

IN THE
INDIANA SUPREME COURT

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, and 43114 IGCC-8
v.)	
)	
DUKE ENERGY INDIANA, INC.,)	
)	The Hon. James D. Atterholt, Chairman
Appellee)	
)	The Hons. Kari A.E. Bennett, Larry S. Landis, Carolene Mays, and David E. Ziegner, Commissioners
INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR,)	
)	
Appellee,)	The Hon. David E. Veleta, Administrative Law Judge
)	
INDIANA UTILITY REGULATORY COMMISSION,)	
)	
Appellee.)	

**BRIEF OF *AMICI CURIAE*
IN SUPPORT OF APPELLANTS**

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TABLE OF CONTENTS

TABLE OF CONTENTS..... I

TABLE OF AUTHORITIES II

INTRODUCTION 4

STATEMENT OF INTEREST..... 5

BACKGROUND 5

I. SCIENTIFIC CONSENSUS AROUND CLIMATE CHANGE AND ITS IMPACTS ON PUBLIC HEALTH AND THE ENVIRONMENT 5

II. REGULATION OF CARBON DIOXIDE EMISSIONS 8

III. PROCEEDINGS BELOW 9

SUMMARY OF ARGUMENT 11

ARGUMENT 11

I. THE COMMISSION MUST DETERMINE WHETHER CONTINUED INVESTMENT IN THE EDWARDSPORT PROJECT ABSENT CO₂ MITIGATION WOULD BE IMPRUDENT. 11

A. Electric Utilities’ Investment in Power Generation Must Be Prudent and Minimize Costs and Risks to Ratepayers..... 11

B. Electric Utilities Must Consider the Risks Associated with Future Carbon Regulation. 13

C. Duke Failed to Mitigate the Carbon Regulatory Risks Its Ratepayers Face on Account of CO₂ Emissions from the Edwardsport Plant. 14

II. THE COMMISSION ERRED BY APPROVING A RATE RECOVERY REQUEST THAT FAILED TO IDENTIFY ACTUAL PROJECT COSTS AND RISKS TO RATEPAYERS. 16

CONCLUSION..... 17

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Citizens Action Coalition of Indiana, Inc. v. Northern Indiana Public Service Co.</i> , 485 N.E.2d 610 (Ind. 1985)	10
<i>Citizens Action Coalition of Indiana, Inc. v. Northern Indiana Public Service Co.</i> , 804 N.E.2d 289 (Ind. Ct. App. 2004).....	13, 14
<i>Coalition for Responsible Regulation v. Environmental Protection Agency</i> , 684 F.3d 102 (D.C. Cir. 2012), <i>aff'd sub nom. Utility Air Regulatory Group v. Environmental Protection Agency</i> , No. 12-1146, 2014 WL 2807314 (U.S. June 23, 2014).....	6
<i>Indiana Gas Co., Inc. v. Office of Utility Consumer Counselor</i> , 575 N.E.2d 1044 (Ind. Ct. App. 1991)	8, 9, 13
<i>L.S. Ayres & Co. v. Indianapolis Power & Light Co.</i> , 351 N.E.2d 814 (Ind. Ct. App. 1976).....	13, 14
<i>Massachusetts v. Environmental Protection Agency</i> , 549 U.S. 497 (2007).....	5
<i>Northern Indiana Public Service Co. v. Citizens Action Coalition of Indiana, Inc.</i> , 548 N.E.2d 153 (Ind. 1989)	9
<i>PSI Energy, Inc. v. Indiana Office of Utility Consumer Counsel</i> , 764 N.E.2d 769 (Ind. Ct. App. 2002).....	13, 14
Statutes	
42 U.S.C. § 7411.....	6
Ind. Code § 8-1-2-4.....	9
Other Authorities	
Ind. R. App. P. 41(B)	2
IPCC, Climate Change 2013: The Physical Science Basis, Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, <i>available at</i> http://www.ipcc.ch/report/ar5/wg1/	2, 3
IPCC, Climate Change 2014: Mitigation of Climate Change, Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, <i>available at</i> http://www.ipcc.ch/report/ar5/wg3/	3

Nat'l Oceanic and Atmospheric Admin., Adapting to Climate Change: A Planning Guide for State Coastal Managers – A Great Lakes Supplement (2011), <i>available at</i> http://coastalmanagement.noaa.gov/climate/docs/adaptationgreatlakes.pdf	3
Nat'l Research Council, America's Climate Choices (2011), <i>available at</i> http://www.nap.edu/catalog.php?record_id=12781	2, 3
Purdue Climate Change Research Ctr., Impacts of Climate Change for the State of Indiana (Feb. 2008), <i>available at</i> http://www.purdue.edu/discoverypark/climate/assets/pdfs/ClimateImpactsIndiana.pdf	4, 5
The Rocky Mountain Climate Org., Great Lakes National Parks in Peril: The Threats of Climate Disruption (July 2011), <i>available at</i> rockymountainclimate.org/images/GreatLakesParksInPeril.pdf	4
U.S. EPA, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (June 18, 2014).....	5
U.S. EPA, Clean Power Plan Maps, http://cleanpowerplanmaps.epa.gov/CleanPowerPlan/	5
U.S. EPA, Climate Impacts in the Midwest (last modified Sep. 9, 2013), http://www.epa.gov/climatechange/impacts-adaptation/midwest.html#impacts	3, 4, 5
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)	2, 3, 5
U.S. Global Change Research Program, Climate Change Impacts in the United States: The Third National Climate Assessment (2014), <i>available at</i> nca2014.globalchange.gov	2, 3, 4
Union of Concerned Scientists, Confronting Climate Change in the U.S. Midwest: Indiana (July 2009), <i>available at</i> http://www.ucsusa.org/assets/documents/global_warming/climate-change-indiana.pdf	3, 5
Union of Concerned Scientists, Heat in the Heartland: 60 Years of Warming in the Midwest (July 2012), <i>available at</i> http://www.ucsusa.org/assets/documents/global_warming/Heat-in-the-Heartland-Full-Report.pdf	4, 5
The White House, The Threat of Climate Carbon Pollution: Indiana, <i>available at</i> http://www.whitehouse.gov/sites/default/files/docs/state-reports/climate/Indiana%20Fact%20Sheet.pdf	4, 5

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. The Court of Appeals erred by rejecting Appellants’ argument that additional findings of fact and conclusion of law on the regulatory risk and mitigation of CO₂ emissions should have been required, incorrectly basing its decision on different facts at issue in a prior IURC action and failing to examine the different record that was before it in this appeal.

Although the IURC in prior proceedings had assumed that Duke Energy Indiana (“Duke”) could capture and sequester carbon at its new coal-gasification power plant in Edwardsport, Indiana, during the Commission proceedings from which this appeal stems, Appellants offered evidence showing that sequestration is not feasible and properly raised the issue of whether Duke should be required to develop a plan to mitigate the regulatory risk to ratepayers from the four million tons of carbon pollution that the plant will generate every year. Duke disputed any such obligation. Accordingly, the Commission was obliged to make findings of fact and reach conclusions of law on the issue of carbon pollution mitigation before authorizing a substantial increase in the amount that Duke can recover from ratepayers for plant construction costs. It failed to do so, and, therefore, transfer is appropriate.

Citizens Coal Council, Earth Charter Indiana, Healthy Dubois County, Inc., the Hoosier Environmental Council, Hoosier Interfaith Power & Light, Indiana Distributed Energy Alliance, the Indiana State Conference of the National Association for the Advancement of Colored

People, and the Environmental Law and Policy Center¹ (collectively, “*Amici*”) submit this brief in support of Appellants’ petition to transfer.

STATEMENT OF INTEREST

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 climate change. *Amici* file this brief because a denial of the petition to transfer could frustrate their efforts to reduce climate pollution and promote a cleaner energy future.² In this brief, *Amici* explain why any Certificates issued or re-issued by the IURC to a utility that invests in coal-fired electric generation should require mitigation of the financial risks to ratepayers from the emission of greenhouse gases and why the IURC’s failure to make any findings of fact or conclusions of law regarding that issue 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—a consequence of anthropogenic greenhouse gas emissions—threatens the health and well-being of people in Indiana, across the U.S., and around the world.³ While debate continues about the nature and

¹ The Environmental Law and Policy Center seeks leave to appear as *amici curiae* before this Court. Because the other *Amici* received permission to appear before the Court of Appeals, leave to appear as *amici curiae* before this Court is not required. *See* Ind. R. App. P. 41(B).

² The specific interests of *Amici* are detailed at greater length in the motions for leave to appear submitted before the Court of Appeals and, with respect to the Environmental Law and Policy Center, before this Court.

³ *See* U.S. Global Change Research Program, *Climate Change Impacts in the United States: The Third National Climate Assessment (2014)*, available at nca2014.globalchange.gov (“National Climate Assessment”); IPCC, *Climate Change 2013: The Physical Science Basis*, Working

timing of future climate disruptions and the magnitude of future adverse effects, there is overwhelming consensus in the international scientific community that a substantial reduction in CO₂ and other greenhouse gas emissions is necessary if we are to avoid the most devastating of these impacts.⁴

Already, the consequences of global warming and climate change are being felt here in Indiana, elsewhere in the U.S., and abroad. In Indiana, average annual temperatures have increased over the last several decades, heat waves are becoming more frequent and severe, winters are getting shorter, and heavy rainstorms are becoming more common.⁵ The U.S. Environmental Protection Agency (“EPA”) anticipates that these trends will continue and forecasts a 3°F increase in average summer temperatures in the Midwest over the next few decades and a 10°F increase by the end of this century.⁶

In Indiana, these changes are projected to result in increased occurrence of extreme hot temperature events, in more frequent and intense storms and flooding, in the risk of multi-year

Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, *available at* <http://www.ipcc.ch/report/ar5/wg1/> (“IPCC 2013”); Nat’l Research Council, *America’s Climate Choices* (2011), *available at* http://www.nap.edu/catalog.php?record_id=12781; *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 (Dec. 15, 2009).

⁴ *See* IPCC, *Climate Change 2014: Mitigation of Climate Change, Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, *available at* <http://www.ipcc.ch/report/ar5/wg3/>; IPCC 2013.

⁵ *See* National Climate Assessment; 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>; Union of Concerned Scientists, *Confronting Climate Change in the U.S. Midwest: Indiana* (July 2009), *available at* http://www.ucsusa.org/assets/documents/global_warming/climate-change-indiana.pdf (“UCS Indiana Report”); U.S. EPA, *Climate Impacts in the Midwest*, <http://www.epa.gov/climatechange/impacts-adaptation/midwest.html#impacts> (“EPA Midwest Impacts”).

⁶ EPA Midwest Impacts.

droughts, and in threats to various animal and hardwood species.⁷ Rising air temperatures mean that Indiana's prized Dunes National Lakeshore faces disruption of its delicate ecosystem.⁸ The water temperature of Lake Michigan also is rising, and winter ice cover is decreasing.⁹ Scientists predict that the Lake may have winters with no ice cover in as little as ten years.¹⁰ Less ice means more waves and stronger winter storms, and, therefore, accelerated erosion of the vulnerable lakeshore dunes.¹¹

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.¹² In 2008, flooding across the Midwest caused 24 deaths and \$8 billion in agricultural losses.¹³ 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.¹⁴ These communities also will face

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

⁸ The Rocky Mountain Climate Org., *Great Lakes National Parks in Peril: The Threats of Climate Disruption 2* (July 2011), *available at* rockymountainclimate.org/images/GreatLakesParksInPeril.pdf.

⁹ *Id.* at 15–16.

¹⁰ *Id.* at 16.

¹¹ *Id.*

¹² Purdue Study at 1; National Climate Assessment; 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 (“Heat in the Heartland”).

¹³ 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> (“Indiana Climate Fact Sheet”).

¹⁴ *Id.*

higher levels of ozone pollution and rising incidents of pest and vector-borne disease¹⁵ and will suffer water quality degradation and diminished agricultural and livestock productivity.¹⁶

II. REGULATION OF CARBON DIOXIDE EMISSIONS

On June 2, 2014, EPA proposed regulations requiring each state develop a plan to implement the “best system of emission reduction” to reduce CO₂ emissions from existing fossil power plants.¹⁷ The proposed rule sets state-specific CO₂ emissions rate goals for the power sector.¹⁸ For Indiana, EPA has proposed an emission rate goal of 1,607 pounds CO₂ per megawatt-hour on an interim (2020–2029) basis and a final goal of 1,531 pounds CO₂ per megawatt-hour by 2030.¹⁹ When compared to Indiana’s 2012 average emission rate across fossil-fueled plants, the 2030 goal represents a 20 percent reduction in the carbon intensity of the State’s electricity sector.²⁰

The proposed rule is the latest step in an ongoing regulatory process. In 2007, the Supreme Court held that, under the federal Clean Air Act, CO₂ and other greenhouse gases are “air pollutants” and EPA must determine whether they endanger public health. *Massachusetts v. Evtl. Prot. Agency*, 549 U.S. 497, 532–35 (2007). After analyzing available science, EPA determined that current and projected emissions of six greenhouse gases, including CO₂, threaten public health and welfare of current and future generations.²¹ The U.S. Court of Appeals for the

¹⁵ Purdue Study at 22–23; EPA Midwest Impacts; Heat in the Heartland at 23–24.

¹⁶ UCS Indiana Report; Purdue Study at 11–14; Indiana Climate Fact Sheet.

¹⁷ U.S. EPA, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (June 18, 2014).

¹⁸ *Id.* at 34,895.

¹⁹ *Id.*

²⁰ See U.S. EPA, Clean Power Plan Maps, <http://cleanpowerplanmaps.epa.gov/CleanPowerPlan/>.

²¹ 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).

District of Columbia Circuit upheld that finding and confirmed that the Clean Air Act requires the EPA to address greenhouse gas emissions under its stationary source permitting programs. *See Coal. for Responsible Regulation v. Env'tl. Prot. Agency*, 684 F.3d 102, 120–22, 134–36 (D.C. Cir. 2012), *aff'd sub nom. Util. Air Regulatory Grp. v. Env'tl. Prot. Agency*, No. 12-1146, 2014 WL 2807314 (U.S. June 23, 2014); *see also* 42 U.S.C. § 7411 (requiring EPA to issue performance standards for stationary sources).

III. PROCEEDINGS BELOW

In 2006, Duke sought approval from the IURC to build and operate the new Edwardsport plant.²² In support of its proposal, Duke pointed to the potential cost savings for ratepayers that carbon capture technology could provide in the event of carbon regulation²³ and to the location of the project site “in a region that appears to be promising for geological carbon sequestration.”²⁴ The Commission approved the project and Duke’s \$1.985-billion cost estimate, allowing for recovery of those costs from ratepayers, but conditioning its approval on Duke’s studying the feasibility of carbon capture and sequestration (“CCS”) and on its building of infrastructure to support carbon capture.²⁵ Following substantial construction cost overruns, Duke requested and received a \$365-million increase in costs recoverable from ratepayers,

²² *In re Joint Petition and Application of Duke Energy Indiana Energy, Inc.*, Cause No. 43114, at 2 (I.U.R.C. Nov. 20, 2007) (“IURC 2007 Order”).

²³ *Id.* at 43–44.

²⁴ Direct Test. of James L. Turner, Cause No. 43114 IGCC 4S1, at 10 (Apr. 16, 2010).

²⁵ IURC 2007 Order at 47, 62. In March 2009, Duke filed a petition with the Commission seeking recovery of carbon sequestration costs for Edwardsport, but, in light of Duke’s testimony that geologic data gathered at the Edwardsport site indicated that conditions for sequestration “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).

bringing total construction costs to \$2.35 billion.²⁶ A second rate increase request—for an additional \$530 million—resulted in the IURC Order at issue here.²⁷

During the proceedings underlying that Order, Appellants offered testimony criticizing Duke's failure to include an estimate of CCS costs and pointed to Duke's own data showing that geological conditions at and around Edwardsport are not conducive to carbon sequestration.²⁸ Appellants' witness David Schlissel also criticized Duke's failure to include CCS cost assumptions 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.²⁹ Mr. Schlissel testified that prudence requires the examination of a range of potential CO₂ prices reflecting the economic risks that carbon regulation poses.³⁰ 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.³¹ Pointing to the foreseeable federal regulation of CO₂ emissions and the infeasibility of CCS at the Edwardsport site, Sierra Club witness Nachy Kanfer called for a condition on any reissued Certificates requiring mitigation of 1.6 million tons of CO₂ annually through retirements of other Duke coal generating units, investment in renewable energy generation, and/or adoption of energy efficiency measures.³²

²⁶ *In re Verified Petition of Duke Energy Indiana, Inc.*, Cause No. 43114 IGCC 1, at 1, 29 (I.U.R.C. Jan. 7, 2009).

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

²⁸ Direct Test. of Kerwin L. Olson, Cause No. 43114 IGCC 4S1, at 11–13 (July 30, 2010).

²⁹ Direct Test. of David A. Schlissel, Cause No. 43114 IGCC 4S1, at 11–23 (July 30, 2010).

³⁰ *Id.* at 15.

³¹ *Id.* at 17–18, n.28.

³² Test. of Nachy Kanfer, Cause No. 43114 IGCC 4S1, at 4–10 (June 29, 2012).

In its own testimony, Duke disputed Appellants' contention that it must mitigate emissions from Edwardsport, but the Commission did not rule on the issue.³³ Nevertheless, the Commission concluded that completion of the project is in the public interest and approved a settlement agreement allowing for recovery of \$2.595 billion in construction.³⁴ The Court of Appeals affirmed the IURC decision.

SUMMARY OF ARGUMENT

Indiana law requires that the IURC make findings of fact and reach conclusions of law on all issues in dispute and that utilities exercise prudence in their energy resource planning decisions. During the proceedings below, Appellants called for an examination of the risks that future carbon regulations pose to Duke's ratepayers and 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 or to mitigate its carbon regulatory risk, but the IURC authorized a rate recovery increase without making any findings or conclusions regarding the disputed issues. Accordingly, the IURC's Order was made in error, and transfer is appropriate.

ARGUMENT

I. THE COMMISSION MUST DETERMINE WHETHER CONTINUED INVESTMENT IN THE EDWARDSPORT PROJECT ABSENT CO₂ MITIGATION WOULD BE IMPRUDENT.

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

The IURC is required to review utilities' investment decisions for prudence and establish rates at just and reasonable levels. *See generally Ind. Gas Co., Inc. v. Office of Util. Consumer*

³³ *In re Verified Petition of Duke Energy Indiana, Inc.*, Cause No. 43114 IGCC 4S1 (I.U.R.C. Dec. 27, 2012).

³⁴ *Id.* at 121, Ex. A at 2.

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.”); *see also* Ind. Code § 8-1-2-4. When the IURC approves rate recovery for the costs of a power plant, ratepayers become the involuntary guarantors of the utility’s investment decision. Absent Commission oversight, utilities could shift investment risk to ratepayers and would, therefore, lack any incentive to select less risky investments. By reviewing proposals under a prudent investment standard, the Commission can ensure that utilities’ decisions are based on a reasonable assessment of projected energy needs, available alternatives, and total costs—including foreseeable future regulatory compliance costs—and that ratepayers are not made to bear unreasonable risks. *See generally* *Ind. Gas Co.*, 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).

In the context of capital investment in coal-fired power generation, a utility must employ 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.”³⁵ Here, Duke failed to undertake least-cost planning because it ignored the true costs of the Edwardsport project, relying instead on an imprudently low estimate of potential future carbon costs. Given this failure, Duke’s decision to invest over three billion dollars of ratepayer money in a project without ensuring that the regulatory risks to its ratepayers from the future costs of carbon regulation would be mitigated was imprudent.

³⁵ IURC 2007 Order at 43.

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

Given EPA’s ongoing regulation of greenhouse gas emissions and its recently proposed rule governing emissions from existing power plants,³⁶ additional compliance costs are foreseeable, and utilities must include them in least-cost planning. Indeed, Duke’s then 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.”³⁷ This risk of increased regulatory costs is no different in kind from other risks that utilities routinely analyze before 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.

Given these risks, prudent utilities should consider less carbon-intensive options to meet consumer demand—*i.e.*, energy efficiency and other demand-side management, renewable resources, and natural gas combined cycle power generation—alongside any proposed investment in coal-fired power.³⁸ If a utility does decide to invest in coal-fired electricity generation, it cannot simply shift to 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

³⁶ *See supra* at 5–6.

³⁷ Direct Test. of James E. Rogers, Cause No. 43114, at 18 (Oct. 10, 2006); *see also id.* at 9 (“I believe CO₂ regulation is highly likely.”).

³⁸ IURC 2007 Order at 43 (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”).

risk”). Instead, it must include reasonable estimates of costs of complying with future emissions limits in its calculation of total project costs and adopt measures to mitigate those costs.

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.³⁹ Nevertheless, the Edwardsport plant does not include any 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 by Duke’s own expert.⁴⁰ Given its apparent abandonment of CO₂ mitigation via sequestration, 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; as Appellants’ expert testified below, however, if the company had modeled a complete range of potential costs it would have identified as much as \$3.5 billion in additional impacts over the next 20 years.⁴¹ Moreover, whether or not Duke’s carbon price estimate is reasonable, ratepayers will be protected only if the company is required to develop a

³⁹ Rogers Test. at 18.

⁴⁰ Direct Test. of Robert D. Moreland, Cause No. 43653, at 5–7 (Jul. 2, 2009).

⁴¹ Schlissel Test. at 11–23.

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 December 27, 2012 Order.

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 future regulatory costs insulates the company from risk and guarantees its profitability. While the Commission certainly retains authority to protect ratepayers by denying rate recovery for regulatory costs imprudently incurred, it is still up to the Commission when issuing a Certificate for the project of Edwardsport's magnitude to evaluate the risk that such costs might arise and rule on whether a utility must develop a plan to mitigate them.

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, but 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. For example, 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.

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

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 (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.*, 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.*, 575 N.E.2d at 1048.

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 a plan to mitigate the risks associated with the emission of more than a hundred million tons of CO₂ over the plant’s projected lifetime. Given Appellants’ and Duke’s testimony before the IURC—which demonstrate that the issue of future carbon regulatory compliance costs had been

“put in dispute by the parties”—the Commission was required to make findings on that issue.

See Ayres, 351 N.E.2d at 830.

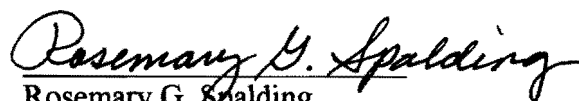
In addition, the Commission’s conclusions that the requested rate recovery increase was prudent and that the project remains in the public interest—conclusions that require an understanding of actual project cost—are unsupported given the Commission’s failure to make any findings of fact about what the costs of complying with future carbon regulation might be, how they should be factored into least-cost planning, or whether the risk that ratepayers will bear such costs requires mitigation. *See PSI Energy, Inc.*, 764 N.E.2d at 773–74 (legal standard for judicial review of IURC decisions); *Citizens Action Coal. of Ind., Inc.*, 804 N.E.2d at 294 (same).

CONCLUSION

For the foregoing reasons, *Amici* respectfully ask this Court to grant Appellants’ petition to transfer.

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Respectfully Submitted,



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WORD COURT CERTIFICATE

I verify that this brief contains no more than 4,200 words.

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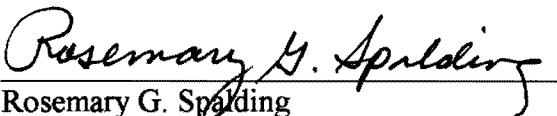
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