**IN THE**
**INDIANA SUPREME COURT**
**CAUSE NO. __________________________**

**COURT OF APPEALS CAUSE NO. 93A02-1301-EX-00076**

| | | |
|---|---|---|
| CITIZENS ACTION COALITION OF INDIANA, INC., et al., | ) | |
| Intervenors-Appellants, | ) | Appeal from the Indiana Utility Regulatory Commission |
| v. | ) | Cause Nos. 43114 IGCC-4, 43114 IGCC-4-S1, 43114 IGCC-5, 43114 IGCC-6, 43114 IGCC-7, and 43114 IGCC-8 |
| DUKE ENERGY INDIANA, INC., | ) | |
| Petitioner-Appellee, | ) | The Hon. James D. Atterholt, Chairman |
| and, | ) | The Hons. Kari A.E. Bennett, Larry S. Landis, Carolene R. Mays, and David E. Ziegner, Commissioners |
| INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR, | ) | The Hon. David E. Veleta, Administrative Law Judge |
| Respondent-Appellee, | ) | |
| and, | ) | |
| INDIANA UTILITY REGULATORY COMMISSION, | ) | |
| Appellee. | ) | |

---

**JOINT PETITION TO TRANSFER OF APPELLANTS CITIZENS ACTION COALITION OF INDIANA, INC., SAVE THE VALLEY, INC., SIERRA CLUB, INC., AND VALLEY WATCH, INC. (JOINT INTERVENORS)**

---

Jennifer A. Washburn, Atty. No. 30462-49
Citizens Action Coalition of Indiana, Inc.
603 E. Washington Street, Ste. 502
Indianapolis, IN 46204
317/735-7764
<jwashburn@citact.org>

Jerome Polk, Atty. No. 23712-49
POLK & ASSOCIATES, LLC
6300 Falconsgate Avenue
Davie, Florida 33331-2928
317/636-5165
<jpolk@polk-law.com>

*Attorneys for Appellants*
*Joint Intervenors*

QUESTION PRESENTED ON TRANSFER

I. Whether the Commission's Final Orders of December 30, 2012 meets the well-defined and long-established requirements of the applicable standard of judicial review for Commission final orders generally even though:

   a. The Commission substantially limited the evidence which the parties were permitted to present regarding serious allegations of ex parte communications, conflicts of interest, undue influence and other misconduct depriving Petitioners of administrative due process during the regulatory review of the Project;

   b. The Commission failed to make ultimate conclusions or findings of fact on material issues raised by JIs regarding the modification or replacement of the condition previously included in the CPCN but eliminated in the Order under review addressing the mitigation of ratepayer risks associated with the huge quantities of carbon dioxide to be emitted by the Plant during its projected operating life;

   c. The Commission failed to make ultimate conclusions or findings of fact—and failed to require the submission of evidence—regarding the traditional judicial test of "reasonableness" for the $13.6 million in attorneys' fees and expenses paid to two of the Settling Parties;

   d. The Commission authorized the recovery through rates of the first $2.595 billion in costs, plus financing costs, but disallowed all additional costs incurred in the construction of the Project notwithstanding that the Commission (a) made findings which necessarily entail that at least some of the allowed costs were attributable to imprudence and/or mismanagement on the part of the constructing utility and/or its primary contractors and (b) had yet to review any evidence whatsoever regarding the vast majority of the disallowed costs; and

   e. The Commission summarily rejected serious allegations of gross mismanagement and concealment, if not outright fraud, in the construction of the Project without making findings of fact or reviewing and analyzing evidence on specific issues of such alleged misconduct fairly and squarely raised on the record by Petitioners.

**TABLE OF CONTENTS**

Page No.

QUESTION PRESENTED ON TRANSFER………………………………………….. ii

TABLE OF AUTHORITIES………………………………………………………… v

BACKGROUND AND PRIOR TREATMENT OF ISSUES……………………….. 1

ARGUMENT……………………………………………………………………..... 2

I. The Standards of Review…………………………………………………....... 2

  a. Improper Review Deprives JIs of Due Process Rights……………………... 2

    i. Specific findings of fact must be made on all issues presented……. 3

    ii. The Commission's ultimate conclusions must be consistent with and logically inferred from basic findings of fact………………….. 4

    iii. Final tier of review………………………………………………….. 4

  b. A Settlement Does Not Waive or Lower the Standard of Review………… 4

II. The Commission substantially limited the evidence which the parties were permitted to present regarding serious allegations of ex parte communications, conflicts of interest, undue influence and other misconduct depriving Petitioners of administrative due process during the regulatory review of the Project……….. 5

III. The Commission failed to make ultimate conclusions or findings of fact on material issues raised by JIs regarding the modification or replacement of the condition previously included in the CPCN but eliminated in the Order under review addressing the mitigation of ratepayer risks associated with the huge quantities of carbon dioxide ("$CO_2$") to be emitted by the Plant during its projected operating life……………………………………………………………………………… 6

IV. The Commission failed to make ultimate conclusions or findings of fact—and failed to require the submission of evidence—regarding the traditional judicial test of "reasonableness" for the $13.6 million in attorneys' fees and expenses paid to two of the Settling Parties………………………………………………………. 7

V. The Commission authorized the recovery through rates of the first $2.595 billion in costs, plus financing costs, but disallowed all additional costs incurred in the construction of the Project notwithstanding that the Commission (a) made findings which necessarily entail that at least some of the allowed costs were attributable to imprudence and/or mismanagement on the part of the constructing utility and/or its primary contractors and (b) had yet to review any evidence whatsoever regarding the vast majority of the disallowed costs…………………………………………… 9

VI. The Commission summarily rejected serious allegations of gross mismanagement and concealment, if not outright fraud, in the construction of the Project without making findings of fact or reviewing and analyzing evidence on specific issues of such alleged misconduct fairly and squarely raised on the record by Petitioners….. 11

CONCLUSION………………………………………………………………………. 13
WORD COUNT CERTIFICATE………………………………………………………. 14
CERTIFICATE OF SERVICE………………………………………………………. 15

## TABLE OF AUTHORITIES

Page No.

**Cases**

*Citizens Action Coal. v. N. Ind. Pub. Serv. Co.*, 485 N.E.2d 610 (Ind. Ct. App. 1985)………………………………………………………………………………... 3, 4

*Citizens Action Coal*. v. PSI Energy, 664 N.E.2d 401 (Ind. Ct. App. 1996)………….. 5, 8

*City of Evansville v. Southern Indiana Gas and Electric Co.*, 339 N.E.2d 562 (Ind. Ct. App.1975)...………………………………………………………………....….. 3

*General Tel. Co. of Ind. v. Public Service Commission*, 1958, 150 N.E.2d 891, 238 Ind. 646, rehearing denied 154 N.E.2d 372, 238 Ind. 646…………………………… 3

*Hidden Valley Lake Property Owners Ass'n v. HVL Utilities, Inc.*, App. 4 Dist.1980, 408 N.E.2d622, rehearing denied 411 N.E.2d 1262…………………………………... 3

*In Re General Motors Corporation Pick-up Truck Fuel Tankproducts Liability Litigation*, 55 F.3d 768 (3rd Cir.,1995)…………………………………………….... 8, 9

*L. S. Ayres & Co. v. Indianapolis Power & Light Co.*, 169 Ind.App. 652, 661, 351 N.E.2d 814, 822 (Ind. App. 1976)……………………………..……………..... 3, 7

*McClain v. Review Bd. of Ind. Dept. of Workforce Dvlpmt.*,693 N.E.2d 1314(Ind.1998)…………………………………………………………………… 4

*Monon R. R. v. Public Service Comm'n*, 170 N.E.2d 441, 442 (Ind. 1960)…………… 12

*Prandini v. National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir.1977)…………………... 9

*Warren v. Ind. Telephone Co.*, 217 Ind. 93, 26 N.E.2d 399 (1940)…………………… 2

*Weinberger v. Great Northern Nekoosa Corp.,* 925 F.2d 518, 524 (1st Cir., 1991)...... 9

*Wichita Railroad & L. Co. v. Public Utils. Comm'n*, 260 U.S. 48, 59 (1922)………… 12

**Constitution**

Ind. Constitution, Article 1, § 12……………………………………………………. 2

**Statutes**

Ind. Code § 8-1-8.5-6.5 .......................................................................................... 11, 12

Ind. Code Ch. 8-1-8.5…………………………………………………………….. 11

Ind. Code Ch. 8-1-8.7…………………………………………………………….. 11

Ind. Code § 8-1-8.7-6…………………………………………………………….. 12

Ind. Code § 8-1-8.7-7…………………………………………………………….. 12

Ind. Code § 8-1-8.8-12…………………………………………………………… 10

**Rules**

Ind. R. App. P. 57(H)(1)………………………………………………………….. 2
Ind. R. App. P. 57(H)(4)………………………………………………………….. 2
Ind. R. App. P. 57(H)(6)………………………………………………………….. 2

**Other Authorities**

In re Duke Energy Indiana, Inc., Cause No. 43114, 261 P.U.R.4th 165 (Ind.U.R.C.)… 1, 6

**BACKGROUND AND PRIOR TREATMENT OF ISSUES**

Appellants, Citizens Action Coalition of Indiana, Inc., Save the Valley, Inc., Sierra Club, Inc., and Valley Watch, Inc. ("Joint Intervenors" or "JIs"), are citizens' advocacy and environmental organizations, with interests similar if not identical to approximately 790,000 retail ratepayers of Duke Energy Indiana, Inc. ("Duke"). JIs appeal orders of the Indiana Utility Regulatory Commission ("Commission") approving and implementing a settlement agreement ("Settlement") between Duke, a group of industrial customers ("Industrial Group" or "IG"), Nucor Steel-Indiana ("Nucor"), and the Indiana Office of Utility Consumer Counselor ("OUCC") regarding the Edwardsport Integrated Gasification Combined Cycle Generating Facility ("Plant" or "Project"). (Appellants' App., 245-256). The Settlement purported to resolve all issues surrounding the Project, "including but not limited to all claims of imprudence, fraud, concealment, and gross mismanagement, as well as issues concerning ex parte communications, improper conduct, undue influences, appearances of impropriety, or related issues." (*Id*. at 252). It also permit Duke to include $2.595 billion in Project costs in rate base (plus certain financing costs over and above what customers already paid during construction), approximately $610 million over the originally approved cost estimate of $1.985 billion.[1] (*Id*. at 245-248). The Settlement also awarded over $13 million in attorneys' fees and expenses to the IG and Nucor. (*Id*. at 251).

The Commission issued its Final Order in 43114-IGCC-4 and 4S1 approving the Settlement with some modifications on the same day it issued several other orders implementing the Settlement in 43114-IGCC-5, 6, 7, and 8, timely appeals of all of which are consolidated in

[1] *In re Duke Energy Indiana, Inc.*, Cause No.43114, 261 P.U.R.4th 165, 190 (Ind.U.R.C).

this single appeal.[2] The Court of Appeals affirmed all of the Commission's orders. This Petition addresses only fundamental errors in the Final Order in 43114-IGCC-4 and 4S1 ("Order").

JIs seek transfer pursuant to Ind. R. App. P. 57(H)(1), (4), and (6), based on the Court of Appeals' failure to apply the long-established and well-defined standard of judicial review for Commission final orders which is necessary to provide litigants before the Commission with the due process protections afforded by Article I, Section 12 of the Indiana Constitution.

# ARGUMENT

## I. The Standards of Review

### a. Improper Review Deprives JIs of Due Process Rights

Improper judicial review of an administrative agency decision deprives a party of the due process required by Article 1, section 12 of the Indiana Constitution ("All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.") *Warren v. Indiana Telephone*, 217 Ind. 93, 26 N.E.2d 399 (Ind. 1940). *Warren* states:

> [T]o meet requirements of "due process of law" there must be "judicial review" of orders of an administrative body, for purpose of adjudication that the agency has acted within scope of its powers, that substantial evidence supports the factual conclusions, and that determination comports with the law applicable to the facts found.

*Id*. at 404. This standard requires that the Commission: (1) made basic findings of fact on all issues presented and supported by substantial evidence; (2) reached ultimate findings of fact or conclusions reasonably inferred from the basic findings it made and consistent with applicable

[2] The Commission issued an Interim Order in 43114-IGCC-4, pending the outcome of the investigation in 43114-IGCC-4S1.

law; and, (3) did not act contrary to law. Otherwise, JIs are deprived of proper judicial review and the constitutional guaranty of due process. (Appellants' App., p.38).

*1. Specific findings of fact must be made on all issues presented.*

The Commission make must basic findings of fact on all material issues and support them with cogent reference to substantial evidence in light of the whole record. *Citizens Action Coalition of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 485 N.E.2d 610, 612 (Ind. 1985). (*See also L. S. Ayres & Co. v. Indianapolis Power & Light Co.*, 169 Ind.App. 652, 661, 351 N.E.2d 814, 822 (1976)) (citing *General Tel. Co. of Ind. V. PSC*, 238 Ind. 646 (1958)); *Hidden Valley Lake Property Owners Association v. HVL Utilities*, 408 NE 2d. 622 (1980). It cannot evade its duty to make specific findings on factual determinations simply by characterizing those determinations as immaterial to its ultimate conclusions. The *Hidden Valley* Court found it was:

> only logical and judicially fair that the [Commission] ***must*** in one way or another address each issue raised by the parties appearing before it. If the issue raised is material to the ultimate conclusions, then a specific finding of fact based on substantial evidence must be made concerning that issue. On the other hand, if the PSC decides an issue is immaterial, it must make a specific finding as to the immateriality and give its reasons for arriving at that conclusion.

408 NE 2d. at 626.(emphasis added).

The policies underlying this requirement "apply with special force" to rate orders of the Commission (*L. S. Ayres*, 351 N.E.2d at 822) and are explained well in in that opinion, as well as the companion opinion *City of Evansville v. Southern Ind. Gas & Electric Co.*, 339 N.E.2d 562 (Ind. Ct. App. 1975):

> Since "basic findings" afford a rational and informed basis for review, the danger of judicial substitution of judgment on complex evidentiary issues and policy determinations is substantially reduced. The process of formulating basic findings on all material issues can also serve to aid the Commission in avoiding arbitrary or ill-considered action. "Often a strong impress that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper." There is little assurance that an

administrative agency has made a reasoned analysis if it need state only ultimate findings or conclusions.

351 N.E.2d at 822 (internal citations omitted).

2. *The Commission's ultimate conclusions must be consistent with and logically inferred from basic findings of fact.*

The Court of Appeals cites to *McClain*, which describes this judicial task as reviewing conclusions of ultimate facts for reasonableness, with the degree of deference which is granted based on the amount of expertise exercised by the agency. *McClain v. Review Bd. of Ind. Dept. of Workforce Dvlpmt.*,693 N.E.2d 1314, 1317-1318(Ind.1998). However, if the subject is not within the Commission's area of specialized expertise, the courts award it less deference. *Id*. Either way, courts may examine the logic of inferences drawn and the interpretation of any rule of law that may drive the result. *Id*.

JIs' appeal does not turn on technical inferences drawn from factual findings made within areas of the Commission's "special competence." It involves questions of logic, law and due process, matters which are as much within the competence of this Court as of the Commission.

3. *Final tier of review*

Finally, an agency action is always subject to review as contrary to law and this constitutionally preserved review is limited to whether the Commission stayed within its jurisdiction and conformed to statutory standards and legal principles involved in producing its decision, ruling, or order. *CAC*, 485 N.E.2d at 612-13. JIs question whether the Commission's actions and order conform to the applicable statutory standards and legal principles.

b. A Settlement Does Not Waive or Lower the Standard of Review

The standard for judicial review of Commission decisions is not waived or lowered when the Commission order under review approves a settlement. The Commission must still perform

its statutory responsibility to weigh the evidence, find the facts, and apply the law in a manner which comports with its statutory duties and results in final orders meeting the established standards for principled judicial review. *Citizens Action Coalition v. PSI Energy*, 664 N.E.2d 401, 406 (Ind. Ct. App. 1996).

**II. The Commission substantially limited the evidence which the parties were permitted to present regarding serious allegations of ex parte communications, conflicts of interest, undue influence and other misconduct depriving Petitioners of administrative due process during the regulatory review of the Project.**

First, amidst substantial evidence of improper communications between the Commission and Duke, JIs twice moved for a separate Commission investigation into whether administrative due process was violated in the Project's regulatory review during the extended period it was overseen by former Chairman Hardy and former Chief Administrative Law Judge Storms. (Appellants' Brief, pp.21-30,63-69). Improper communications plagued the Commission orders in 43114-IGCC-1, 2, 3, and 4 in a series of cases where subsequent cases are built upon the preceding ones. (Appellants' App., 1460,FTNT.11). Messrs. Hardy and Storms had improper relationships with Duke, including participating in numerous ex parte communications about the Project, with Storms even seeking Hardy lobbying on his behalf for employment at Duke. (Appellants' Brief,pp.47-62).

Second, the record is clear that the Commission received throughout most of the regulatory review of the Project–including all dockets whose final orders are on appeal here–periodic written and supplementary oral reports from Black & Veatch, a contractor hired by Duke at the Commission's express direction to oversee Duke's Project management and to report to the Commission at regular intervals and upon special request regarding significant developments, issues and problems. (Appellants' Brief, pp.21-30, 63-69). Yet, the Commission denied JIs' two

requests for this highly relevant evidence to be made available to parties and introduced into the record. (*Id.*).

The Brief of Amici Curiae Non-Profit Groups in Support of Appellants written by the ACLU details these issues as they relate to violations of the Due Process Clause of the Fourteenth Amendment, and JIs adopt this discussion at pages 4-12 by reference.

## III. The Commission failed to make ultimate conclusions or findings of fact on material issues raised by JIs regarding the modification or replacement of the condition previously included in the CPCN but eliminated in the Order under review addressing the mitigation of ratepayer risks associated with the huge quantities of carbon dioxide ("$CO_2$") to be emitted by the Plant during its projected operating life.

The Commission explicitly conditioned the Plant's original approval on a subsequently abandoned study of mitigation through the capture and sequestration of $CO_2$ which the Plant would otherwise emit:

> Petitioner has presented a proposal in this proceeding to continue its efforts to prepare for a future in which carbon is regulated. The Commission accepts Petitioner's assurances that it will move forward in the manner outlined in its testimony in this Cause and make such assurances a condition of this Order. Given the inherent relative environmental benefits of IGCC the Commission finds that it is reasonable for Petitioner to move forward as planned consistent with these findings.

*In re Duke Energy Indiana, Inc.*, Cause No. 43114, 261 P.U.R.4$^{th}$ 165, 190 (Ind.U.R.C).

JIs raised a material issue that this condition within the original CPCN was abandoned and needed to be replaced or modified. Thus, the Settlement should not be approved without addressing this. Given that the Plant was expected to emit four (4) million tons of $CO_2$ per year during its thirty-year life, the potential financial impact to Duke and ratepayers could be significant. (Appellants' App.,1555-1561). JIs' testimony argued that the condition should be replaced or modified because (a) part of the initial justification for Duke's CPCN 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.[3] (Appellants' App., 1486-1488,1493-1495, 1551-1562).

The Commission's Order made no reference to JIs' recommendation, simply approving the Settlement with a few modifications but without comment on this material issue. (Appellants' App., 231-244). 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." *L.S. Ayres*, 351 N.E.2d at 830. If the Commission believed that JIs' arguments were not strong or valid, the Commission should have enunciated that in its Order. However, there is no way to know the Commission's reasoning on this issue because the Commission ignored JIs' evidence and arguments. The Commission failed to meet the requirement that orders "must contain specific findings on all the factual determinations material to its ultimate conclusions." *Id.*

**IV. The Commission failed to make ultimate conclusions or findings of fact—and failed to require the submission of evidence—regarding the traditional judicial test of "reasonableness" for the $13.6 million in attorneys' fees and expenses paid to two of the Settling Parties.**

One of the Settlement terms was Duke's "payment to the attorneys representing the [IG's] attorneys' fees in the amount of $11.7 million and of expenses in the amount of $600,000" and "to Nucor Steel-Indiana of between $800,000 and $1 million for certain fees and expenses." (Appellants' App., p.251). The Settling Parties presented no evidence explaining how fees and costs were calculated—nor why this amount might be reasonable or in the public interest.[4] They

---

[3] The Brief of Amici Curiae Non-Profit Groups in Support of Appellants written by Earthjustice details these issues as they relate to imprudent, continued investment in the Project absent CO2 mitigation, and JIs adopt this discussion at pages 8-14 by reference.

[4] The IG, for the first time on appeal, tried to present evidence on the reasonableness of the attorneys' fees in the guise of argument. (IG Brief, pp.36-37). However, IG did not timely present

presented no time sheets documenting time worked, no information on hourly rates, and no itemization of expenses. Nonetheless, the Commission approved this Settlement term without requiring evidence and failing to make findings of fact or ultimate conclusions.

Attorneys' fees in settlements before the Commission must be reasonable in amount and supported by sufficient evidence. *Citizens Action Coalition,* 664 N.E.2d at 406. The Court of Appeals explained the important policy for requiring such:

> "[S]ettlement" carries a different connotation in administrative law and practice from the meaning usually ascribed to settlement of civil actions in a court. . . . 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 (internal citations omitted). Even if the OUCC is a settlement signatory, the evidence must show that the amount of attorneys' fees is reasonable:

> [W]e 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*. The Court of Appeals even analogized Commission cases to some federal class actions and stated that settlements in utility cases should be generally reviewed under the same standards. *Id*.

Moreover, federal courts have held that it makes no difference whether attorneys' fees are paid to settling plaintiffs from a common fund benefitting a class or by the settling defendant from its own funds – the tribunal must still review it for "reasonableness." *See, e.g., In Re General Motors Corporation Pick-up Truck Fuel Tankproducts Liability Litigation*, 55 F.3d 768 (3rd

---

any such evidence before the Commission, so the Court cannot examine the reasonableness of its fees. *See* Appellants' Reply Brief,pp.31-33.

Cir.,1995); *Weinberger v. Great Northern Nekoosa Corp.,* 925 F.2d 518, 524 (1st Cir.,1991); and *Prandini v. National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir.1977).

Although JIs raised this issue multiple times (Appellants' App.,1329-1354; Tr. Vol.159, 034058-034069; Tr. Vol.162, 034730-034731), the Commission failed to make basic findings of fact or conclusions as to whether the amount was reasonable. The Commission attempted to justify this:

> [The attorneys' fees] 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 Settling Parties agreed to this term, but it does not require Commission approval.

(Final Order, p.121). However, the Commission had a duty to determine this was reasonable and in the public interest, regardless of its uncited contention that Duke's shareholders were paying the fees which somehow absolved it of duties to make findings and conclusions. The Commission-approved Settlement effectively became an Order and the Commission did not conduct—or require evidence necessary to conduct—the legally required reasonableness review.

**V. The Commission authorized the recovery through rates of the first $2.595 billion in costs, plus financing costs, but disallowed all additional costs incurred in the construction of the Project notwithstanding that the Commission (a) made findings which necessarily entail that at least some of the allowed costs were attributable to imprudence and/or mismanagement on the part of the constructing utility and/or its primary contractors and (b) had yet to review any evidence whatsoever regarding the vast majority of the disallowed costs.**

The Settlement presented a legally significant "matching" problem with respect to the timing for costs to be recovered and disallowed through rates versus the evidence of record regarding when costs have been (or would have been) incurred. (Appellants' App.,1394-1399). Under the Settlement, Duke was pre-approved to collect costs from ratepayers for the first $2.595

billion, plus nearly all financing costs incurred after July 1, 2012. (Final Order, p. 119). Yet, the Settlement permits Duke to recover the first $2.595 billion (plus additional financing costs) as prudent costs notwithstanding the fact the Commission found some portion of those costs to be imprudent. Moreover, the Commission disallowed the remaining Project costs at a time when it had not had a chance to review those costs. The Commission's conclusion approving the first $2.595 billion and disapproving the rest of the costs was contradicted by its own findings based on the evidence it had heard and also not supported by "substantial evidence" which it had not yet heard.

Duke was able to "timely recover" certain financing and other costs during the Plant's construction, if it could prove that these costs were "reasonable and necessary," i.e. prudent. Ind. Code § 8-1-8.8-12. However, the Commission found that Duke failed to meet its burden of proving it prudently managed contractors to mitigate costs prior to September 30, 2010, and that ratepayers should not be expected to bear these costs. (Appellants' App.,234). Specifically, the Commission reached the following conclusion:

> 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.

*Id*. Despite this imprudence finding, the Commission approved 100% of the costs Duke incurred for the time period of September 30, 2009 through September 30, 2010 in 43114-IGCC-5 and 6 anyway, finding the costs to have been "reasonable." (Appellants' App., 264-5, 276-8). This disregarded substantial evidence and could not be reasonably inferred from the Commission's own findings of fact.

The Settlement also disallowed 100% of the amount over the $2.595 billion "cap," with financing costs, which is effectively all retail direct investment made after April 2011 and all

financing costs accrued thereon. (Appellants' App.,p.1392-1393). However, the only Project activities and costs that could have been subjected to the Commission's ongoing review until that date were those that occurred through September 30, 2011 (i.e., the ongoing review period in 43114-IGCC-8). Thus, findings and supporting evidence required that the cost recovery amount in the Settlement should have been limited to that same time period.

The Commission justified the Settlement stating it was "within the range" of cost recovery between $0 and $3.3 billion proposed by the parties. (Final Order, p.119; *see also* Appellants' Brief, pp.36-37, 44-45, 87-90). That is insufficient rationale for the specific cost recovery amount approved. It assumes without any evidence that the amount of imprudent costs which Duke was allowed to recover for the period prior to September 2011 was less than or equal to the amount of prudent costs it should be permitted to recover subsequent to September 2011. This aspect of the Order does not satisfy the standard of review for Commission decisions.

## VI. The Commission summarily rejected serious allegations of gross mismanagement and concealment, if not outright fraud, in the construction of the Project without making findings of fact or reviewing and analyzing evidence on specific issues of such alleged misconduct fairly and squarely raised on the record by Petitioners.

The Commission made no specific findings of fact on any allegations against Duke of gross mismanagement, concealment, and fraud when it approved the contested Settlement purporting to resolve, with prejudice, those exact issues which would prohibit recovery under both Ind. Code Chapters 8-1-8.5 and 8-1-8.7. Under Ind. Code § 8-1-8.5-6.5, a utility is entitled for subsequent ratemaking purposes, to recover actual costs for a project up to the approved cost estimate which incurred in reliance of a Commission-approved CPCN. Ind. Code Ch. 8-1-8.7 addresses Clean Coal Technology certificates and subsequent recovery. Recovery under both chapters is allowed only for amounts approved by the Commission. However, recovery is not allowed if the public

utility is found to have committed fraud, concealment, or gross mismanagement. *See* Ind. Code §§ 8-1-8.5-6.5, 8-1-8.7-6 and 7.

Regardless of the Settlement submission and terms purporting to foreclose the above statutes' requirements, the Commission was required to make specific findings under each of these statutes in approving, modifying, or rejecting the Settlement. It did not do so and instead refused the opening of a subdocket to examine the ethical issues or introduction of evidence directly related to the statutes above (Appellants' App.,p.243). Thus, the Commission held in its 43114-IGCC-4S1 Order 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 upon which it relied. (*Id.*, pp.235-238).

Indiana law has long applied to Commission actions this rule originally laid down by the U.S. Supreme Court:

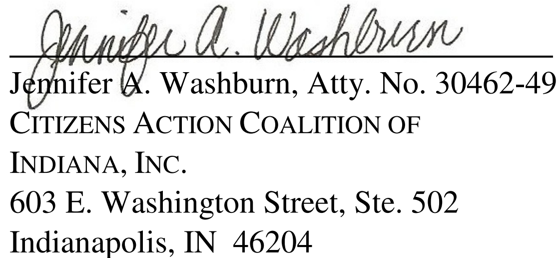
> In creating such an administrative agency, the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith to give validity to its action.

*Monon R. R. v. Public Service Comm'n*, 170 N.E.2d 441, 442 (Ind. 1960)(quoting with approval from *Wichita Railroad & L. Co. v. Public Utils. Comm'n*, 260 U.S. 48, 59 (1922)). The Commission was required to first make specific, negative findings on all material issues of gross mismanagement, concealment and/or fraud fairly raised by the non-Duke parties; it could not lawfully rely solely on its bald conclusion that the non-Duke parties had not met their burden of proof regarding all such issues.

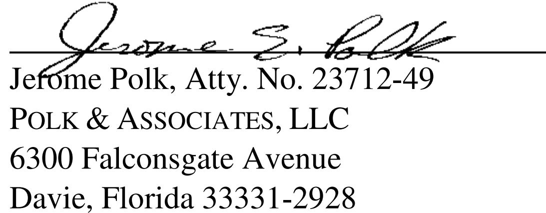
## CONCLUSION

Based upon the foregoing points and authorities, Joint Intervenors, with substantially the same interests as approximately 790,000 retail ratepayers, respectfully request the Indiana Supreme Court accept transfer and vacate the March 19, 2014 memorandum decision of the Court of Appeals, reverse the Indiana Utility Regulatory Commission's order approving the Settlement, and remand the matter to the Commission for further proceedings.

Respectfully submitted,



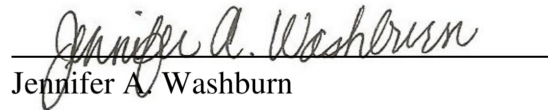
Jennifer A. Washburn, Atty. No. 30462-49
CITIZENS ACTION COALITION OF
INDIANA, INC.
603 E. Washington Street, Ste. 502
Indianapolis, IN 46204



Jerome Polk, Atty. No. 23712-49
POLK & ASSOCIATES, LLC
6300 Falconsgate Avenue
Davie, Florida 33331-2928

WORD COUNT CERTIFICATE

The undersigned counsel verifies that the foregoing Petition to Transfer (excluding cover page, table of contents, table of authorities, word count certificate, certificate of service, and signature block) contains no more than the 4,200 words, including footnotes, permitted by Ind. Appellate Rule 44(E).



Jennifer A. Washburn

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of July, 2014, the foregoing Petition to Transfer of Appellants was served upon the following in accordance with Rule 24, by depositing in the United States Mail, first class postage prepaid, addressed to:

Kelley A. Karn
Elizabeth A. Herriman
Duke Energy Business Services LLC
1000 East Main Street
Plainfield, IN 46168

Jon Laramore
Jane Dall Wilson
Faegre Baker Daniels LLP
300 N. Meridian Street, Ste. 2700
Indianapolis, IN 46204-1782

David Stippler
Randall C. Helmen
Lorraine A. Hitz-Bradley
Indiana Office of Utility Consumer Counselor
PNC Center, Suite 1500 South
115 W. Washington Street
Indianapolis, IN 46204

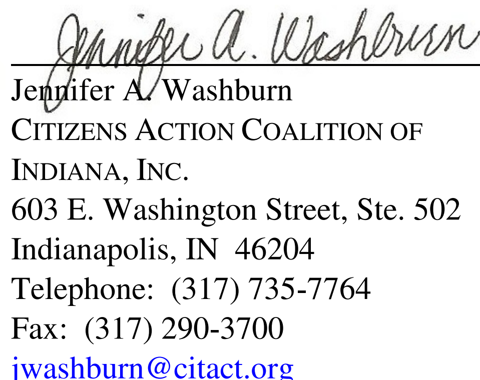
Timothy L. Stewart
Todd A. Richardson
Joseph P. Rompala
Tabitha J. Balzer
Lewis & Kappes, P.C.
One American Square, Suite 2500
Indianapolis, IN 46282

Anne E. Becker
Lewis & Kappes, P.C.
One American Square, Suite 2500
Indianapolis, IN 46282

Honorable Greg Zoeller
Indiana Attorney General
David L. Steiner
Deputy Attorney General of Indiana
Indiana Government Center South
302 W. Washington Street, 5th Floor
Indianapolis, IN 46204

Beth Krogel Roads
Indiana Utility Regulatory Commission
PNC Center, Suite 1500 East
101 W. Washington Street
Indianapolis, IN 46204-3419

Jerome Polk
Polk & Associates, LLC
6300 Falconsgate Ave.
Davie, FL 33331



Jennifer A. Washburn
CITIZENS ACTION COALITION OF INDIANA, INC.
603 E. Washington Street, Ste. 502
Indianapolis, IN 46204
Telephone: (317) 735-7764
Fax: (317) 290-3700
jwashburn@citact.org