IN THE INDIANA SUPREME COURT

CAUSE NO._____________

MICHAEL A. MULLETT, PATRICIA N. MARCH,	)	**Appeal from the Indiana Utility Regulatory Commission**
	)	
Appellants (intervenors below)	)	**IURC Cause No. 38707 FAC 113**
	)	
v.	)	**Honorable James Atterholt**
	)	**Commission Chair**
DUKE ENERGY INDIANA, LLC, NUCOR STEEL-INDIANA, INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR,	)	**Honorable Sarah Freeman**
	)	**Honorable James Huston**
	)	**Honorable Angela Weber**
	)	**Honorable David Ziegner**
Appellees (applicant/petitioner, intervenor, statutory party below).	)	**Commissioners**
	)	
	)	**Honorable David Veleta**
	)	**Senior Administrative Law Judge**

AMICI CURIAE BRIEF OF CITIZENS ACTION COALITION OF INDIANA, ENVIRONMENTAL LAW & POLICY CENTER, ENERGY MATTERS COMMUNITY COALITION, HOOSIER ENVIRONMENTAL COUNCIL, INDIANA COMMUNITY ACTION ASSOCIATION, INDIANA DISTRIBUTED ENERGY ALLIANCE, SAVE THE VALLEY AND VALLEY WATCH IN SUPPORT OF APPELLANTS' PETITION TO TRANSFER

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INTERESTS OF THE AMICI

Amici Citizens Action Coalition of Indiana, Environmental Law & Policy Center, Energy Matters Community Coalition, Hoosier Environmental Council, Indiana Community Action Association, Indiana Distributed Energy Alliance, Save the Valley and Valley Watch are civic, community, consumer, environmental and renewable energy organizations who collectively represent thousands of Indiana residents who care about, are interested in, and work to achieve fair utility rates, clean energy development and healthier, clean air in Indiana. Amici work in complementary ways before the Indiana Utility Regulatory Commission, other state and local agencies, and the state and federal courts to protect the health, environment, and economic well-being of people and communities in Indiana. Amici are concerned that the regulatory and judicial decisions below that allow a utility to shift its financial liability for its own faulty breach of contract onto consumers, who bear no fault whatsoever, by forcing them to pay higher rates and charges is unfair and improper and, if left to stand, could impede growth of clean renewable energy in Indiana.

SUMMARY OF ARGUMENT

This case presents a fundamental question of law and fairness about whether Indiana utility consumers should be forced to pay higher rates and charges when a monopoly electric utility breaches a contract with a third-party energy provider, and the Indiana Utility Regulatory Commission ("Commission" or "IURC") fails to fully analyze and determine the reasonableness and prudency of the utility's breach of contract actions that created the financial liability. Duke Energy Indiana LLC ("Duke Energy") breached its contract with the Benton County Wind Farm ("Benton") that required Duke Energy to purchase 100 megawatts of wind energy and to procure transmission to deliver the energy to the electricity grid managed by the Carmel, Indiana based

Midcontinent Independent System Operator ("MISO"). Benton sued Duke Energy for damages due to the breach of contract. In 2016, the United States Court of Appeals for the Seventh Circuit ultimately ruled in Benton's favor. The U.S. Court of Appeals held that Duke Energy was at fault and liable for breach of contract based on its failure to reserve transmission capacity to carry the wind energy that was generated, and ordered Duke Energy to pay Benton damages for its breach of contract:

> ….Duke must pay Benton. The risk of inadequate transmission was contemplated by the contracting parties and allocated to Duke. By accepting this risk, Duke enabled Benton to finance its project; otherwise potential investors might have feared exactly the overcapacity situation that has come to pass. Duke wanted Benton's facilities to exist and called them into existence by promising to pay even if a shortfall of transmission services should lead to curtailment of deliveries.

Benton County Wind Farm v. Duke Energy Indiana, 843 F. 3d 298, 303-04 (7th Cir. 2016). The U.S. Court of Appeals remanded the case to determine damages, and the parties reached a settlement by which Duke Energy agreed to pay damages of $29 million to Benton.

After the settlement, Duke Energy filed a fuel adjustment case at the Commission requesting authorization to charge consumers for the entirety of the $29 million of its damages resulting from its breach of contract with Benton County. *Application of Duke Energy Indiana for a Change in Its Fuel Cost Adjustment*, Cause No. 38707 FAC 113, Sept. 27, 2017. Under Indiana law, the Commission must specifically examine and find any such charges to be just and reasonable before it can permit a utility, such as Duke Energy, to force consumers to pay the charges–here, the $29 million in damages. Ind. Code. §8-1-2-4. Instead of analyzing the reasonableness of Duke Energy's actions in breaching the contract, however, the Commission only looked at whether the amount of the settlement was reasonable. By asking and addressing the wrong question, the Commission reached the wrong answer by failing to properly apply the

just and reasonable standard and violating Indiana law in a manner that raises rates to Indiana consumers without fundamental fairness. That result is unfair and is contrary to law.

Appellants Mullett and March argued on appeal that forcing consumers to pay these higher charges of $29 million was unreasonable as a matter of law because Duke Energy's breach of contract caused the financial damages and the loss of wind energy service. Accordingly, Duke Energy and its shareholders should be responsible for Duke Energy's errors. The Indiana Court of Appeals ruled in Duke Energy's favor by joining the Commission in again focusing on the reasonableness of the settlement amount, rather than Duke Energy's breach that caused the damages and loss of service. *Mullett v. Duke Energy Indiana,* Court of Appeals Case No. 93A02-1710-EX-2468 Opinion (May 21, 2018). With due respect, the Indiana Court of Appeals' decision is erroneous and contrary to law. If left to stand, it sets an unfortunate precedent allowing consumers to be charged for a monopoly utility's unreasonable decision to breach its contractual obligations, and it risks continued unfairness and illegality in future such cases. Consumers should not be forced to pay for these types of utility mistakes.

The Supreme Court should grant the Petition to Transfer in this case in order to fully consider the important issues on appeal. The Supreme Court should then reverse and remand the Indiana Appellate Court's decision and require the Commission to fully and fairly determine the reasonableness of Duke Energy's actions in breaching its contract, as well as the fairness and legality in these circumstances of charging the entirety of the consequent damages to consumers who bear no fault at all.

ARGUMENT

I. INDIANA LAW DOES NOT ALLOW DUKE ENERGY TO FORCE CONSUMERS TO PAY UNREASONABLE AND UNJUST HIGHER UTILITY CHARGES FOR DAMAGES RESULTING FROM ITS BREACH OF CONTRACT.

Indiana law requires public utilities "to furnish reasonably adequate service and facilities." "The charge made by any public utility for any service rendered or to be rendered either directly or in connection therewith shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful." I.C. §8-1-2-4. The Commission must protect consumers from paying unjust charges. The $29 million of damages was caused by Duke Energy's failure to reserve sufficient transmission capacity despite its contractual obligation to do so. The damages are Duke Energy's fault as recognized by the U.S. Court of Appeals. That is not a "service rendered" to consumers.

The United States Court of Appeals for the Seventh Circuit summarized the issue succinctly: "three parts of the contract strongly imply that Duke must do what is needed to make transmission capacity available." *Benton County Wind Farm,* 843 F. 3d at 304. The U.S. Court of Appeals concluded: "We read this contract as allocating the risk to Duke, which means that Benton receives the compensation by provided by § 4.6(a) [of the contract]..." *Id.* Duke Energy failed in its responsibility to fulfill the contract, and the Commission erred in requiring consumers to pay for $29 million in damages. These charges are not "reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful." I.C. § 8-1-2-4.

II. BOTH THE INDIANA UTILITY REGULATORY COMMISSION AND THE INDIANA APPELLATE COURT ASKED THE WRONG QUESTION AND THEN REACHED THE WRONG ANSWER.

Following the U.S. Court of Appeals' unanimous decision that Duke Energy violated its contract and owed damages, Duke Energy settled with Benton for $29 million and initiated a fuel adjustment charge proceeding before the Indiana Utility Regulatory Commission seeking to charge the full $29 million to Indiana consumers. *Application of Duke Energy Indiana for a Change in Its Fuel Cost Adjustment*, Cause No. 38707 FAC 113, Sept. 27, 2017. The Commission subsequently issued an Order that allowed Duke Energy to shift its financial liability to consumers, but reached that result by focusing on the question of whether the $29 million figure constituted a fair settlement between Duke Energy and Benton County. The Commission did not fully analyze and determine the reasonableness of Duke Energy's actions in failing to comply with its contractual requirements, which resulted in the damages.

Put another way, the Commission did not fully analyze whether Duke Energy should be responsible for the $29 million of damages because the utility had breached the contract and caused the damages by failing to meet its obligation to procure transmission required to deliver the wind energy. *Id.* That reasonableness question was never addressed. The Commission asked and addressed the wrong question and thereby reached the wrong result when it came to properly determining whether the "charge made by any public utility for any service rendered or to be rendered either directly or in connection therewith [is] reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful." I.C. § 8-1-2-4.

The Indiana Court of Appeals likewise addressed the wrong question and thereby reached the wrong answer when it affirmed the Commission's decision by ignoring Duke Energy's previously adjudicated fault in the breach of contract case decided by the U.S. Court of Appeals

and focusing only on whether the $29 million settlement amount itself was reasonable. The Indiana Court of Appeals concluded that "the Wind Farm settlement is in the best interest of customers and the costs are reasonable for what is owed to the Wind Farm…" *Mullett v Duke Energy Indiana,* No. 93A02-1710-EX-2468, slip op. at 9. The Court of Appeals, however, applied the reasonableness test to the wrong question. The settlement amount might be reasonable in terms of negotiating how much breach of contract damages Duke Energy owes to Benton, but that does not mean that it is reasonable to allow the utility to charge consumers for the entire $29 million unless Duke Energy could fully demonstrate that its breach of contract actions and resulting consequences were somehow reasonable.

The Indiana Supreme Court has held that "the Commission's decision must contain specific findings on all the factual determinations material to its ultimate conclusions." *Citizens Action Coalition v. Northern Indiana Public Service Co.*, 485 N.E. 2d 610, 612 (Ind. 1985). Further, "the statutory standard requires a reviewing court to inquire whether there is substantial evidence in light of the whole record to support the Commission's findings of basic facts." *Id.* Applying this standard of review to this case, the Indiana Utility Regulatory Commission should have clearly, fully and fairly addressed, analyzed and determined the question of whether Duke Energy's actions in breaching its contractual obligations were reasonable and prudent, or not. The Commission should then have made specific findings to resolve that question based on record evidence. That is necessary to determine whether or not the proposed charges are in fact "just and reasonable" or instead are "unjust or unreasonable charges for such service [that are] prohibited and declared unlawful." I.C. § 8-1-2-4. The Indiana Court of Appeals should have reviewed whether the Commission made this specific required finding and whether it was based on substantial evidence in order to support an ultimate conclusion on whether or not the charges

were just and reasonable. The Commission and the Indiana Court of Appeals both failed to address the fact that the U.S. Court of Appeals for the Seventh Circuit specifically found Duke Energy at fault for failing to procure transmission, and that this failure caused the breach of contract and resulting damages.

The Commission instead focused on the reasonableness of the settlement that Duke Energy reached with Benton after the breach of contract. Duke Energy's expert witness Swez never addressed Duke Energy's failure to reserve transmission, or explain why the company should not be responsible for the $29 million in damages. He only defends the fairness of the settlement agreement in terms of $29 million being a reasonable assessment of damages. IURC Cause No. 38707-FAC 113 Petitioner's Exhibit 6, at 18-27. [1]

The Indiana Supreme Court addressed a similar issue in *Citizens Action Coalition v. Northern Indiana Public Service Co*. in which the utility failed to complete a nuclear power plant and then tried to charge consumers for the costs incurred. The Court ruled: "I.C. § 8-1-2-1, in conjunction with I.C. § 8-1-2-4, protects consumers from having to pay for service not received." *Citizens Action Coalition v. Northern Indiana Public Service Co.*, 485 N.E. 2d 610, 615 (Ind. 1985). That same logic applies to the present case. Duke Energy was at fault in breaching its power purchase contract, thereby preventing wind energy it had agreed to purchase from being generated and delivered for the benefit of its consumers. Duke Energy should not be authorized

[1] The Court of Appeals correctly noted Office of Utility Consumer Counselor ("OUCC") "had no objection to the proposed recovery except that it be spread over a twelve-month period." *Mullett v. Duke*, slip op., at 9. However, the Commission record merely shows that the OUCC, for no stated reason, did not address the issue of Duke Energy's breach at all. *See Application of Duke Energy Indiana for a Change in Its Fuel Cost Adjustment*, Cause No. 38707 FAC 113, at 4; *Mullett v Duke,* slip op., at 4. OUCC's litigation choice does not constitute evidence that Duke Energy somehow acted reasonably when it breached its contract with Benton.

by the Commission to then simply pass on the breach of contract damages settlement as additional charges to consumers to pay even though they received no wind energy services.

The Commission's failure to fully address and analyze Duke Energy's failure to reserve transmission and its breach of its contract with Benton constitutes reversible error. A court on review must inquire whether specific findings exist as to all factual determinations material to ultimate conclusions; whether substantial evidence within the record as a whole supports the findings of fact; and whether the decision, ruling or order is contrary to law. *Mullett v. Duke, slip op.* at 6. While citing the correct standard for factual determinations, the Indiana Court of Appeals failed to apply it. Duke Energy's reasonableness or lack thereof in breaking the contract by not reserving transmission falls within "all factual determinations material to its ultimate conclusions." *Citizens Action Coalition v. Northern Indiana Public Service Co.*, 485 N.E.2d at 612. There must be "substantial evidence in light of the whole record" cited to support the required finding. *Id.* Applying the proper legal standards, the Indiana Supreme Court should reverse and remand for the Commission to address the proper question and then resolve it properly to reach a lawful and fair result in this case.

CONCLUSION

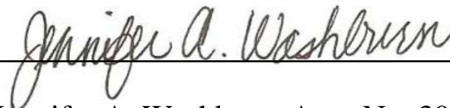
Duke Energy was at fault for breaching its contract with Benton, and the U.S. Court of Appeals for the Seventh Circuit ordered Duke Energy to pay damages. Duke Energy and Benton settled on an amount of $29 million in damages. The Indiana Utility Regulatory Commission approved Duke Energy's request to charge higher rates to consumers for the $29 million of its damage liability by focusing only on the amount of the settlement, instead of on the reasonableness or unreasonableness of Duke Energy's faulty actions which caused the contractual breach and damages. By taking this approach, the Commission committed legal

error and the Indiana Court of Appeals' subsequent decision to affirm that error was legally incorrect.

For the reasons stated above, the Indiana Supreme Court should: (1) Grant Appellants' Petition to Transfer; (2) Grant the Motion for the above parties to appear as amici and file this amici curiae brief for the Court's consideration; (3) Vacate and reverse the Indiana Court of Appeals' decision; (4) Reverse and remand the Commission's Order as contrary to law, and instruct the Commission on remand to determine the reasonableness or unreasonableness of Duke Energy's actions in breaching its contract with Benton that resulted in the damages; and (5) Grant such further relief as may be just and equitable.

Dated: September 4, 2018

Respectfully submitted,



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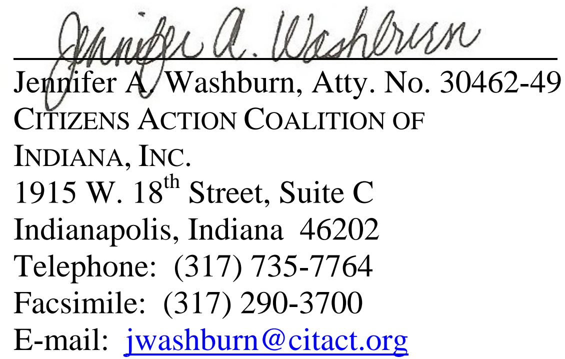
WORD COUNT CERTIFICATE

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



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing have been served on Public Service Contacts through E-Service using the IEFS this 4th day of September, 2018, on the following:

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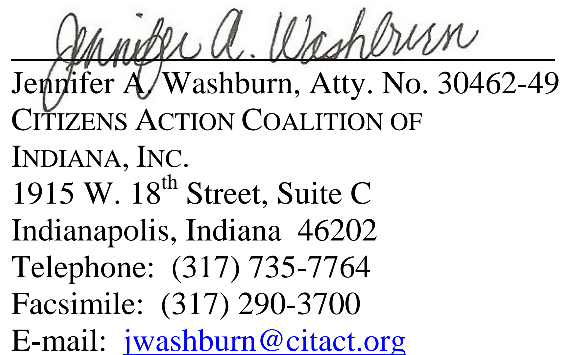

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