STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF NORTHERN INDIANA PUBLIC SERVICE COMPANY FOR (1) APPROVAL OF A TRANSMISSION, DISTRIBUTION AND STORAGE SYSTEM IMPROVEMENT CHARGE ("TDSIC") RATE SCHEDULE, (2) APPROVAL OF PETITIONER'S PROPOSED COST ALLOCATIONS, (3) APPROVAL OF THE TIMELY RECOVERY OF TDSIC COSTS THROUGH PETITIONER'S PROPOSED TDSIC RATE SCHEDULE, AND (4) AUTHORITY TO DEFER APPROVED TDSIC COSTS, PURSUANT TO IND. CODE CH. 8-1-39.	)	**CAUSE NO. 44371**

OUCC'S PETITION FOR RECONSIDERATION

The Indiana Office of Consumer Counselor (OUCC), by counsel, respectfully submits its Petition for Reconsideration as follows:

I. Treatment of Replaced Asset Investment Cost

A. Introduction

The OUCC requests the Commission reconsider the following findings from page 18 of its Final Order in this Cause:

> The statutory definition of eligible improvements at Ind. Code 8-1-39-2 authorizes recovery of investments for replacement projects and the definition of pretax return at Ind. Code 8-1-39-3 provides that revenues should provide for such investments, notably without suggesting any deduction or netting of the replaced asset. Further, TDSIC costs as defined at Ind. Code 8-1-39-7 includes this unadjusted pretax return. While acknowledging that Ind. Code 8-1-39-13(a) allows the Commission to consider other information in setting the appropriate pretax return, we read this section to be addressing the weighted cost of capital rate rather than the investment amount so as to reconcile the statutory language of Sections 13 and 3. Accordingly, we do not find statutory support for the

> netting of investment in determining the appropriate investment to be afforded cost recovery. In addition, the TDSIC statute requires a general rate case before the expiration of the utility's 7-year plan which provides a built in mechanism to update the net investment of the utility. Thus, we decline to require NIPSCO to recognize the replaced asset investment cost already embedded in base rates because Ind. Code 8-1-39 does not support it outside of the required rate case.

Allowing a utility to earn a return on and a return of property that is no longer used and useful is contrary to Indiana law and represents a confiscatory taking from NIPSCO ratepayers. Additionally, in this time of escalating utility costs for Indiana ratepayers, it is in the public interest to recognize the retired or replaced investment already embedded in base rates. Failure to recognize amounts already in base rates for retired or replaced investment will exacerbate Indiana's declining competitiveness in electric utility rates. This is contrary to the public interest.

B. Used and Useful

Indiana has traditionally followed the "used and useful" standard that requires utility plant investment to be in-service and used and useful before it is included in rate base in a base rate proceeding. This protects customers from paying rates for plant not actually rendering service. Ind. Code 8-1-2-6 states, *inter alia*, that "The Commission shall value all property of every public utility actually used and useful for the convenience of the public at its fair value..." (emphasis added).

Specifically, rate base consists of the utility property that is used to provide the public with the service for which the rates are charged. *L.S. Ayres & Co. v. Indianapolis Power & Light Co.*, 169 Ind. App. 351 N. E. 2d 814 (Ind. App). The Commission's charge was to establish rates that will allow a utility to sufficiently cover its operating expenses as well as provide a return on

investment to shareholders. *Ofc. of Util. Consumer Counselor v. Gary-Hobart Water Corp.*, 650 N.E.2d 1201 (Ind. App. 1995)

"Under traditional regulatory concepts, utility company shareholders and bondholders, not the consumers, furnish the capital necessary for the operation of the business. The consumer pays a fair return on the utility's capital and in addition pays the costs of operation including taxes, but it is well-established that the company's investors, not its consumers, must contribute the utility's capital." *City of Evansville v. S. Ind. Gas & Elec. Co.*, 167 Ind. App. 472, 509, 339 N.E.2d 562, 585 (Ind. App. 1975). (citations omitted).

Consistent with that standard, the costs of Construction Work in Progress (CWIP) were traditionally borne by shareholders, and any benefit that accrued from the CWIP "should be passed on to the investor who has borne the cost of the work and not the consumer who pays neither the cost of nor a rate of return on the construction. (Such work in progress cannot be included in a utility's rate base.)" *Ofc. Of Util. Consumer Counselor v. Pub. Serv. Co. of Ind., Inc.*, 449 N.E.2d 604, 607 (Ind. App. 1983). The costs of construction work in progress were traditionally excluded from base rates, because "the Commission is prohibited from including the value of construction work in progress in the utility's rate base, for such property has not yet achieved the status of property '*actually used and useful* for the convenience of the public.'" *Capital Improvement Bd. v. Pub. Serv. Comm'n,* 176 Ind. App. 240, 270, 375 N.E.2d 616, 637 (Ind. App. 1978) (emphasis in original). "Payments for work done are made as that work progresses, but the property under construction cannot begin to earn a return until it is actually in service." *Principles of Public Utility Regulation*, Vol. I, p. 178 (Miche Co. 1969). "For, by definition, a plant under construction cannot produce energy, which is the source of utility revenues." *Re Potomac Elec. Pwr. Co.*, 29 P.U.R. 4th 585, 606 (D.C. Pub. Serv. Comm'n Jul. 18,

1979); *accord, Re Maine Public Serv. Co.*, 49 P.U.R. 4th 398, 412 (Me. Pub. Utils. Comm'n Oct. 14, 1982); *Re: Ariz. Pub. Serv. Co.*, 20 P.U.R. 4th 253 (Ariz. Corp. Comm'n Aug. 1, 1977); *Alaska Gas & Serv. Co.*, 1A APUC 202, 1975 WL 23288 (Alaska Pub. Util. Comm'n Jul. 1, 1975).

These concepts were enshrined in our enabling statute, requiring the Commission to value a utility's property based on "all property...actually used and useful for the convenience of the public[.]" I.C. § 8-1-2-6(a). "The Commission's 'used and useful' standard requires: (1) that the utility plant be actually devoted to providing utility service, and (2) that the plant's utilization be reasonably necessary to the provision of utility service." *City of Evansville v. S. Ind. Gas & Elec. Co.,* 167 Ind. App. 472, 516, 339 N.E.2d 562, 589 (Ind. App. 1975). That is because "utility charges are based on service." *Citiz. Action Coalition of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 485 N.E.2d 610, 613 (Ind. 1985). "Without 'used and useful' property there cannot be any service." *Id.* at 614.

A specific exception to the "used and useful" standard was established when utilities were mandated to invest in expensive and previously unanticipated qualified pollution control property (QPCP). The development of the CWIP rules in Indiana was a recognition of the financial burden that these environmental projects placed on utilities.

In developing the rules to implement the QPCP statutes, the Commission placed a traditional ratemaking limitation upon a utility's right to recover QPCP costs. 170 I.A.C. 4-6-22 provides that tracker recovery should cease when an item is placed in rate base. NIPSCO and other utilities have acknowledged the limitations of ECR cost recovery in many petitions filed with the Commission.[1] The QPCP cost recovery rules are entitled "Ratemaking Treatment for

[1] See, *Petition of NIPSCO*, Cause No. 44012 (Phase III), 2012 WL 4023656, p. 25 (Ind. Util. Regulatory Comm'n Sept. 5, 2012); *Petition of NIPSCO*, Cause No. 42150, 2002 WL 32089927 (Ind. Util. Regulatory Comm'n Nov. 26,

Qualified Pollution Control Property Under Construction," and they recognize that the rule applies to works in progress. Under 170 I.A.C. 4-6-22,

> A utility may continue collecting revenues as a result of ratemaking treatment granted by the commission under this rule for the value of its qualified pollution control property **under construction, to the extent that the related qualified pollution control property projects continue to be or are deemed to be under construction, until the commission determines whether these projects are used and useful in a proceeding that involves the establishment or investigation of the utility's base rates and charges**, the values of these projects do not exceed the construction cost estimates approved by the commission, **and** the projects are any of the following:
>
> (1) Equipment that constitutes clean coal technology, as defined in section [170 I.A.C. 4-6-]1(f) of this rule.
> (2) Air pollution control devices at a coal burning electric generating facility for which the utility has obtained and continues to possess a valid certificate of public convenience and necessity under IC 8-1-8.5.
> (3) Part of a utility's environmental compliance plan or modified environmental compliance plan for which the utility has obtained and continues to possess commission approval under IC 8-1-27.
> (4) Air pollution control devices and the utility has obtained the commission's approval or modified approval for their use under sections [170 I.A.C. 4-6-] 2 through 7 of this rule.
>
> Emphasis added.

Unlike expense trackers such as the FAC and GCA, the CWIP tracker is, in essence, an investment tracker which passes through to ratepayers increased returns on new environmental investment. Essentially, environmental cost trackers allow for additional return (net operating income) for the utility.

Over time, all Indiana electric utilities established environmental cost recovery (ECR) CWIP trackers which provided them an opportunity to earn a return on their pollution control

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2002); *Re PSI Energy, Inc.*, Cause Nos. 42061, 41744 S1, 2002 WL 2006154 *10 (Ind. Util. Regulatory Comm'n Jul. 3, 2002)("consistent with 170 IAC 4-6-22, the QPCP projects will be deemed to be under construction, and PSI will continue to receive revenues through Rider 62, until the Commission determines that the QPCP projects are used and useful in a base rate case.").

projects. These costs were tracked until the property was considered used and useful for the convenience of the public and in service at which time they were placed in rate base at the utility's next base rate case and no longer eligible to be tracked.

Only recently, was the Commission confronted with a case involving QPCP that was replacing QPCP already embedded in base rates.

C. Replacement Property

In Cause No. 42150 ECR 21, NIPSCO sought to track the cost of SCR replacement catalyst layers (environmental property), even though it acknowledged that the original environmental property was already embedded in base rates and upon which NIPSCO was already earning a return of and on. The original environmental property was used and useful and in service. However, once the environmental property was replaced it was no longer used and useful or in service.

Neither the CWIP rules nor the various QPCP/CCT statutes provide the express authority for the Commission to offset the value of the replacement environmental property that is under construction and will ultimately be used and useful, with the value of the environmental property that is being retired or replaced. Nevertheless that is what the Commission correctly did.

The Commission's Final Order in Cause No. 42150 ECR 21 dated October 16, 2013, pages 14- 15 states:

> However, the OUCC makes a compelling case that if NIPSCO recovers a return on and return of its investment for the replacement layer through its trackers and for the original layer through its base rates and charges, *ratepayers are paying for two catalyst layers, when only one is actually in service.* Multiplied over several catalyst layers per SCR unit and several SCR units over NIPSCO's generation fleet, *this issue could have a*

> *significant impact on customer rates*...In light of this, we see no reason that NIPSCO should be prohibited from recovering a return of its investment in the original layer. Similarly, because the replacement layer is necessary for the continued operation of the SCR, NIPSCO should be allowed to recover the full return of its investment in the replacement layer. However, should we grant full recovery of NIPSCO's return on its investment in the replacement layer when it already receives a return on its investment in the original layer through its base rates and charges, *then until its next base rate case, NIPSCO would receive a return on investment from two catalyst layers, while only one layer is in service.*
>
> ...In making our determination, Ind. Code § 8-1-8.7-3(b)(9) allows us to consider any other factors we consider relevant, including the public's interest. In order to do so, we must seek a solution that allows the utility to recover the costs of necessary replacements to its pollution control systems, but does not require ratepayers to continue paying a return on an investment in catalyst layers that are no longer in service. In light of this and our discussion above, we find that NIPSCO shall be allowed to seek recovery of its full depreciation expense (return of investment) for the replacement layer. However, NIPSCO shall only be allowed to seek recovery of the incremental amount of the return on its investment for the replacement catalyst layer that exceeds the return on investment currently included in its base rates and charges for the original catalyst layer. (*Northern Indiana Public Service Company*, emphasis added)

It is important to note that this netting or offset of retired assets is not expressly required or permitted by statute or rule. However, it is in the public interest and consistent with good regulatory practice. Investment trackers such as the ECRM have primarily focused on production plant for extraordinary environmental investments. In contrast, the passage of SEA 560 as codified in Ind. Code 8-1-39 et seq. permits tracked cost recovery for transmission and distribution (T&D) investments. As NIPSCO freely admits, its seven (7) year TDSIC plan is primarily a plan to replace older less reliable assets with new more reliable assets. It is, in essence, a replacement tracker.

This is not a mechanism designed to track the costs associated with an SCR, for example, that must somehow be retrofitted into an existing footprint of a generating facility. This is not a baghouse or some other large capital investment that was not even contemplated at the time the

facility was built. This mechanism tracks replacement items primarily poles, transformers, conductors and substations. Unlike environmental capital investment projects that take years before they become used and useful, replacement poles can be in service and used and useful in a matter of days. The replaced items immediately become not used and useful. The replaced items also seem to be easily identified by the utility which should only earn a return on the net value of the T&D assets.

D. DSIC/TDSIC Tracker

There is precedent for a T&D investment tracker. It can be found in Ind. Code 8-1-31-et seq. and 170 I.A.C. 6-1.1 and which provide for the tracked recovery of new distribution system improvement charge (DSIC) for water utilities. The statute specifically requires the Commission to approve a DSIC in order to allow a water utility to adjust its basic rates and charges to recover a pre-tax return and depreciation expense on eligible distribution system improvements. The Commission's Final Order in *Indiana American*, Cause No. 42351 DSIC-1 dated February 27, 2003, agreed with the OUCC which advocated reducing the amount on which the return applies by the original cost of those assets that are no longer in service as they have been replaced by the assets eligible for the DSIC. The Commission found that "if retirements are ignored and a utility is allowed to earn a return on new plant through a DSIC, they will collect a return on both the new plant through its DSIC and on the retired asset through its return on the fair value rate base determination from the utility's last rate case." *Id.* at 23.

In its most recent DSIC docket, Indiana American proposed to treat retirements as an offset for purposes of calculating the incremental depreciation expense but not for purposes of

calculating the incremental pre-tax return associated with the DSIC improvements.[2] The Commission rejected Indiana American's argument. In its Final Order the Commission stated, in part, as follows:

> Moreover, contrary to Mr. Roach's statement that there is no provision in the DSIC statue for offsetting the original cost of associated retirements against eligible distribution system improvements, Ind. Code 8-1-31-11 requires the Commission to determine an "appropriate pretax return." "Appropriate pretax return" is defined as "the revenues necessary to [ ] produce net operating income equal to the public utility's weighted cost of capital multiplied by the net original cost of eligible distribution system improvements." While "net original cost" is not defined in statute, our treatment of retirements from DSIC I appropriately nets the original cost of the retired assets from the DSIC improvement. Otherwise, "if retirements are ignored and a utility is allowed to earn a return on new plant through a DSIC, they will collect a return on both the new plant through its DSIC and on the retired asset through its return on the fair value rate base determination from the utility's last rate case."
> DSIC I at 23.

Although the TDSIC statute is not word for word identical to the DSIC statute, the public interest can only be served by crediting ratepayers with the amount of assets retired or replaced. As the Commission has noted, Sec. 13 of the TDSIC statute mandates that in determining the appropriate pre-tax return, the Commission may consider other information that it determines is necessary.. In fact, the language in Ind. Code 8-1-8.7-3(b)(9), the Clean Coal Technology statute, is virtually identical to this language. The Commission cited that ability to consider other factors in its determination that it would be in the public interest to only allow recovery of the net value of assets in NIPSCO's ECR docket, Cause No. 42150 ECR 21. This language provides the Commission with the authority to offset the return on the new assets with the value of the retired

[2] Petitioner relied on the Commission's final order in *Indiana Michigan Co.*, Cause no. 44182 where the Commission accepted Petitioner's proposal to recover only the incremental depreciation expense, incremental property tax increase, and carrying charges for post-in-service equipment; which it found made it inappropriate to reduce the carrying charge (i.e. return on) on the new assets. This is directly opposite of what the Commission found in 42150 ECR-21 where the commission only allowed an incremental return on the replaced assets but allowed the utility to continue to recover depreciation on those assets.

or replaced assets in this case. The Commission chose not to do so. The result of this decision is that NIPSCO ratepayers will not only be required to pay for the new plant as provided in SEA 560, but will continue to pay for utility plant that is no longer used and useful, contrary to Indiana law. This amounts to double recovery which will last for up to eight years until new base rates are established. The Commission should reconsider and allow only a return of and a return on the net assets for the following reasons:

a. The TDSIC statute provides that only projects with assets that were not included in the public utility's rate base in its most recent general rate case are eligible for tracked recovery. Ind. Code 8-1-39-2(2). It is unfathomable to think that a utility would attempt to include in its 7-year plan, assets that were already in base rates. The only rational reason for this language to be contained in this statute is to avoid double recovery. If the utility is already receiving a return of and return on an asset in base rates, it may not also earn a return on its replacement.

b. Simply because SEA 560 doesn't specifically mention the netting principle, the Commission cannot ignore Ind. Code 8-1-2-6 and case law defining used and useful property. In fact, Ind. Code 8-1-39-16(b)(2) expressly states that this chapter does not limit the commission's valuation of utility property under IC 8-1-2-6. It is undisputed that the assets that will be replaced by NIPSCO will no longer be used and useful. The only exception to the used and useful rule can be found in the CWIP statutes which allow a return on investments that are under construction but are anticipated to be used and useful when completed. Neither the CWIP rules nor the QPCP statutes expressly allow for an offset of retired or replaced assets. Nevertheless, the Commission has required this netting in its most recent ECR order which involved replacement investments.

c. NIPSCO's base rates determined in Cause No. 43969 include millions of dollars for T&D related revenue requirements, including return on and return of T&D investment. To ignore these revenues while at the same time allowing the utility to collect a return of and return on the replacement assets, constitutes double recovery and fails to credit ratepayers with payments made to date.

d. In Vectren Energy Delivery of Indiana, Inc.'s TDSIC filing, Cause No. 44429, Petitioner proposes to earn a return on both the new and replaced assets but proposes to earn a return of only the net new investment by reducing depreciation expense on the new capital investments by the depreciation expense on the replaced assets. Although this proposal does not go far enough, it is recognition that the revenue requirement for new assets should be reduced to reflect revenue on replaced assets currently embedded in base rates.

e. The Commission can make this offset without having any impact on NIPSCO's rate base. The reduction for the replaced assets can be made in the tracker proceeding. No adjustment need be made to NIPSCO's rate base set in its last rate case. It is only at the time of NIPSCO's next base rate case that the replaced asset, which is no longer on NIPSCO's books and records, would not be included in rate base. The new investment, which is recorded on the books and records at original cost, will be fully included in rate base and NIPSCO will be made whole on its rate base in the next base rate case and during the years prior to the next base rate case through the TDSIC tracker.

f. The fact that NIPSCO's base rates will be reset in 7 years will not correct the millions of dollars of over recovery NIPSCO will receive over the next 7 years. The materiality of this amount to NIPSCO's ratepayers cannot be overstated.

II. Customer Class Revenue Allocation

A. Introduction

The OUCC requests the Commission reconsider the following finding on page 16 of its Final Order in this Cause:

> Further, NIPSCO's proposal to exclude Rates 632,633 and 634 is a reasonable method to accomplish the alignment of the cost causation with the cost allocation, under the evidence specific conditions presented in this proceeding together with the 43969 Order, for the purpose of allocating distribution costs in a manner that comports with Ind. Code 8-1-39-9(a)(1). We find it is appropriate to adjust the 43969 Order approved Joint Exhibit C allocation factors by removing Rates 632, 633 and 634 from the calculation for purposes of allocating distribution-related TDSIC costs so that rate classes that do not use the distribution system are not allocated distribution costs.

B. Statutory Requirement

For purposes of allocating costs, Ind. Code 8-1-39-9(a)(1) states that cost allocation must be based upon the allocation factors based on firm load approved in the public utility's most recent base rate order. There was only one revenue allocation factor approved in NIPSCO's last base rate case. Namely, Joint Exhibit C.[3] At that time, there were no contracts in place under interruptible Rider 675. These allocation factors approved in the 43969 Final Order were based solely on firm load. Joint Exhibit C was applicable to all rate classes, and **distribution costs were allocated to all classes.** All consumer classes were represented during the negotiation of those allocation factors and accepted them as the allocators to be used going forward.

NIPSCO's proposed TDSIC T&D allocators presented for the first time in this case, were not contemplated, not proposed, not evaluated, and were not approved in NIPSCO's most recent retail base rate case. In essence, the Commission by accepting NIPSCO's proposal, is changing

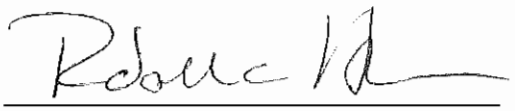
[3] Joint Exhibit E, also approved in NIPSCO's last base rate case was solely for the purpose of use in NIPSCO's RTO tracker and the RA Tracker.

the terms of the settlement agreement reached by all the parties and approved in Cause No. 43969. NIPSCO's proposal violates the settlement agreement, was not approved by the Commission in its last base rate case and unjustly favors one customer class to the detriment of the other consumer classes. For those reasons, NIPSCO's proposal should be rejected and the Commission should authorize the use of the allocators approved in NIPSCO's last base rate case, namely those found in Joint Exhibit C.

III. Conclusion

For the reasons set forth above, the OUCC respectfully requests the Commission reconsider its Final Order with respect to its findings on replaced asset investment cost and customer class revenue allocation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the ***OUCC Motion for Reconsideration*** has been served upon the following parties of record in the captioned proceeding by electronic service on March 10, 2014.

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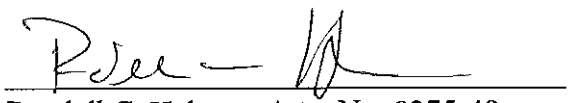

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