

IN THE INDIANA COURT OF APPEALS
CASE 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,
v.	)	and 43114 IGCC-8
)	
	)	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

BRIEF OF PROPOSED *AMICI CURIAE*
IN SUPPORT OF APPELLANTS

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INTRODUCTION

This appeal raises the question of whether the Indiana Utility Regulatory Commission (“IURC” or “Commission”) may amend Certificates of Public Convenience and Necessity and Clean Coal Technology Certificates (“Certificates”) previously issued for new coal-fired electric generation facilities without evaluating fully the risks and costs to ratepayers of future carbon regulation and the associated requirements to mitigate carbon dioxide (“CO₂”) emissions. Citizens Action Coalition, Save the Valley, Sierra Club, and Valley Watch (collectively, “Appellants”) have appealed a decision by the Commission to approve a substantial increase in the amount that Duke Energy Indiana (“Duke”)—an investor-owned, Fortune 250 electric utility company—can recover from its ratepayers for the construction of a new coal-gasification power plant in Edwardsport, Indiana. Without addressing the issue expressly raised below by Appellants of whether Duke should be required to develop a plan to mitigate the risk to ratepayers from the four million tons of carbon pollution that the plant will generate every year, the IURC concluded that completion of the project is in the public interest and that its extraordinarily high costs are just and reasonable. Given the IURC’s failure to make any findings of fact or reach any conclusions of law on the issue of carbon pollution mitigation expressly raised by Appellants, proposed *amici curiae* Citizens Coal Council, Earth Charter Indiana, Healthy Dubois County, Inc., the Hoosier Environmental Council, Hoosier Interfaith Power & Light, Indiana Distributed Energy Alliance, and the Indiana State Conference of the National Association for the Advancement of Colored People (“Proposed *Amici*”) urge this Court to vacate the IURC’s December 27, 2012 Order (the “Order”) and remand the proceedings to the IURC with instructions to make findings and reach conclusions which require Duke to quantify carbon regulatory risk and to develop a plan to mitigate it.

INTERESTS OF PROPOSED *AMICI CURIAE*

Proposed *Amici* are state, local, and national non-profit organizations, which collectively have thousands of members across Indiana who support their advocacy to protect the health, environment, and economic well-being of Indiana communities from threats such as human-induced climate change. Proposed *Amici* file this brief in support of Appellants because an affirmance of the Order could frustrate their efforts to reduce climate pollution and promote a cleaner energy future.¹ In this brief, Proposed *Amici* explain why any Certificates issued or re-issued by the IURC to a utility that invests in fossil-fueled electric generation must require mitigation of the financial risks to ratepayers from the emission of greenhouse gases. The IURC's failure to make any findings of fact or conclusions of law on the issue squarely raised by Appellants of whether Duke should have mitigated such risks was unlawful.

BACKGROUND

I. SCIENTIFIC CONSENSUS AROUND CLIMATE CHANGE AND ITS IMPACTS ON PUBLIC HEALTH AND THE ENVIRONMENT

The scientific evidence is overwhelming that global climate change threatens the health and well-being of people in Indiana, across the U.S., and around the world. The international scientific consensus is that this change is a consequence of anthropogenic greenhouse gas

¹ More detailed statements of the interests of Proposed *Amici* are included in the Motion for Leave to Appeal as *Amici Curiae* and to File a Brief in Support of Appellants, submitted herewith.

emissions.² While debate remains as to the nature and timing of future climate disruptions and the magnitude of future adverse effects, an overwhelming majority of mainstream scientists agree that a substantial reduction in CO₂ and other greenhouse gas emissions is necessary if we are to avoid the most devastating of these impacts. The Intergovernmental Panel on Climate Change (“IPCC”), the scientific body established by the United Nations Environment Programme and World Meteorological Organization to assess the causes and impacts of climate change, predicts that to avoid the worst impacts, U.S. greenhouse gas emissions must be reduced to at least 80 percent below 2000 levels by mid-century³—a goal that was adopted in 2009 by a group of electric utilities, including Duke.⁴

The risks to public health and the environment from climate change are substantial and far-reaching. Already, the consequences of global warming and climate change are being felt here in Indiana, elsewhere in the U.S., and abroad—often, with a disproportionately high impact on low income communities and communities of color. In Indiana, average annual temperatures have increased over the last several decades, heat waves are becoming more frequent and severe,

² See Nat’l Research Council, *America’s Climate Choices* (2011), *available at* http://www.nap.edu/catalog.php?record_id=12781; U.S. Global Change Research Program, *Global Climate Change Impacts in the United States* (2009), *available at* <http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf> [hereinafter “2009 USGCRP Climate Report”]; Intergovernmental Panel on Climate Change, *Fourth Assessment Report: Climate Change 2007* (2007), *available at* http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm [hereinafter “2007 IPCC Fourth Assessment Report”]; *see also* U.S. EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,510 (Dec. 15, 2009) (relying on the assessments of the NRC, the USGCRP, and the IPCC as primary scientific and technical basis for the endangerment decision).

³ See 2007 IPCC Fourth Assessment Report, *Contribution of Working Group III to the Fourth Assessment Report, Summary for Policymakers* (2007), *available at* <http://www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4-wg3-chapter13.pdf>.

⁴ Edison Elec. Inst., *Press Release: EEI Board Unveils Expanded Framework to Help Guide Climate Legislation, Minimize Compliance Cost to Customers* (Jan. 14, 2009).

winters are getting shorter, and heavy rainstorms are becoming more common.⁵ The U.S. Environmental Protection Agency (“EPA”) anticipates that these trends are likely to continue and projects that average summer temperatures in the Midwest will increase by 3°F over the next few decades and could increase by over 10°F by the end of this century.⁶

In Indiana, these changes in climate are projected to result in further increased occurrence of extreme hot temperature events, in frequency and intensity of storms and flooding, in the risk of multi-year droughts, and in threats to various animal and hardwood species.⁷ Hot temperatures that now occur in Indiana for two and a half weeks during summer months are likely to occur for seven to ten weeks each year.⁸

Rising temperatures mean that Indiana’s prized Dunes National Lakeshore, which drew more than 1.8 million visitors in 2011 and over \$58 million in visitor spending,⁹ faces disruption

⁵ See generally Nat’l Climate Assessment & Dev. Advisory Comm., Draft Climate Report (2013), available at <http://ncadac.globalchange.gov/>; Nat’l Oceanic and Atmospheric Admin., Adapting to Climate Change: A Planning Guide for State Coastal Managers – A Great Lakes Supplement (2011), available at <http://coastalmanagement.noaa.gov/climate/docs/adaptationgreatlakes.pdf>; 2009 USGCRP Climate Report; Union of Concerned Scientists, Confronting Climate Change in the Midwest: Indiana (July 2009), available at http://www.ucsusa.org/assets/documents/global_warming/climate-change-indiana.pdf [hereinafter “UCS Indiana Report”]; U.S. EPA, Climate Change: Midwest Impacts & Adaptation, <http://www.epa.gov/climatechange/impacts-adaptation/midwest.html#impacts> [hereinafter “EPA Midwest Impacts”] (last visited Sept. 4, 2013).

⁶ EPA Midwest Impacts.

⁷ Purdue Climate Change Research Center, Impacts of Climate Change for the State of Indiana (Feb. 2008), available at <http://www.purdue.edu/discoverypark/climate/assets/pdfs/ClimateImpactsIndiana.pdf> [hereinafter “Purdue Indiana Climate Study”].

⁸ *Id.* at 3.

⁹ Nat’l Park Serv., Economic Benefits to Local Communities from National Park Visitation 19 (2011), available at <http://www.nature.nps.gov/socialscience/docs/NPSSystemEstimates2011.pdf>.

of its delicate ecosystem.¹⁰ Average temperatures near the Dunes during the last decade were 1.6°F hotter than average temperatures for the twentieth century.¹¹ In addition to higher air temperatures, the water temperature of Lake Michigan is rising and winter ice cover is decreasing.¹² Scientists predict that the Lake may have some winters with no ice cover in as little as ten years.¹³ Less ice means more waves and stronger winter storms, and, therefore, accelerated erosion of the vulnerable lakeshore dunes.¹⁴

As temperatures continue to rise in Indiana and across the Midwest, communities will face increasing health risks such as more frequent and severe heat waves, droughts, hurricanes, and floods.¹⁵ In 2008, flooding across the Midwest caused 24 deaths and \$8 billion in agricultural losses.¹⁶ During the same year, 82 of the 92 counties in Indiana were declared Presidential disaster areas and 17,000 Indiana families suffered damage to their homes on account of winter weather, severe storms, and flooding.¹⁷ These communities also will face

¹⁰ The Rocky Mountain Climate Org., Great Lakes National Parks in Peril: The Threats of Climate Disruption 2 (July 2011), *available at* <http://rockymountainclimate.org/images/GreatLakesParksInPeril.pdf>.

¹¹ *Id.* at ii.

¹² *Id.* at 15–16.

¹³ *Id.* at 16.

¹⁴ *Id.*

¹⁵ Purdue Indiana Climate Study at 2–3; 2009 USGCRP Climate Report; EPA Midwest Impacts; Union of Concerned Scientists, Heat in the Heartland: 60 Years of Warming in the Midwest (July 2012), *available at* http://www.ucsusa.org/assets/documents/global_warming/Heat-in-the-Heartland-Full-Report.pdf (hereinafter “UCS Heat in the Heartland”).

¹⁶ The White House, The Threat of Climate Carbon Pollution: Indiana, *available at* <http://www.whitehouse.gov/sites/default/files/docs/state-reports/climate/Indiana%20Fact%20Sheet.pdf>.

¹⁷ *Id.*

higher levels of ozone pollution and rising incidents of pest and vector-borne disease¹⁸ and will suffer water quality degradation and diminished agricultural and livestock productivity.¹⁹ Last summer, drought conditions caused Indiana's corn and alfalfa production to fall 29 percent and 32 percent, respectively, from 2011 yields.²⁰

The collective societal cost of such harms has been quantified by a working group of federal agencies and assigned a dollar value.²¹ These "social cost of carbon" estimates allow federal agencies and others to incorporate the benefits of greenhouse gas reduction in their cost-benefit analyses for regulatory actions, thus enabling a more complete understanding of their consequences. To this end, the working group quantified agricultural productivity loss, adverse human health effects, property damages from sea level rise and flooding, and depletion of ecosystem services expected to be caused by climate change.²² Implicit in this undertaking is a recognition of the need to make *some* calculation of the marginal benefit of reducing CO₂ emissions, despite the limitations inherent in evaluating benefits across a multi-decade time horizon and the uncertainty in extrapolating damages from temperature rises. Based on the

¹⁸ Purdue Indiana Climate Study at 22–23; EPA Midwest Impacts; UCS Heat in the Heartland at 23–24.

¹⁹ UCS Indiana Report; Purdue Indiana Climate Study at 11–14.

²⁰ The White House, *The Threat of Climate Carbon Pollution: Indiana*, available at <http://www.whitehouse.gov/sites/default/files/docs/state-reports/climate/Indiana%20Fact%20Sheet.pdf>.

²¹ Interagency Working Grp. on Social Cost of Carbon, U.S. Gov't, Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (February 2010), available at <http://www.epa.gov/otaq/climate/regulations/scc-tsd.pdf> [hereinafter "2010 SCC Support Document"]; Interagency Working Grp. on Social Cost of Carbon, U.S. Gov't, Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (May 2013), available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/social_cost_of_carbon_for_ria_2013_update.pdf [hereinafter "2013 SCC Update"]; see also U.S. EPA, *The Social Cost of Carbon*, <http://www.epa.gov/climatechange/EPAactivities/economics/scc.html> (last visited Sept. 4, 2013).

²² 2010 SCC Support Document at 2.

working group's recent update of its social cost of carbon estimates—which range from \$11 per ton to \$221 per ton (in 2007 dollars) depending on discount rate and year of emissions avoidance²³—avoidance of the four million tons of CO₂ emissions that are projected to be emitted by the Edwardsport plant each year would result in between \$1.9 and \$8.9 billion²⁴ in marginal benefits over the next 30 years.

II. REGULATION OF CARBON DIOXIDE EMISSIONS

On June 25, 2013, President Obama announced a comprehensive plan to cut the carbon pollution that causes climate change and endangers public health.²⁵ Noting that the power sector produces nearly 40 percent of this pollution, the President directed the EPA to revise its carbon pollution standards for new power plants by September 20, 2013; to issue proposed standards, regulations, or guidelines addressing carbon pollution from existing power plants by June 1, 2014; and to finalize those limits within a year.²⁶

The President's announcement only confirmed and publicized a regulatory process that has been underway for years. In 2007, the Supreme Court held that CO₂ and other greenhouse gases are covered by the Clean Air Act's broad definition of "air pollutant" and that the EPA must determine, through a science-based inquiry, whether greenhouse gases endanger public health. *Massachusetts v. Envtl. Prot. Agency*, 127 S. Ct. 1438, 1462–63 (2007). After analyzing

²³ 2013 SCC Update, Table A1.

²⁴ *See id.* (estimates are presented in 2007 dollars and are based on discount rates of 5% and 3% between the years 2014 and 2043).

²⁵ The White House, Fact Sheet: President Obama's Climate Action Plan (June 25, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/06/25/fact-sheet-president-obama-s-climate-action-plan>; Executive Office of the President, The President's Climate Action Plan (June 2013), available at <http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

²⁶ *Id.*; The White House, Presidential Memorandum – Power Sector Carbon Pollution Standards (June 25, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards>.

the available climate science, the EPA issued a formal finding that current and projected emissions of six greenhouse gases, including CO₂, threaten the public health and welfare of current and future generations.²⁷ This finding has since been upheld by the U.S. Court of Appeals for the District of Columbia Circuit. *See Coal. for Responsible Regulation v. Env'tl. Prot. Agency*, 684 F.3d 102, 120–22 (D.C. Cir. 2012). That court also confirmed that the Clean Air Act requires the EPA to address greenhouse gas emissions under its stationary source permitting programs. *Id.* at 134–36. As supported by these decisions, Section 111 of the Clean Air Act requires the EPA to issue performance standards for air pollutants from both new and existing electric generating units. *See* 42 U.S.C. § 7411(a)(1). While the precise details of these rules are still uncertain, it is clear that utilities will need to meet new regulatory requirements (and incur their associated costs) in the near future.

Duke itself acknowledges that carbon regulation is a near certainty.²⁸ Nevertheless, Duke's resource planning decisions in Indiana rely heavily on building new and retrofitting existing coal plants to the exclusion of cleaner alternatives.²⁹ Seventy percent of Duke's current electric generating capacity in the state is coal-fired, and ninety-seven percent of Duke's 2011 total electricity production was generated by burning coal.³⁰ As the fifth highest CO₂ emitter

²⁷ U.S. EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

²⁸ Test. of James E. Rogers, Cause No. 43114, at 9 (Oct. 10, 2006) [hereinafter "Rogers Direct"] ("I believe CO₂ regulation is highly likely.").

²⁹ *In re Verified Petition of Duke Energy Indiana, Inc.*, Cause No. 44217, at 30–39 (IURC Apr. 3, 2013) (approving Duke's plan to charge its ratepayers hundreds of millions of dollars to retrofit decades-old coal-fired generating units).

³⁰ Test. of Douglas F Esamann, Cause No. 44217, at 7 (June 28, 2012).

among all U.S. power producers,³¹ Duke is in no position to ignore the fact that carbon regulation is imminent.

III. PROCEEDINGS BELOW

In 2006, Duke sought approval from the IURC to build and operate an integrated gasification combined cycle (“IGCC”) electric power plant in Edwardsport, Indiana.³² In support of its selection, Duke pointed to the potential cost savings for ratepayers that carbon capture technology could provide in the event of carbon regulation³³ and to the location of the project site “in a region that appears to be promising for geological carbon sequestration.”³⁴ Appellants intervened in the IURC proceedings and filed testimony alleging a number of deficiencies with Duke’s case-in-chief.³⁵ Nevertheless, the IURC granted Duke’s requests, issuing the necessary Certificates for the project, approving Duke’s \$1.985 billion cost estimate, allowing for recovery of construction and operating costs from ratepayers, but conditioning its approval on Duke’s

³¹ Natural Res. Def. Council, *Benchmarking Air Emissions of the 100 Largest Electric Power Producers in the United States 10* (2013), available at <http://www.nrdc.org/air/pollution/benchmarking/files/benchmarking-2013.pdf>.

³² *In re Joint Petition and Application of Duke Energy Indiana Energy, Inc.*, Cause No. 43114, at 2 (I.U.R.C. Nov. 20, 2007).

³³ *Id.* at 43–44.

³⁴ Direct Test. of James L. Turner, Cause No. 43114 IGCC 4S, at 10 (Apr. 16, 2010).

³⁵ *In re Joint Petition and Application of Duke Energy Indiana Energy, Inc.*, Cause No. 43114, at 3, 27–30, 33–34, 44 (I.U.R.C. Nov. 20, 2007).

studying the feasibility of carbon capture and sequestration (“CCS”) and on its building of infrastructure to support carbon capture.³⁶

In 2008, following substantial construction cost overruns, Duke requested a \$365 million increase in the cost estimate of the project.³⁷ The IURC granted this request and approved recovery from ratepayers of \$2.35 billion in construction costs.³⁸ Less than a year later, Duke requested yet another increase in its project cost estimate—this time, an additional \$530 million, putting the total cost of the Edwardsport project at \$2.88 billion.³⁹ This rate increase request resulted in the IURC Order now being appealed.⁴⁰ Again, the parties presented evidence on the comparative merits of Duke’s request.⁴¹

Specifically, Citizens Action Coalition Program Director Kerwin Olson’s testimony criticized Duke’s failure to include an estimate of CCS costs and pointed to the fact that data Duke gathered in connection with drilling a wastewater injection well revealed that geological conditions at and around Edwardsport were not conducive to carbon sequestration.⁴² Appellants’

³⁶ *In re Joint Petition and Application of Duke Energy Indiana Energy Inc.*, Cause No. 43114, at 46–47, 62 (I.U.R.C. Nov. 20, 2007). In March 2009, Duke filed a petition with the Commission seeking recovery of the costs of carbon sequestration for Edwardsport, but, in light of testimony by Duke that “the results of geologic data gathered from the drilling of a treated wastewater injection well at the Edwardsport IGCC Project site [. . .] indicated that the results were less than optimal due to lower than anticipated porosity and permeability,” the Commission concluded that “the evidence does not sufficiently support a finding that the measurable benefits of the carbon sequestration study merit the material cost to ratepayers at this time.” *In re Verified Petition of Duke Energy Indiana, Inc.*, Cause No. 43653, at 7, 20 (I.U.R.C. Jan. 23, 2013).

³⁷ *In re Verified Petition of Duke Energy Indiana, Inc.*, Cause No. 43114 IGCC 1, at 1 (I.U.R.C. Jan. 7, 2009).

³⁸ *Id.* at 29.

³⁹ *In re Verified Petition of Duke Energy Indiana, Inc.*, Cause No. 43114 IGCC 4S1, at 4, 8 (I.U.R.C. Dec. 27, 2012).

⁴⁰ *Id.*

⁴¹ *Id.* at 9–92.

⁴² Direct Test. of Kerwin L. Olson, Cause No. 43114 IGCC 4S, at 11–13 (July 30, 2010).

witness David Schlissel also criticized Duke's failure to include assumptions of CCS costs in its modeling analyses as well as its use of a single set of low projections for the costs of emitting CO₂ under a future regulatory scheme.⁴³ Given the uncertainties associated with the timing, stringency, and design of future regulation of greenhouse gases, Mr. Schlissel testified that prudence requires the examination of a range of potential CO₂ prices reflecting the economic risks that carbon regulation poses for Duke and its ratepayers.⁴⁴ If carbon regulation results in costs on the higher ends of CO₂ price forecasts, Duke ratepayers could end up footing the bill for more than \$3.5 billion in compliance costs over the next 20 years—in addition to the more than \$3 billion already approved by the IURC for plant construction and operation.⁴⁵

Pointing to the foreseeable business and financial risks posed by anticipated federal regulation of CO₂ emissions and to the fact that carbon storage at the Edwardsport site had been deemed infeasible, Sierra Club witness Nachy Kanfer called for a condition on any reissued Certificates for Edwardsport requiring mitigation of 1.6 million tons of CO₂ annually—the difference in total emissions between projections for Edwardsport and the alternate resource plan recommended by Appellants—through retirements of other Duke coal generating units, investment in renewable energy generation, and/or adoption of energy efficiency measures.⁴⁶

In its December 2012 Order, the Commission did not rule on whether Duke must mitigate any of the four million tons per year that the Edwardsport IGCC facility is projected to emit in

⁴³ Direct Test. of David A. Schlissel, Cause No. 43114 IGCC 4S, at 11–23 (July 30, 2010) [hereinafter “Schlissel Direct”].

⁴⁴ Schlissel Direct at 15.

⁴⁵ *Id.* at 17–18, n.28 (discussing 2008 Synapse CO₂ price forecasts).

⁴⁶ Test. of Nachy Kanfer, Cause No. 43114 IGCC 4S1, at 4–8 (June 29, 2012).

order to insulate Duke's ratepayers from financial risk.⁴⁷ Nevertheless, it concluded that completion of the project is in the public interest and approved a settlement agreement between Duke, its industrial customers, and the state consumer counselor, allowing for recovery of \$2.595 billion in construction costs and hundreds of millions more in additional financing charges from ratepayers.⁴⁸

SUMMARY OF ARGUMENT

Indiana law requires that the IURC make findings of fact and conclusions of law on all issues in dispute and also that utilities follow principles of prudence and least-cost planning in their energy resource planning decisions, including mitigation of regulatory risk where necessary to protect ratepayers. During the proceedings below, Appellants called for an examination of a range of potential CO₂ prices reflecting the economic risks that future carbon regulations pose to Duke's ratepayers and, given the infeasibility of CCS at the Edwardsport site, for the conditioning of the Certificates for Edwardsport on a carbon risk mitigation requirement. Duke disputed the need to consider the potential for higher CO₂ prices and did not commit to any action to mitigate its carbon regulatory risk. Despite the parties' disputes over carbon risk mitigation, the IURC authorized a rate recovery increase for the Edwardsport project without making any findings of fact or conclusions of law regarding those issues. Accordingly, the IURC's Order was made in error and should be vacated.

⁴⁷ *In re Verified Petition of Duke Energy Indiana, Inc.*, Cause No. 43114 IGCC 4S1 (I.U.R.C. Dec. 27, 2012).

⁴⁸ *Id.* at 121.

ARGUMENT

I. THE COMMISSION MUST DETERMINE WHETHER DUKE'S CONTINUED INVESTMENT IN THE EDWARDSPORT PROJECT IN THE ABSENCE OF CO₂ MITIGATION WOULD BE IMPRUDENT.

A. Investment in Power Generation by Electric Utilities Must Be Prudent and Minimize Costs and Risks to Ratepayers.

As natural monopolies, electric utilities enjoy exclusive access to customers in a defined geographic area to whom they owe a duty to provide service. In exchange, utilities can recover their capital investments in generation and transmission infrastructure from their customers through electricity rate charges. Given the inherent lack of competition, regulation of ratemaking ensures that a utility does not demand unfair compensation from its customers for the service it provides. When establishing rates, the IURC must review utilities' investment decisions for prudence and establish rates at levels that are just and reasonable. *See generally Indiana Gas Co., Inc. v. Office of Util. Consumer Counselor*, 575 N.E.2d 1044, 1046 (Ind. Ct. App. 1991) ("As a quid pro quo for being granted a monopoly in a geographical area for the provision of a particular good or service, the utility is subject to regulation by the state to ensure that it is prudently investing its revenues in order to provide the best and most efficient service possible to the consumer."); *see also* Ind. Code § 8-1-2-4 (2013).

In Indiana, when the IURC approves rate recovery for the costs of a new power plant, ratepayers become the involuntary guarantors of the utility's investment decision. Absent Commission oversight, utilities could simply shift all investment risks to ratepayers and would, therefore, lack the incentives to select less risky investments. By reviewing proposals under a prudent investment standard, the Commission can ensure that initial decisions to build new power plants are based on a reasonable assessment of projected energy needs, available alternatives and total costs, and that ratepayers are not made to bear unreasonable risks. *See*

generally *Ind. Gas Co., Inc. v. Office of Util. Consumer Counselor*, 575 N.E.2d at 1046; *N. Ind. Pub. Serv. Co. v. Citizens Action Coal. of Ind., Inc.*, 548 N.E.2d 153, 159–60 (Ind. 1989).

The Commission has interpreted prudence to mean “the degree of care required by the circumstances under which the action or conduct is to be exercised.”⁴⁹ In the context of substantial capital investment in coal-fired power generation, a utility must employ least-cost planning principles when selecting among available alternatives.⁵⁰ The Commission has defined least-cost planning as a “planning approach which will find the set of options most likely to provide utility services at the lowest cost once appropriate service and reliability levels are determined,” consistent with the utility’s “obligation to provide reliable service . . . [and] its exercise of reasonable judgment as to how best to meet its obligation to serve.”⁵¹

Appellants presented the Commission with evidence that Duke had failed to evaluate the true costs of the Edwardsport project—which, given the unlikelihood that carbon sequestration can be achieved at the Edwardsport site, should have included other measures to mitigate carbon risk—and to select the lowest-cost option to meet customer needs. Given these failures, Duke’s decision to invest over three billion dollars of ratepayer money in a project without ensuring that the future costs of carbon regulation would be mitigated was imprudent.

⁴⁹ *In re Verified Petition of Duke Energy Indiana, Inc.*, Cause No. 43114 IGCC 4S1, at 110–11 (I.U.R.C. Dec. 27, 2012).

⁵⁰ *In re Duke Energy Indiana Inc.*, Cause No. 43114, at 43 (I.U.R.C. Nov. 20, 2007) (indicating that “least-cost planning is an essential component of our Certificate of Need law”) (quoting *In re Petition of PSI Energy, Inc.*, Cause No. 42145, at 4 (I.U.R.C. Dec. 19, 2002); *In re Petition of S. Ind. Gas & Electric Co.*, Cause No. 38738, at 5 (I.U.R.C. Oct. 25, 1989)).

⁵¹ *In re Duke Energy Indiana Inc.*, Cause No. 43114, at 43 (I.U.R.C. Nov. 20, 2007).

B. Electric Utilities Must Consider the Risks Associated with Future Carbon Regulation.

As discussed above, climate change presents enormous risks to the health, environment, and economic well-being of communities in Indiana and beyond. Recognizing the risks of carbon pollution as an endangerment to human health and welfare and following the requirements of the Clean Air Act, EPA has begun to regulate greenhouse gas emissions that cause climate change.⁵² While the Agency has not yet imposed limits on the emission of CO₂ from existing power plants, President Obama has directed the EPA to issue final standards for these sources by June 2015.⁵³

Although we do not yet know the exact form the regulations will take, any meaningful carbon regulatory scheme will require utilities to incur additional costs if they wish to continue generating electricity from coal-fired power plants. Indeed, Duke President and CEO James Rogers acknowledged that “[n]ew CO₂ regulations could significantly increase our cost of generating electricity over time and ultimately result in higher prices for our customers.”⁵⁴ According to the range of CO₂ prices suggested by Appellants’ expert, David Schlissel, these costs could total more than \$3.5 billion over the next 20 years.⁵⁵ This risk of increased regulatory costs is no different in kind from other risks that utilities routinely analyze before

⁵² See, e.g., U.S. EPA, Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010); U.S. EPA, Heavy-Duty Engine and Vehicle, and Nonroad Technical Amendments; Final Rule, 78 Fed. Reg. 36,370 (June 17, 2013); U.S. EPA, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010); U.S. EPA, Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22,392 (Apr. 13, 2012).

⁵³ The White House, Presidential Memorandum – Power Sector Carbon Pollution Standards (June 25, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards>.

⁵⁴ Rogers Direct at 18.

⁵⁵ See Schlissel Direct at 17–18, n.28 (discussing 2008 Synapse CO₂ price forecasts).

making investment decisions. Accordingly, a prudent utility must factor into its resource planning process and ultimate decision-making the financial risks associated with future regulatory actions and the need for mitigation of those risks.⁵⁶

Investment in less carbon-intensive, cost-effective options to meet consumer demand, such as energy efficiency and other demand side management, renewable resources, and natural gas combined cycle power generation, must be considered alongside any proposed investment in coal-fired power.⁵⁷ If a utility does decide to invest in coal-fired electricity generation, it cannot simply shift to its ratepayers the risks associated with future carbon regulation. *Cf. Citizens Action Coal. of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 485 N.E.2d 610, 615 (Ind. 1985) (ratepayers are not “required to act in aid and support of the utility as an insurer of the investor’s risk”). Instead, it must include reasonable estimates of the costs complying with future emissions limits in its calculation of total project costs and must adopt measures to mitigate those costs.

As regulation of CO₂ emissions from existing sources gets closer, prudent electric utilities are recognizing the need to protect their customers and shareholders from the great financial risk associated with continued investment in electric generation projects that will emit greenhouse gases for the next 30 to 40 years and have begun factoring the cost of future carbon regulation into their evaluation and selection of resource options. Utilities with electric generation portfolios that are more carbon-intensive face greater risk of increased costs than do

⁵⁶ In addition to the financial risks associated with the costs of complying with future climate change regulation, utilities face those risks associated with the physical impacts of climate change—higher temperatures, more severe weather events, etc.—on electricity consumption and on generation and transmission infrastructure.

⁵⁷ *In re Joint Petition and Application of Duke Energy Indiana Energy, Inc.*, Cause No. 43114, at 43 (I.U.R.C. Nov. 20, 2007) (recognizing that “least-cost planning is an essential component of [the Commission’s] Certificate of Need law” and defining “least-cost planning” as a “planning approach which will find the set of options most likely to provide utility services at the lowest cost once appropriate service and reliability levels are determined”).

utilities with more diversified portfolios. *See, e.g., Pub. Serv. Comm'n of State of N.Y. v. F.E.R.C.*, 813 F.2d 448, 462 (D.C. Cir. 1987) (diversification of invested capital is reasonably presumed to benefit ratepayers by reducing utility's operating and financial risks); *State, ex rel. Pittman v. Miss. Pub. Serv. Comm'n*, 538 So. 2d 387, 397 (Miss. 1989) (same). The inclusion of low-carbon supply- and demand-side resources in a generation portfolio represents a hedge against the financial risks associated with future carbon regulation.

Utilities across the country have recognized the advantage of diversified resource portfolios, and those that can meet new demand with less carbon-intensive solutions face lower risk with respect to carbon regulation. For example, Idaho Power obtains energy from a diverse set of generation resources, including hydroelectric, coal, wind, natural gas, geothermal, biomass, and waste combustion, and relies on coal for less than a third of its generation.⁵⁸ Likewise, Xcel Energy—a Minnesota-based utility with more than 3.3 million electric customers in seven states—gets 46 percent of its power supply from coal, but generates more than half of its electricity supply from natural gas, nuclear, wind, hydro, solar, and biomass.⁵⁹ PacifiCorp—a Western utility that serves approximately 1.8 million customers in six states—meets customer need through a diverse resource mix of coal, natural gas, hydroelectric, wind, solar, geothermal, and demand side management, with 52 percent of generation coming from coal.⁶⁰ During its resource planning process, PacifiCorp explicitly considered resource diversity and CO₂

⁵⁸ Idaho Power, Resource Portfolio Fuel Mix – 2012, http://www.idahopower.com/AboutUs/EnergySources/FuelMix/resourcePortfolio_2012.cfm (last visited Sept. 4, 2013).

⁵⁹ Xcel Energy, Power Generation: Power Supply (2012), http://www.xcelenergy.com/xcelen/About_Us/Our_Company/Power_Generation/Power_Generation_Main (last visited Sept. 4, 2013).

⁶⁰ PacifiCorp 2013 IRP 81 (April 2013), *available at* http://www.pacificorp.com/content/dam/pacificorp/doc/Energy_Sources/Integrated_Resource_Plan/2013IRP/PacifiCorp-2013IRP_Vol1-Main_4-30-13.pdf.

emissions when comparing resource portfolios.⁶¹ PG&E in California meets consumer demand with close to equal percentages of natural gas, nuclear, hydroelectric, and renewables.⁶² Such diversification insulates utilities and their ratepayers from the risks associated with future carbon regulation and underscores that Duke's further investment in coal-fired power against the backdrop of an already coal-dependent resource portfolio is not prudent.

States that require electric utilities to include carbon emissions costs in their resource planning analyses or to otherwise evaluate risks associated with future carbon regulation represent the growing consensus that utilities must address climate change risk now rather than later. In 2008, the Public Service Commission of Wisconsin denied an application for a certificate of public convenience and necessity for a new coal-fired power plant where the applicant utility failed to consider the costs of compliance with future carbon regulation.⁶³ A recent order by the Arkansas Public Service Commission called for consideration of the cost of compliance with future carbon regulation.⁶⁴ In Minnesota, utilities are required by statute to factor into all electricity generation resource acquisition proceedings "an estimate of the likely range of costs of future carbon dioxide regulation on electricity generation" that is determined by the Minnesota Public Utilities Commission. Minn. Stat. Ann. § 216H.06.

⁶¹ *Id.* at 196.

⁶² PG&E, PG&E's 2011 Electric Power Mix, http://www.pgecorp.com/corp_responsibility/reports/2011/index.html/en03_clean_energy.jsp (last visited July 1, 2013).

⁶³ *Application of Wisconsin Power and Light Company*, Docket No. 6680-CE-170, at 8–10 (Wis. Pub. Serv. Comm'n Dec. 12, 2008) ("This large increase in greenhouse gas emissions takes this utility and this state in the wrong direction at a time when carbon constraints are imminent.").

⁶⁴ *In the Matter of the Continuation, Expansion, and Enhancement of Public Utility Energy Efficiency Programs in Arkansas*, Docket No. 13-002-U, at 19 (Ark. Pub. Serv. Comm'n Jan. 4, 2013) ("The Commission proposes that, while reasonable minds can differ regarding the exact magnitude of the cost of compliance with greenhouse gas regulation at existing power plants, it is prudent to forecast that the effect of greenhouse gas regulation on energy costs, and thus the associated economic risk, is not zero.").

In 2003, the California Public Utilities Commission (“PUC”) adopted an energy resource “loading order” that requires investor-owned utilities to account for the financial risk associated with CO₂ emissions when making long-term power plant investments and in developing long-term resource plans.⁶⁵ Recognizing that “[g]reenhouse gas emissions pose a real and substantial financial risk to customers and the utilities,” the California PUC concluded that utilities must take into account the cost of future carbon regulation when evaluating resource investment decisions in order to protect ratepayers from such risk.⁶⁶

Given the risks of climate change impacts to human health and welfare and the risk that ratepayers will bear the costs of future carbon regulation, any prudent utility must mitigate its CO₂ emissions to protect against such risks.

C. Duke Failed to Mitigate the Carbon Regulatory Risks Its Ratepayers Face on Account of CO₂ Emissions from the Edwardsport Plant.

As discussed above, Duke acknowledges that future regulation of CO₂ emissions will subject it to higher generation costs and its ratepayers to higher electricity prices.⁶⁷ Duke’s initial selection of the Edwardsport project suggested recognition by the company of carbon regulatory risk and appeared to be an attempt to manage such risk by investing in a project where CO₂ could be captured and sequestered. However, Duke now seems to have reversed course:⁶⁸ the Edwardsport plant, which began commercial operations in June 2013, does not include any

⁶⁵ See California Energy Comm’n, Energy Action Plan (May 8, 2003), available at http://www.energy.ca.gov/energy_action_plan/2003-05-08_ACTION_PLAN.PDF.

⁶⁶ California Pub. Utils. Comm’n, Decision 04-12-048 (Dec. 20, 2004), available at http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/43224.htm.

⁶⁷ Rogers Direct at 18.

⁶⁸ Clive Thompson, *A Green Coal Baron?*, N. Y. Times, June 22, 2008, http://www.nytimes.com/2008/06/22/magazine/22Rogers-t.html?_r=1&pagewanted=all (reporting that Duke CEO James Rogers estimated that affordable carbon capture and sequestration technology was 10 to 15 years away).

CCS systems, and Duke is under no obligation to capture or store any of the four million tons of CO₂ the plant is projected to emit every year. Moreover, the geological conditions around the Edwardsport plant site have been deemed unfit for sequestration.⁶⁹ Given its apparent abandonment of CO₂ mitigation via CCS, Duke must take other action to mitigate the CO₂ emissions of its coal-dependent power generation fleet.

In urging the IURC to approve a rate recovery increase for the Edwardsport project, Duke failed to analyze seriously the risks associated with future carbon regulation, let alone account for those risks in its estimate of project costs. Although Duke did include a single set of CO₂ price assumptions in its modeling of alternative resource plans, Duke selected a price so low that it had no meaningful impact on the economics of the company's plan to invest in new coal-fueled generation at Edwardsport and to continue to operate almost all of its coal-fired power plants.⁷⁰ Moreover, whether or not Duke's carbon price estimate is reasonable, ratepayers will be protected only if the company is required to develop a plan to mitigate the risk that the four million tons of CO₂ that the Edwardsport plant is projected to emit every year for decades to come will result in greater regulatory costs in the future than Duke currently estimates. Duke has not done so. And although Appellants' testimony below challenged both Duke's use of a single, low price estimate of CO₂ costs instead of a reasonable range of possible costs and Duke's failure to propose any steps to mitigate the risk of these costs, the IURC failed to include any findings of fact or conclusions of law on these issues in its Order.

⁶⁹ Direct Test. of Robert D. Moreland, Cause No. 43653, at 5–7 (June 23, 2009).

⁷⁰ *In re Verified Petition of Duke Energy Indiana, Inc.*, Cause No. 44217, at 30–39 (IURC Apr. 3, 2013) (approving Duke's plan to charge its ratepayers hundreds of millions of dollars to retrofit decades-old coal-fired generating units).

Given the impending regulation of CO₂ emissions and the potential magnitude of the costs of such regulation over thirty years or more, Duke's investment in the Edwardsport project represents a huge gamble on a single price forecast, which comes at the expense of Duke's ratepayers. Duke and its shareholders profit from selling more electricity and from expanding the utility's rate base, and Duke's ability to pass on to ratepayers any future regulatory costs insulates the company from risk and guarantees its profitability. It is up to the Commission, therefore, to protect ratepayers by either denying rate recovery for such costs or requiring the utility to develop a plan to mitigate them.

While Duke's failure to assess the full costs and risks of the Edwardsport project resulted in an unfair comparison between other, less carbon-intensive options and the investment of more than three billion dollars in a coal-gasification power plant, it is not too late for Duke to take concrete steps to diversify its resource portfolio and thereby mitigate the financial risks that the company and its ratepayers face from future carbon regulation. Specifically, Duke could forgo investment in pollution controls at other coal-fired units—which will also be subject to eventual carbon regulation—and, instead, retire those units in favor of investment in less carbon-intensive alternatives that do not bear the same carbon risk. Given Duke's failure to identify mitigation measures that reduce Indiana ratepayers' carbon risk, the IURC's approval of its rate recovery request was in error. In order to remedy this error, the Court should remand to the IURC with instructions to require Duke to develop a plan to mitigate the Edwardsport plant's CO₂ emissions.

II. THE COMMISSION ERRED BY APPROVING A RATE RECOVERY REQUEST THAT FAILED TO PRESENT AN ESTIMATE OF THE ACTUAL PROJECT COSTS AND RISKS TO RATEPAYERS.

A. Legal Standard

When determining whether a decision of the Commission was made in error, reviewing courts will look at (1) whether the Commission's "decision contain[s] specific findings on all of the factual determinations material to its ultimate conclusions," *PSI Energy, Inc. v. Ind. Office of Util. Consumer Counsel*, 764 N.E.2d 769, 773–74 (Ind. Ct. App. 2002); *see also L.S. Ayres & Co. v. Indianapolis Power & Light Co.*, 351 N.E.2d 814, 830 (Ind. Ct. App. 1976) (holding that the Commission must "articulate the policy and evidentiary factors underlying its resolution of all issues which are put in dispute by the parties"); and (2) "whether there is substantial evidence in the record to support the agency's basic findings of fact," *PSI Energy, Inc. v. Ind. Office of Util. Consumer Counsel*, 764 N.E.2d at 773–74; *see also Citizens Action Coal. of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 804 N.E.2d 289, 294 (Ind. Ct. App. 2004). When evaluating the existence of substantial evidence, courts look at whether the challenged order is the product of a failure to consider necessary factors. *See Ind. Gas Co., Inc. v. Office of Util. Consumer Counsel*, 575 N.E.2d at 1048.

B. The Commission Made No Specific Findings of Fact or Conclusions of Law with Respect to the Risks and Costs of Complying with Future Regulatory Limits on Carbon Dioxide.

Here, the Commission made no specific findings of fact or conclusions of law regarding the risks and costs of complying with future CO₂ emissions regulation or regarding the need for Duke to develop a plan to mitigate the risks associated with the emission of more than a hundred million tons of CO₂ over the projected lifetime of the plant. Testimony presented by Appellants during the IURC proceeding clearly raised these issues, and Duke submitted rebuttal testimony,

demonstrating the dispute between the parties. Accordingly, the Commission was required to make findings of fact on the issue of future regulatory compliance costs associated with carbon pollution. *See L.S. Ayres & Co. v. Indianapolis Power & Light Co.*, 351 N.E.2d at 830 (holding that the Commission must “articulate the policy and evidentiary factors underlying its resolution of all issues which are put in dispute by the parties”).

C. The Record Does Not Support an Ultimate Conclusion that the Project Remains in the Public Interest or that the Rate Recovery Approved Is Just and Reasonable.

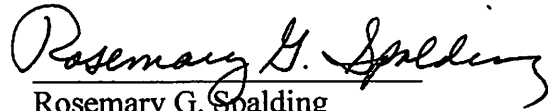
In addition, the Commission’s conclusions that the requested rate recovery increase was prudent and that the project remains in the public interest—determinations which require an understanding of the actual project cost—are unsupported given the Commission’s failure to make any findings of fact whatsoever about what the costs of complying with future carbon regulation might be, how they should be factored into a determination of the least-cost planning option, or whether the risk that ratepayers will bear such costs requires their mitigation. *See PSI Energy, Inc. v. Ind. Office of Util. Consumer Counsel*, 764 N.E.2d at 773–74 (articulating the legal standard for judicial review of IURC decisions); *Citizens Action Coal. of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 804 N.E.2d at 294 (same). For this reason alone, the Order should be vacated and this matter remanded to the Commission to address these issues.

CONCLUSION

For the foregoing reasons, Proposed *Amici* respectfully ask this Court to find that the IURC’s December 27, 2012 Order was made in error and to remand the proceedings to the IURC with instructions to require Duke to quantify the Edwardsport plant’s carbon risk and to develop a plan to mitigate it.

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Respectfully Submitted,



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WORD COURT CERTIFICATE

I verify that this brief contains no more than 7,000 words.

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I hereby certify that on this 9th day of September, 2013, the "Brief of Proposed *Amici Curiae* in Support of Appellants" was served upon the following persons by first-class United States mail, postage prepaid:

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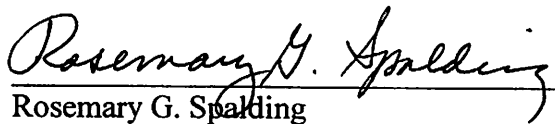
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