period of April 1, 2009, through September 30, 2011. The Commission was tasked in these cases with deciding whether Duke's costs incurred in constructing the Plant during this time period were prudent and, therefore, recoverable from ratepayers.

During all times at issue in these cases – April 1, 2009, through September 30, 2011 – the Commission received monthly reports from Black & Veatch about how the Project was progressing. In addition, during this time period, both Black & Veatch and Commission staff attended monthly "project status meetings" – sometimes at the project site in Edwardsport, sometimes at Becthel's headquarters in Houston, Texas. This information was then reported to the Commissioners who were tasked with deciding, in the cases now on appeal, whether Duke prudently managed the Project during this time period.

The Commission had extensive access to information about the subject matter of the cases on appeal that was not made available to the non-Duke parties to these cases. While the

Commission may claim the Commissioners never "relied" on this information in the cases now on appeal, the fact that the finders-of-fact were privy to a treasure trove of relevant information which the parties have never been given an opportunity to see – let alone rebut – is a violation of the Commission's statutory obligation to act as "an impartial fact-finding body" in cases before it. I.C. § 8-1-1-5(a).

b. The Parties have a right to know what information Black & Veatch provided to the Commission under both the "due process" clause of the 14th Amendment to the U.S. Constitution and under the "due course of law" clause of Article I, Section 12 of the Indiana Constitution.

"The Due Process Clause [of the 14th Amendment to the U.S. Constitution] and Due Course of Law Clause [of Article 1, Section 12 of the Indiana Constitution] prohibit state action which deprives a person of life, liberty, or property without the 'process' or 'course of law' that is due, that is, a fair proceeding." *Indiana High Sch. Ath. Ass'n v. Carlberg by Carlberg*, 694 N.E.2d 222, 241 (Ind. 1997). Both state and federal courts have held that state utility commission proceedings are subject to minimum requirements of due process. *See e.g., Warren v. Indiana Tel. Co.*, 217 Ind. 93, 105 (Ind. 1940); *and, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 542 (U.S. 1978).

Among these requirements is the right of interested parties to review and challenge the evidence on which the tribunal makes its determinations. Indeed, the U.S. Supreme Court has stated the following regarding due process in the context of administrative proceedings:

> A party is entitled, of course, to know the issues on which decision will turn and ***to be apprised of the factual material on which the agency relies for decision so that he may rebut it***. Indeed, ***the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation***.

Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 289 (U.S. 1974) (emphasis added) (*citing, Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292

(1937); and *United States v. Abilene & S. R. Co.*, 265 U.S. 274 (1924)). *See also, Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (U.S. 1978) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action ***and afford them an opportunity to present their objections***." (emphasis added)).

Under this principle articulated in *Bowman Transp., Inc.*, the lack of clarity with respect to what the Black & Veatch reports say, when and what the Commission knew, and what, if anything, the Commission did in response is precisely why the Black & Veatch reports must be made available to the parties. It is clear that significant amounts of information were provided to Black & Veatch regarding the Project, its status, ongoing problems, and the scope and cost increases it experienced. It is equally clear that Black & Veatch, in turn, conveyed significant amounts of information to the Commission. The Commission therefore had information not available to the parties which the Commission either used or chose not to use, and there is a real problem in the apparent implicit, selective, and undisclosed reliance by the Commission on the reports.

This implicit relationship is illustrated in an e-mail exchange over September 6 and 7, 2009, between former Duke executive Jim Turner and former Chairman of the Commission, David Hardy. Chairman Hardy stated: "Odd observation and not a conclusion but with the oversight of Eport and our emphasis on schedule and cost - I am beginning to think that has a benefit - only a glimmer at this stage, difficult to prove and harder to quantify but I will be curious to see if it gets any clearer." Mr. Turner replied, "I think the IURC's oversight is adding value and helps drive an attention to disciplined cost management – not just with the Duke team but with our 'friends' at Bechtel." (Appellants' App., 829.)

Another example is where a large piece of equipment – an HRSG column – was dropped as it was being unloaded in November of 2009. In that case, former Chairman Hardy went directly to Jerry Webb, the staff person assigned Edwardsport oversight responsibility in conjunction with the Black & Veatch reporting process, regarding a rumor he has heard regarding an HRSG column drop at the project site. In response to this email exchange – which Chairman Hardy forwarded to Duke Franchised Electric and Gas Group President Jim Turner – Mr. Turner quipped, "Our Chairman [Hardy] knows stuff before I do." (Appellants' App., 830.)

None of the parties to this case were copied on any of these emails.

An even more compelling example relates to the matter of the need for and timing of an integrated schedule for the Project. In April, 2009, acting on information provided by Black & Veatch, former Chairman Hardy communicated, ex parte, with former Duke Group President Turner regarding the need for the Company to develop an integrated schedule for the Project absolutely as soon as possible. Mr. Turner then communicated with his subordinate, Mr. Haviland, requesting "something in writing" that he could share with Mr. Hardy on this issue, which Mr. Haviland then prepared and provided to Mr. Turner to share ex parte with Mr. Hardy. (Appellants' App., 835-836.)

Indeed, in cross-examination in IGCC-4S1, Mr. Haviland began to explain this series of communications between Duke, Black & Veatch, IURC Staff, and then-Chairman Hardy. However, the presiding ALJ struck the testimony from the record. Specifically, Mr. Haviland stated the following:

> The monthly meetings were ***attended by the IURC staff and Black & Veatch***, and they had apparently – the IURC folks, after going to one of the meetings, I guess it must have been the one before this – the month before this, or it could have been this month in April, told Mr. Hardy [IURC Chairman] a concern about the [Edwardsport] schedule. He ***[Chairman Hardy] then, apparently, called Mr. Turner [of Duke]***. I don't know what their communication method was, but ***Mr. Turner then asked me to put together a***

> ***response to Mr. Hardy [then-IURC Chairman], which I did***, and you can see that down below here.

(Tr., Vol.77, 016292-016293 (emphasis added).)

The presiding ALJ case struck this statement from the record and directed Mr. Haviland not to mention Black & Veatch on the record again. (Tr. Volume 77, 016293-016298.)

It is neither legal nor proper for the Commission to be given secret information about a project during the statutorily-required regulatory review of the project, then withhold that information from the parties to the proceeding. This is true regardless of whether the Commission *acts* on this information or *chooses not to act* on this information. Under such conditions the Commission ceases being an impartial fact-finder, in violation of IC 8-1-1-5(a). *See, Public Service Commission of Ind. v. Indiana Bell Telephone Co.*, 235 Ind. 1, 27, 130 N.E.2d 467, 479 (Ind.1955) ("[T]he Commission cannot act on its own independent information, but must base its findings upon evidence presented in the case, with an opportunity to cross-examine witnesses, to inspect documents or exhibits, and to offer evidence in explanation or rebuttal and nothing can be treated as evidence which has not been introduced as such.")

There is no dispute on this point: The Commission was provided information about Duke's management of the Edwardsport Project while the Commission was simultaneously engaged in a formally-docketed proceeding regarding oversight of the very same Project. The parties have a right to know what that information was. They cannot rebut information that has been concealed from them. *See id.*

Due process requires the parties to have access to the same factual information the finder of fact has. Clearly, that did not happen here. Indeed, the parties to this case still have no idea of the full scope of the information about Edwardsport that Black & Veatch reported to the Commission, each month, *throughout all five cases currently on appeal*. So, the Commission's

orders must be vacated and these cases remanded with instructions to the Commission to disclose to the parties all information it obtained about the Edwardsport Project from Black & Veatch while these cases were pending.

B. ISSUES RELATING TO STANDARD OF REVIEW

3. Settling Parties' Failure to Submit Evidence on – and Commission's Failure to Review Reasonableness of – $12.7 Million in Settlement Attorneys' Fees and $900,000 in litigation costs

In IGCC-4S1, the Settling Parties bore the burden of proving that the terms of the proposed Settlement was reasonable and in the public interest. One of these Settlement terms provided that Duke would pay $11.7 million in attorneys' fees to the law firm of Lewis & Kappes and another $1 million in attorneys' fees to Nucor Steel. In addition, Duke would pay $600,000 to Lewis & Kappes and $300,000 to the OUCC for litigation expenses. However, the Settling Parties presented ***absolutely no evidence*** explaining how these fees and costs were calculated or otherwise justifying these amounts.

Consequently, at the Settlement Hearing, Joint Intervenors moved for the equivalent of a directed verdict on this issue by moving to reject the proposed Settlement – or the attorneys' fee portion of it – for insufficiency of evidence. Joint Intervenors made the motion both orally and in writing and renewed the motion at the conclusion of all evidence.

The Commission denied Joint Intervenors' motion at the hearing. In its Final Order, the Commission stated the following on this issue:

> The sums provided for in provision 9 of the Settlement Agreement are to be paid by Duke from shareholders' funds, and therefore represent financial commitments to be borne solely by the Company, separate and apart from the rate and regulatory provisions in the Settlement Agreement. The Non-Settlement Parties object to this term of the Settlement Agreement and argue that it is not supported by the record evidence in this proceeding. . . . ***The Settling Parties agreed to this term, but it does not require Commission approval.***

(Final Order, p. 121 (emphasis added).)

This is incorrect. The Commission had a duty to determine that *all* of the Settlements' terms were reasonable and in the public interest. The Commission's decision not to require any evidence in support of the attorneys' fee provisions – provisions involving a multi-million dollar payment to opposing counsel which was negotiated in secret and never explained on the record – created an improper appearance that undermines the credibility of the regulatory process.

a. The Commission Was Required to Review the Attorneys' Fee Provisions of the Settlement to Determine Whether They Were Reasonable and in the Public Interest.

Indiana courts have made abundantly clear that attorneys' fee provisions of settlements in cases before the IURC must be ***reasonable in amount*** and ***supported by sufficient evidence***. *Citizens Action Coalition v. PSI Energy*, 664 N.E.2d 401, 406 (Ind. Ct. App. 1996). Indeed, the Indiana Court of Appeals explained the policy reasons for scrutinizing attorneys' fee provisions in settlements before the IURC, as follows:

> We note at the outset that "settlement" carries a different connotation in administrative law and practice from the meaning usually ascribed to settlement of civil actions in a court. While trial courts perform a more passive role and allow the litigants to play out the contest, regulatory agencies are charged with a duty to move on their own initiative where and when they deem appropriate. Any agreement that must be filed and approved by an agency loses its status as a strictly private contract and takes on a public interest gloss. ***Indeed, an agency may not accept a settlement merely because the private parties are satisfied; rather, an agency must consider whether the public interest will be served by accepting the settlement.***

Id. at 406 (emphasis added; internal citations omitted).

In this case, the Commission explicitly violated this pronouncement by the Court of Appeals. As noted above, the Commission justified approval of the attorneys' fee provisions as follows: "The Settling Parties agreed to this term, ***but it does not require Commission approval."*** (Appellants' App., 243 (emphasis added).) The Court of Appeals has clearly stated

that "an agency may not accept a settlement merely because the private parties are satisfied[,]" *id*, yet that is precisely what the Commission did here.

The Court of Appeals has also clearly articulated the reasons attorneys' fee provisions in IURC cases must be subjected to "public interest" review. *Id*. Specifically, the Court of Appeals analogized IURC cases to several federal class action cases and stated that settlement agreements in utility cases should be generally reviewed under the same standards. *Id*. Specifically, the Court stated:

> When awarding attorney fees, federal courts have a duty to ensure that claims for attorneys' fees are reasonable. *See Hensley v. Eckerhart*, 461 U.S. 424, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983). Federal court[s] have applied this reasonableness standard to common fund cases. *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *Swedish Hosp. Corp. v. Shalala*, 303 U.S. App. D.C. 94, 1 F.3d 1261, 1265 (D.C. Cir. 1993). Indeed, federal courts must balance the competing goals of fairly compensating attorneys for their services rendered on behalf of a class and of protecting the interests of the class members in the fund. *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994) (requiring balancing of these competing interests in determining what multiplier to use to adequately compensate counsel for contingency when using lodestar method). ***We find guidance from these federal decisions and conclude that the commission must examine a settlement agreement for attorneys' fees in common fund cases to determine whether the fee agreement is reasonable under the circumstances of the case. Thus, we reject the notion that an agency is absolved from considering the public interest in making an award of attorney fees when a statutory representative is provided to represent the public interest. The commission still must review the agreement under a reasonableness standard.***

Id. (emphasis added).

Because the Indiana Court of Appeals equated the review of fee provisions in settlements in IURC proceedings to those in federal class actions, this Commission has a wealth of case law on which it can draw to determine the extent of its duty to review the reasonableness of the fee provisions in the settlement in this case.

First, it should be noted that in cases impacting classes of individuals, the burden of proof rests with proponents of the settlement to convince court that the terms of the agreement are fair. *See e.g.*, *Purcell v. Keane*, (1972, ED Pa) 54 FRD 455, 80 BNA LRRM 2566, 68 CCH LC P

12881; *Hill v. Art Rice Realty Co.*, (1974, ND Ala) 66 FRD 449, 1974-2 CCH Trade Cases P 75364, *affd without op* (1975, CA5 Ala) 511 F2d 1400; *Ohio Public Interest Campaign v. Fisher Foods, Inc*., (1982, ND Ohio) 546 F Supp 1; *Berry v. School Dist*. (1998, WD Mich) 184 FRD 93.

This burden of proof includes establishing that any attorneys' fees paid under the agreement are reasonable. Indeed, it is reversible error for a court to approve attorneys' fees under a settlement without assessing the reasonableness of the fees. *Piambino v. Bailey*, (1980, CA5 Fla) 610 F2d 1306, CCH Fed Secur L. Rep. P. 97275, 29 FR Serv. 2d 370, reh. den. (1980, CA5 Fla) 618 F2d 1390 and cert. den. (1980) 449 US 1011, 101 S. Ct. 568, 66 L. Ed. 2d 469.

There are a number of policy reasons for requiring attorneys' fees provisions in class settlements to be subject to judicial scrutiny for the justification of the amount awarded. Federal courts have described two risks in particular of excessive attorneys' fee payments under class settlements, as follows:

> The problem has two aspects: extortion (that is, the prosecution of strike suits) and collusion (that is, the tension which necessarily arises between class members and class counsel when settlements and attorneys' fees are negotiated simultaneously). While the conflict between a class and its attorneys may be most stark where a common fund is created and the fee award comes out of, and thus directly reduces, the class recovery, there is also a conflict inherent in cases like this one, where fees are paid by a quondam adversary from its own funds—the danger being that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.

Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518 (1st Cir., 1991) (emphasis added).

For this reason, in approving a settlement affecting a class, a court must carefully scrutinize attorneys' fee settlements. Stated another way, "To fully discharge its duty to review and approve class action settlement agreements, a district court must assess the reasonableness of the attorney's fees." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 14:1, at 507 (4th ed. 2002).

Indeed, state and federal cases holding that fee awards in class action settlements must be proven to be reasonable are legion. By way of example, the New Mexico Court of Appeals has stated, "a court has a duty to establish the reasonableness of a fee award, which arises out of its obligation to protect class interests by, inter alia, preventing conflicts of interest between class counsel and the class members and preventing collusion between class counsel and the defendant." *In re New Mexico Indirect Purchasers Microsoft Corporation*, 149 P.3d 976, 996 (N.M. Ct. App, 2007) (internal quotes and citations omitted). The Court went on to note that "a court must acknowledge the *public perception of windfall fees* in class actions and use judicial oversight to ensure that fees awarded to class counsel are proportional to the benefit obtained for the class." *Id*. (emphasis added).

Similarly, the Fifth Circuit Court of Appeals has stated that a court "is not bound by the Agreement of the parties as to the amount of attorneys' fees." *Piambino*, 610 F.2d at 1328. Rather, a trial court must scrutinize the agreed-to fees, and not merely "ratify a pre-arranged compact." *Id.* (holding that by summarily approving attorneys' fees presented in an unopposed settlement agreement, the district court "abdicated its responsibility to assess the reasonableness of the attorneys' fees proposed under a settlement of a class action, and its approval of the settlement must be reversed on this ground alone").

Another reason to require scrutiny of attorneys' fee awards in every class settlement is to avoid the possibility of a "reverse auction" – i.e., when a defendant offers a premium award of attorneys' fees to the party or parties that appear most receptive to settlement. *Reynolds v. Benefit Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. Ill. 2002). For this reason, attorneys' fee provisions of settlements impacting classes of individuals must be scrutinized thoroughly to

insure that they are reasonable – i.e., that the settling party or parties have not been offered a "sweetheart deal."

The preferred method for calculating an appropriate attorneys' fee provision in a class action is the "lodestar method," whereby the number of attorneys' hours are multiplied by a reasonable hourly rate to calculate a reasonable attorneys' fee under the settlement. *Weinberger*, 925 F.2d at 526 ("[W]e have customarily found it best to calculate fees by means of the time-and-rate method known as the lodestar.") However, in this case, the Settling Parties presented absolutely *no evidence* to establish that the amount of the attorneys' fees provided under the settlement is reasonable under *any methodology*.

Indeed, the Settling Parties even refused to provide this information to the Settling Parties in discovery. As noted in the Motion to Dismiss Joint Intervenors tendered on July 16, 2012 (refiled on July 23, 2012), the Non-Settling Parties submitted discovery requests to each of the settling parties, seeking *some* explanation as to how the amounts of the fee awards were calculated. In its responses, the Industrial Group refused to provide any documentation supporting its $11.7 million award of attorneys' fees.

This is completely inconsistent with the requirement that settlements including attorneys' fee provisions in class cases must be reasonable in amount and supported by evidence. Indeed, a failure to provide detailed timesheets showing the basis for an attorney fee award is, by itself, a basis for reducing or rejecting the fee provisions of a class settlement. Specifically, "the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance[.]" *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984).

b. Contention That the Proposed Attorneys' Fees Are to Be Paid out of Duke Shareholder Funds Does Not Absolve the IURC From Its Duty to Review the Fees for Reasonableness.

In response to Joint Intervenors' arguments, both the Settling Parties and the Commission relied on the bare assertion that the proposed attorneys' fees will be paid out of Duke shareholder funds, rather than Duke ratepayer funds. The Commission apparently believed that this relieved the Settling Parties from their burden of proof.

However, ***neither the Settling Parties nor the Commission offered any legal precedent for this contention***. In contrast, there is ample case law holding that such fees must be reviewed for reasonableness, regardless of their source of payment.

In the *Weisenberger* case, the settling parties made an argument similar to the Settling Parties' argument here – i.e., because the attorneys' fees would be paid by shareholders, not class members, this obviated the need for judicial review of the fee amount. The *Weisenberger* court disagreed, stating, "***there is also a conflict inherent in cases like this one, where fees are paid by a quondam adversary from its own funds***—the danger being that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees[.]" 925 F.2d at 524 (emphasis added).

Other federal courts have similarly held that settlements for the payment of attorneys' fees are subject to a review for reasonableness, even in cases where the fees were negotiated separately from the underlying settlement and paid out of a fund separate from that of the class recovery. *See, In Re General Motors Corporation Pick-up Truck Fuel Tankproducts Liability Litigation*, 55 F.3d 768 (3rd Cir., 1995); and *Prandini v. National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir.1977) (holding that potential conflict of interest in excessive attorneys' fee award was present even though attorneys' fees were to be paid from a separate fund.).

Stated another way, "*That the defendant will pay the attorneys' fees from its own funds likewise does not limit the court's obligation to review the reasonableness of the agreed-to fees*. Restricting the court's discretion to a perfunctory review in such a circumstance would disregard the economic reality that a settling defendant is concerned only with its total liability." *In Re: Heartland Payment Systems, Inc. Customer Data Security Breach Litigation*, --- F.Supp.2d ----, 2012 WL 948365 (S.D.Tex) (emphasis added).

Indeed, in the present case, one must wonder what Duke would have been willing to give up in the Settlement Agreement if the law firm of Lewis & Kappes had been satisfied with only being paid $5 million – or $2 million, or $1 million. The fact that Duke shareholders paid Lewis & Kappes $12.3 million out of their own pocket certainly does not change the obvious economic reality: Duke would surely have offered ratepayers *something* in exchange for keeping some of this money.

As noted above, in Indiana, fee awards as part of settlement agreements in administrative, utility proceedings are not simply matters of private agreement. Rather, they are subject to a public interest review that has been analogized to the review of settlements in class action cases. *Citizens Action Coalition v. PSI Energy*, 664 N.E.2d at 406. Even in cases where – as here – one party agrees to pay the other parties' attorneys' fees out of its own funds, such a review is required. *Weinberger,* 925 F.2d at 524. The Settling Parties were obligated to present evidence in their case-in-chief establishing the reasonableness of the attorneys' fee provisions of the Settlement Agreement, regardless of the purported source of the funds. They did not, and the Commission concluded they were not required to do so. This was reversible error. *Piambino,* 610 F2d at 1328.

4. Commission's Failure to Make Findings of Fact, Based on Substantial Evidence, on Specific Allegations of Fraud, Concealment, and Gross Mismanagement

As noted above, IGCC-4S1 was divided into two "phases." In Phase I, Duke bore the burden of proof in (1) establishing the reasonableness of its new cost estimate for the Project and (2) showing that its costs actually incurred through September 30, 2010, were prudent. In Phase II, the other parties sought disallowance of these costs under I.C. § 8-1-8.5-6.5 based on allegations of "fraud, concealment or gross mismanagement."[4]

However, in the IGCC-4S1 Final Order, the Commission did not make findings of fact, supported by substantial evidence, on the specific allegations of fraud, concealment, and gross mismanagement raised by Joint Intervenors and other parties. Therefore, this Order must be reversed.

Specifically, in their Exceptions to the Settling Parties' Proposed Order in IGCC-4S1, Joint Intervenors devoted **twenty-seven (27) pages** to summarizing the evidence in that demonstrated fraud, concealment, and/or gross mismanagement by Duke. Over these twenty-seven pages, Joint Intervenors identified eight different categories of conduct by Duke that allegedly amounted to "fraud, concealment, or gross mismanagement." Under each allegation, Joint Intervenors cited to specific evidence in the record supporting their allegations. (Appellants' App., 1412-1439.)[5]

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[4] I.C. § 8-1-8.5-6.5 states, in relevant part, "Absent fraud, concealment, or gross mismanagement, a utility shall recover through rates the actual costs the utility has incurred in reliance on a certificate issued under this chapter[.]" Thus, costs already approved as "prudent" under the "ongoing review" provisions of I.C. § 8-1-8.5-6 may nonetheless be excluded from recovery upon a showing of "fraud, concealment, or gross mismanagement[.]"

[5] Joint Intervenors will not recite here all of the evidence supporting allegations of "fraud, concealment, and gross mismanagement." For the full twenty-seven page summary of this evidence, see Joint Intervenors' Exceptions (Appellants' App., 1412-1439.)

However, in its Final Order in IGCC-4S1, the Commission did not address the factual bases of each – or indeed any – of these specific issues. In its "Discussion and Findings," the Commission did not mention any of the facts Joint Intervenors had identified as evidence of "fraud, concealment, or gross mismanagement," nor did the Commission identify countervailing facts that might undercut Joint Intervenors' arguments. Rather, the Commission broadly addressed these issues and summarily concluded as follows:

> The Non-Duke Parties have the burden of proving fraud, concealment and gross mismanagement. We find that, on the basis of the competing evidence presented in Phase II or this proceeding, the Non-Duke Parties have not met their burden of proof with regard to fraud, concealment or gross mismanagement.

(IGCC-4S1 Final Order, p. 116.)

The legal standard for any IURC decision is well established: "[T]he statutory standard requires that the Commission's decision contain specific findings on *all the factual determinations material to its ultimate conclusions*." *L. S. Ayres & Co. v. Indianapolis Power & Light Co.*, 169 Ind.App. 652, 661, 351 N.E.2d 814, 822 (Ind. App. 1976) (emphasis added) (citing, *General Tel. Co. v. Public Serv. Comm'n* (1958), 238 Ind. 646, 150 N.E.2d 891; *Fred J. Stewart Trucking, Inc. v. Bunn Trucking Co.* (1972), 151 Ind.App. 157, 278 N.E.2d 310; and *Daviess-Martin County Rural Tel. Corp. v. Public Serv. Comm'n* (1961), 132 Ind.App. 610, 174 N.E.2d 63). In *LS Ayres*, the Court went on to explain the need for specific findings on all of the basic facts underlying the Commission's ultimate conclusions, stating, "There is little assurance that an administrative agency has made a reasoned analysis if it need state only ultimate findings or conclusions." *Id.*

The Commission made no factual findings on any of Joint Intervenors' specific allegations of "fraud, concealment, and gross mismanagement," nor did the Commission identify specific evidence on which it relied. This Court cannot be expected to search through the record

below and guess at the Commission's reasons for finding that none of these issues rose to the level of "fraud, concealment, or gross mismanagement."

The Commission failed in its basic duty to make findings of fact, based on substantial evidence, on the material issues raised in Phase II of IGCC-4S1. *L. S. Ayres & Co.*., 351 N.E.2d at 822. The Commission's Order must therefore be reversed.

5. Commission's Failure to Make Any Findings of Fact or Conclusions of Law, Whatsoever, Regarding Mitigation of Carbon Dioxide Emissions#

In opposition to the Settlement in IGCC-4S1, Joint Intervenors argued that the Commission should include a requirement that DEI mitigate approximately 1.6 million tons of CO_2 emissions per year over the projected initial 30-year operating life of the Project through a combination of additional "old coal" plant retirements and end-use efficiency and renewable generation, including distributed renewable generation. (Appellants' App., 1561.)

The rationale for this action was explained in the testimony of Joint Intervenors' witness Nachy Kanfer:

> At the inception of the Edwardsport Project, the Company contemplated mitigating its CO_2 emissions with Carbon Capture and Sequestration ("CCS"). The Company, the Commission, and the parties directed substantial time and resources to a preliminary analysis of that method in Cause Nos. 43114-IGCC-S1and 43653. However, Duke has evidently reconsidered moving forward with CCS in the face of the rapidly escalating costs of studying CCS, as well as increasing doubts and delays in developing a federal and state eminent domain and liability regime. In particular, the New York Times, in a 12 June 2008 article, reported Duke CEO Jim Rogers saying this on the subject of CCS:
>
> > The technology to remove CO_2 from the smokestacks and "sequester" it affordably is, he estimates, 10 to 15 years away. . . . Even if someone manages to make carbon sequestration feasible, Rogers worries that there's a limit to what the public will tolerate.
> >
> > "We don't know what happens if the carbon leaks back out of the ground, and we've never done it successfully on scale," he told me.

> Later, he said, "So you'll get the next version of "Not in My Backyard" — it'll be "Not Under My Backyard."
>
> See Olive Thompson, A Green Coal Baron?, The New York Times, June 22, 2008.
>
> Notably, carbon risk mitigation was among Duke's cited reasons for proposing to construct the Edwardsport facility in the first place. Despite that fact, Duke has now constructed a facility that will – without dispute – emit huge new volumes of carbon pollution. Moreover, since abandoning its plans to install on the Edwardsport facility, Duke has not brought forward to the Commission any proposed means of mitigating this risk . . . . Therefore, an alternative method of CO_2 mitigation for Edwardsport is a critical need if it is assumed that the Project will become and remain operational for its projected useful life of 30 years and generate emissions of approximately four million tons of CO_2 in each of those 30 years.

(Appellants' App., 1557-1558.)

The Settling Parties' response could be described as the "ostrich approach" to the issue of global climate change and the role that CO_2 emissions from sources such as the Edwardsport Plant unquestionably play in that process. Because there was currently no federal law mandating CO_2 mitigation, the Settling Parties argued that the Commission need not consider the financial impact of any potential regulation or litigation.

However, the absence of any federal law expressly mandating the mitigation of CO_2 emissions is no excuse for either the Company or the Commission to disregard the risks and potential financial costs which those emissions indisputably represent to Duke and its customers. As Mr. Kanfer explained:

> The Commission's resource planning rules require that the Commission assess and address these types of business and financial risks to Duke and its Indiana ratepayers. In particular, 170 IAC 4-7-6 expressly requires the Company to assess "the significant environmental effects, including: (A) air emissions" of each existing fossil fueled generating unit and proposed new supply-side resources. It also requires the Company, in the resource planning scenario analysis that it performs, to consider the effects of changes in federal and state energy and environmental policies. Under the present Indiana resource planning regime, these requirements are enforced through the CPCN process for new generating facilities

> under IC 8-1-8.5 when a utility such as Duke proposes to add a particular unit such as Edwardsport.

(Appellants' App., 1556-1557.)

Whether presently limited by law or not, Joint Intervenors argued Edwardsport CO_2 emissions are currently a business and financial risk to DEI and its ratepayers which require mitigation because of their projected magnitude (four million tons per year) and expected duration (at least 30 years). Accordingly, even if the Commission did not reject the Settlement Agreement outright, Joint Intervenors asked that the Settlement be modified to include a condition requiring the Company to mitigate at least 1.6 million tons per year of its CO_2 emissions. (Appellants' App., 1493-1495.)

In its Final Order, the Commission did not adopt Joint Intervenors recommendation. The Commission did not reject it, either. The Commission ignored it.

Perhaps the Commission felt the evidence did not support Joint Intervenors' conclusions about the financial risk to Duke and its customers posed by CO_2 emissions, but there is no way to know. In its "Discussion and Findings" in the IGCC-4S1 Order, the Commission made no reference to the issue of CO_2 mitigation. The Commission reached ***no conclusion*** and made ***no findings whatsoever*** on the issue. (Appellants' App., 231-243.)

This failure by the Commission is contrary to law. As the Court of Appeals has stated, "we are compelled to require the Commission to articulate the policy and evidentiary factors underlying its resolution of ***all issues which are put in dispute by the parties***. in *L.S.Ayres*, 351 N.E.2d at 830 (emphasis added).

The IGCC-4S1 Final Order approving the Settlement must therefore be reversed and remanded. Because the Final Orders in IGCC-5, 6, 7, and 8 implemented the terms of this Settlement, they must be reversed and remanded, as well.

C. ISSUES RELATING TO COST RECOVERY

6. The Commission Found That Some of Duke's Costs Incurred Prior to September of 2010 Were Not "Prudent," Yet Approved Duke's Recovery of 100% of These Costs

The Commission's Final Orders in IGCC-4S1, 5, and 6 must also be reversed and remanded because the findings of fact and conclusions of law in these three orders are contradictory. Specifically, in IGCC-4S1, the Commission found that Duke failed to meet its burden of proving it prudently managed its contractors to mitigate costs prior to September 30, 2010. Yet, in IGCC-5 and 6, the Commission approved, for ratemaking purposes, 100% of Duke's costs incurred up to that date – explicitly finding *all* of those costs to have been "reasonable."

As noted in the Statement of Facts, above, in IGCC-4S1, all of the non-Duke parties argued that Duke failed "to properly manage its contractors led to the unexpected commodity quantity growth, and the increased costs of the IGCC Project." Therefore, these parties argued that Duke should not be able to shift the costs of the massive increase in material quantities – nearly doubling the size of the Plant by October 2009 – to ratepayers.

The IURC agreed with the non-Duke parties, explicitly, stating:

> Duke effectively asked this Commission to charge the ratepayers for the commodity driven cost overruns and then allow it to pursue litigation of the contact terms with it primary contractors, pledging to provide compensation to the ratepayers once such litigation was complete. However, Duke was unwilling to sufficiently define its litigation strategy or even estimate the likely financial outcome of any litigation. ***The evidence of record in this proceeding does not support that Duke fulfilled its responsibility to hold its primary contractors accountable through the terms of its contract with them or the management of such terms.***

(Appellants' App., 234.)

So, the Commission's finding of fact was this: Duke failed to hold its contractors accountable. (Id.) Based on this finding, the Commission reached the following conclusion of law: ***"Therefore, Duke has not met its burden of showing that the management of its contractors was prudent."*** (Id.)

Again, as noted in the Statement of Facts, above, this entire discussion involved events that occurred up through October of 2009. (Id. at 111.) So, these events all occurred prior to September of 2010. Despite finding Duke failed to meet its burden of proof, the Commission nonetheless approved 100% of Duke's costs up through September of 2010 as having been "reasonable."

For example, in its Final Order in IGCC-6, the Commission noted that Duke's construction costs for the Project up through September 30, 2010, was $1,879,872,000. (Appellants' App., 271.) The Commission approved inclusion of 100% of this amount for ratemaking purposes, stating, "The costs and rates presented in Duke Energy Indiana's IGCC Rider (Standard Contract Rider No. 61) . . . including the actual IGCC Project costs incurred through September 30, 2010, are hereby approved as reasonable." (Appellants' App., 278.)

Under I.C. § 8-1-8.5-6.5 and I.C. § 8-1-8.7-7, a utility is essentially guaranteed to earn a return on all construction costs that the Commission has approved as part of the periodic review process of a power plant's construction. In addition, the utility can "timely recover" certain financing and other costs *during* the construction, if the utility shows these costs were "reasonable and necessary." I.C. § 8-1-8.8-12. The Commission clearly stated that Duke had the burden of proof on these issues. (Appellants' App., 780, FN6.)

In IGCC-4S1, the Commission explicitly found Duke failed to meet its burden of proving the reasonableness of costs incurred prior to September 30, 2010, and that that ratepayers should

not be expected to bear these costs. Yet, in IGCC-5 and 6, the Commission approved these costs for inclusion in rates, anyway.

This flat contradiction between the Commission's Final Order in IGCC-4S1 and the Commission's Final Orders in IGCC-5 and IGCC-6 is never explained. Consequently, these Orders must be reversed and remanded.

7. The Commission Allowed Duke to Earn a Return on Customer-Contributed Capital by Accepting Duke's Calculation of AFUDC Without Accounting for Deferred Taxes

Under Indiana law, Duke is allowed to recover the costs of financing its construction of so-called "clean energy" projects in two different ways. First, Duke is permitted to "timely recover" some of its financing costs directly from ratepayers. *See*, I.C. § 8-1-8.8-12. This form of financing costs is known as return on "construction work in progress," or "CWIP." Second, Duke is allowed to capitalize other financing costs by rolling them into the total cost of the Project and including them in Duke's rate base under I.C. § 8-1-8.5-6.5. These financing costs are known as "allowance for funds used during construction," or "AFUDC."

In determining the amount of both types of financing costs, the Commission must settle on the proper "rate of return" a utility may earn. One issue presented to the Commission in this case was whether – in making these rate of return calculations – Duke should have factored in the interest-free money which Duke collects from ratepayers for taxes which Duke is then allowed to defer paying.

In its Final Order in IGCC-4S1, the Commission concluded that Duke *must* take this interest-free loan from customers into account in calculating the financing costs Duke is allowed to recover from customer, monthly, in the form of CWIP. (Final Order (IGCC-4S1), p. 120.)

However, the Commission allowed Duke to *ignore* the impact of this interest-free loan from customers in calculating Duke's rate of return for capitalized financing costs, AFUDC.

The Commission provided no justification for this disparate treatment of these two types of financing costs. Indeed, in its "Discussion and Findings," the Commission did not even address this issue which Joint Intervenors had raised several times – first in their testimony, then in their Exceptions to Duke's Proposed Order, and finally in their Surreply. (Appellants' App., 1215-1216, 1462-1469, and 1539-1542.)

Rather, the Commission approved Duke's AFUDC calculation without comment on the dispute. (Appellants' App., 241.)

Under Indiana law, this is a settled issue. Duke's deferred taxes are considered capital that has been contributed by customers, and Duke's allowed rate of return must be reduced accordingly.

Specifically, this issue was addressed conclusively in *Evansville v. SIGECO*, 167 Ind. App. 472. In that case, the Indiana Court of Appeals addressed the appropriate ratemaking treatment of deferred taxes.

First, the Court noted that a utility may only earn a return on investor-supplied capital, stating, "Our Public Service Commission Act reflects the traditional notion that the 'fair rate of return' which a regulated utility is permitted to earn must be based upon capital advanced by its investors." *Id*. at 509.

The Court went on to unambiguously state that deferred taxes are *not* investor-contributed capital, but *customer-contributed capital*. *Id.*at 510. ("The funds represented by the Petitioner's accumulated 'deferred tax' reserve account clearly constitute consumer contributed capital.") The Court then cited a multitude of cases from various state and federal courts, noting

that the "overwhelming majority" of jurisdictions prohibit a utility from earning a return on capital contributed in the form of deferred taxes. *Id*.

The Court concluded, "We hold that the method adopted by the Commission for the treatment of Petitioner's 'deferred tax' reserves results in a schedule of rates which are not 'reasonable and just' to the extent that the method permits the Petitioner to obtain a return on funds contributed by consumers." *Id.* at 512.

The legal analysis in the *Evansville* case amounts to a simple syllogism: A utility cannot earn a return on customer-contributed capital. Deferred taxes are customer-contributed capital. Therefore, a utility cannot earn a return on deferred taxes. *Id*.

The Commission was tasked with deciding what constitutes a "reasonable rate of return" for the Edwardsport Project – i.e., what rate of return would Duke need to offer in order to raise the capital to finance its construction. The Commission cannot exclude from this calculation the benefit Duke receives from "free money" from ratepayers in the form of collected – but deferred – taxes.

The Commission permitted Duke to ignore this source of capital in calculating its capitalized financing costs. As a matter of law, this was an error the Commission repeated in each of the dockets on appeal. Consequently, these orders must be reversed and remanded with instructions that deferred taxes must be included in Duke's capital structure for the purposes of calculating *both* CWIP *and* AFUDC.

8. Commission Approved Settlement Without Specific Finding that the Amount of Cost Recovery Was Proper

Finally, the IGCC-4S1 Final Order must be reversed because the Commission approved cost recovery of $2.595 billion of costs (plus additional capitalized financing costs accruing after

June of 2012) without making any specific findings of fact, supported by substantial evidence, that this was the correct amount of cost recovery for Duke to receive. Rather, the Commission simply accepted this figure, over Joint Intervenors' objection, because the other parties had agreed to it. The Commission provided no justification for awarding this amount other than that it "fell within the range" of the other parties' pre-settlement positions. (Appellants' App., 241.)

The legal standard for any IURC decision is well established: "[T]he statutory standard requires that the Commission's decision contain specific findings on *all the factual determinations material to its ultimate conclusions*." *L. S. Ayres*, 351 N.E.2d at 822 (emphasis added). In *LS Ayres*, the Court explained the need for specific findings on all of the basic facts underlying the Commission's ultimate conclusions, stating, "There is little assurance that an administrative agency has made a reasoned analysis if it need state only ultimate findings or conclusions." *Id.*

So, the Commission cannot simply state its ultimate factual conclusions; it must make specific findings on the underlying facts, as well. The Court detailed the distinction between an "ultimate" fact and the underlying factual determinations that must appear in a Commission order, as follows:

> Ultimate facts may be described generally as factual conclusions derived from the basic facts; *they are often expressed in terms of statutory criteria such as 'fair value' or 'used and useful.'* Since findings of ultimate fact represent inferences drawn by the agency, they are not susceptible to scrutiny for evidentiary support in the record, but the reasonableness of the agency's inference is a question appropriate for judicial determination-a 'question of law.'

Id. at 664-665 (emphasis added).

That is precisely the type of ultimate issue that was unexplained in the Commission's order here. Specifically, the "hard cap" represents the total amount of construction and financing costs Duke will be permitted to include in its rate base in its next rate case pursuant to I.C. § 8-1-

8.5-6.5. Clearly this is an "ultimate fact" that must be supported by basic factual findings, and not an issue which the Commission can defer to the judgment of the Settling Parties.

Indeed, other jurisdictions have found that a utility commission must make specific findings supporting a ratemaking calculation in a settlement. A state utility commission fails in its duty to make specific findings of fact if the commission accepts a ratemaking settlement term simply because it falls "within the range" of the parties pre-settlement positions. *See, State ex rel Utils. Comm'n v. Cooper*, 735 N.E.2d 541 (N.C. 2013).

In *Cooper*, the North Carolina Supreme Court considered a Utility Commission decision in a rate case by Duke Energy Carolinas, LLC. In that case – as here – an agreement was reached by fewer than all parties. Specifically, most – but not all – of the parties agreed to stipulate to calculate Duke's rates using a return on equity ("ROE") of 10.5% – a figure that fell within the range of the parties' testimonial positions of 9.25% and 11.4%.

The Court described the Commission's justification for adopting this specific figure, as follows:

> Ultimately, the Commission concluded that the 10.5% ROE set forth in the Stipulation is "just and reasonable to all parties in light of all the evidence presented." The Commission noted that, while an ROE of 10.5% had not specifically been recommended by any particular expert witness, it fell within the "range" between the Public Staffs initial position of 9.25% and Duke's requested ROE of 11.25%. The Commission further noted that the 10.5% ROE was within the range of ROEs recommended by the witnesses.

Id. at 544.

However, the North Carolina Supreme Court found that the stipulation by less than all parties to a figure "within the range" of testimony was insufficient factual justification. The Court stated the Commission was free to *consider* a non-unanimous stipulation as evidence, but the Commission "must then arrive at its '*own independent conclusion*' as to the fair value of the

applicants investment, the rate base, and what rate of return on the rate base will constitute a rate that is just and reasonable[.]" *Id.* at 546. (emphasis in original).

In this case, the IURC explained its basis for approving the specific dollar amount of $2.595 billion (as of June 30, 2012), as follows:

> The Settlement Agreement permits recovery of only approximately $94 million in direct construction costs above the previously approved amount of $2.225 billion, and requires Duke to shoulder at least $700 million in costs. This reduction in the amount of the requested approved cost estimate *falls within the proposed ranges that could be supported by the evidentiary record[.]*

(Final Order, p. 119 (emphasis added).)

The Commission's rationale here is strikingly similar to the Commission's rationale in *Cooper* – i.e., the ratemaking input fell "within the . . . ranges" proposed by the litigants. However, here – as in *Cooper* – there is no evidence in the record that the final number was accurate. No witness provided any calculation that produced $2.595 billion as Duke's prudent costs for the Edwardsport Plant, nor did the Commission.

Duke requested more. The other parties requested less. This number is in between. That was the Commission's sole justification.

This does not satisfy the requirement under Indiana law "that the Commission's decision contain specific findings on all the factual determinations material to its ultimate conclusions." *L. S. Ayres*, 351 N.E.2d at 822. Because the IURC's sole justification for adopting $2.595 billion (as of June 30, 2012) as Duke's investment in the Edwardsport Plant was that this figure fell "within the proposed ranges" of possibilities, the Commission's IGCC-4S1 Final Order must be reversed and remanded for specific findings.

VI. CONCLUSION

In this Brief, Joint Intervenors have asserted numerous bases for reversal of the Commission's Final Orders in IGCC-4, 4S1, 5, 6, 7, and 8. This was necessary to give this Court a thorough overview of the primary defects in these Orders.

However, the most egregious problems with the Edwardsport series of cases are clearly issues #1 and #2 – both of which relate to the shockingly free flow of information about Edwardsport between Duke and Duke's regulators, without any participation by the other parties to the Edwardsport cases.

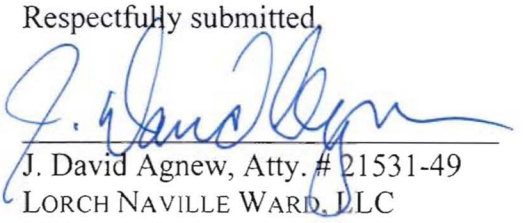
Throughout the course of IGCC-4S1, the Commission refused to entertain the possibility that Duke's hiring of Scott Storms or the frequent off-the-record communications between Duke and Chairman Hardy about Edwardsport might have had any impact on prior Edwardsport rulings. After studiously ignoring these issues, the Commission approved a Settlement resolving all issues relating to Edwardsport, apparently in the hope of putting the matter to rest without examination. This was improper.

Similarly, the Commission has stubbornly refused to allow any party to know what information the Commissioners obtained from monthly reports and other communications from the engineering firm of Black & Veatch about the progress of construction at the Plant. Emails between IURC staff, Commissioners, Black & Veatch, and Duke personnel reveal a casual exchange of information about the plant outside of the regulatory review process. However, the non-Duke parties have been firmly excluded from this exchange. This also was improper.

For these reasons, the Commission's Orders in IGCC-4, 4S1, 5, 6, 7, and 8 must be vacated. The cases should be remanded with instruction (1) for the filing of the Black & Veatch reports as evidence, and (2) for the appointment of a specially appointed adjudicator to determine

whether any of the Commission's orders should be reconsidered, beginning with IURC Cause No. 43114.

Respectfully submitted,



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