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CONSUMERS, INC.**

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Ms. DeAnna L. Poon
Assistant General Counsel
Indiana Utility Regulatory Commission
101 West Washington St., Ste. 1500 E
Indianapolis, IN 46204

Re: INDIEC Comments on Rulemaking #18-02

Dear DeAnna:

Please accept the following comments with regard to the Commission's Rulemaking from Indiana Industrial Energy Consumers, Inc. (INDIEC).

Comment # 1: 170 IAC 1-1.1-3(a)

In 170 IAC 1-1.1-3(a), the Commission has retained the existing deadline of midnight for filing submissions. This provision is consistent with practice before state and federal courts, and there is no good cause for deviation. INDIEC supports the Commission's retention of the midnight deadline.

Comment # 2: 170 IAC 1-1.1-4(a)(1)

The proposed changes amend 170 IAC 1-1.1-4(1) to require motions for confidential treatment to be filed "as soon as practicable before the date" the information is due to be filed, rather than allowing the motion to be filed "on or before" that date. As such, the change would no longer permit motions for confidential treatment to be filed the day the information is due.

INDIEC respectfully recommends against requiring a motion for confidential treatment to be filed before the information is due. Frequently, intervenors seek to utilize information that the utility or another party deems confidential, rather than information that the intervenors themselves claim is confidential. The intervenor files a motion for confidential treatment, but must rely on the utility or other party to support the motion with a separate motion. In these situations, it is not clear whether the new changes would require that motion to be filed before the intervenor's due date as well, or only that the intervening party's motion be filed before the due date. This ambiguity also exists in the present language of the rule. In practice, the rule has been applied such that only the intervening party must file the motion the day the testimony is due, and the supporting motion is filed at some point thereafter.

Because it is often the utility or another party claiming confidentiality, the intervenors must rely on others to identify whether the information is covered by an existing confidentiality order, or whether a new one must be requested. In addition, because the information is often incorporated into written analysis by the intervenor witness and/or calculations or spreadsheets prepared by the intervenor witness (rather than exclusively attaching the data response itself), determining whether the information is covered by an existing order may require the utility or other party to review the testimony of the intervenor witnesses. Similarly, to the extent an intervenor must notify another of the use of what is designated as confidential information not covered by an existing order, the rule would still require disclosure of a portion of an intervenor's testimony prior to the date it is due. In other words, requiring the motions for confidential treatment to be submitted before the filing date may in certain circumstances effectively require the intervenors to preview their testimony to others before the due date.

Moreover, if the purpose of the rule change is to provide the information to the Commission more quickly, then moving forward the intervening party's deadline for filing confidential information would not accomplish that goal. Instead, the component slowing the process is the delay from waiting for a supporting motion for confidential treatment, because that is the last step that must occur before the Commission can enter an order confidentiality.

As such, INDIEC respectfully recommends that the Commission retain the existing language of "on or before the date" in Rule 170 IAC 1-1.1-4. In addition, if the Commission wishes to access confidential information more quickly, INDIEC recommends that the Commission impose more stringent deadlines on the timing of any additional motions for confidential treatment by the non-filing party seeking to protect the information from disclosure. For example, a new subsection (C) could be added to 170 IAC 1-1.1-4(a)(1) with the following language:

170 IAC 1-1.1-4(a)(1)(C): This subsection applies if a filing party wishes to submit confidential information provided and considered confidential by another party ("providing party"), and the providing party wishes to submit its own supporting motion for confidential treatment. In this circumstance, the providing party must submit its supporting motion for confidential treatment within X number of days after the deadline of the filing party's submission. The providing party's motion should indicate whether the other parties to the proceeding object to preliminary confidential treatment of the information.

INDIEC respectfully suggests that the "X" number of days be in the range of five to ten days.

Comment # 3: 170 IAC 1-1.1-4(a)(2)

Under the proposed changes, 170 IAC 1-1.1-4(2) would be created as a new subsection requiring that motions for confidential treatment should indicate whether the other parties to the proceeding object to the preliminary confidential treatment of the information.

INDIEC respectfully recommends against inclusion of this new subsection in its entirety. As explained above, intervenor witnesses often utilize information obtained through discovery that the utility or other parties claim is confidential, then incorporate the information into written analysis and spreadsheets. Requiring parties to ascertain whether other parties would object to preliminary confidential treatment of the information effectively requires the filing party to preview its testimony to other parties before the date the material is due. INDIEC strongly objects to imposing such a requirement.

This proposed rule also poses practical issues as well. The rule does not indicate how much time a filing party must give other parties to evaluate and respond as to any objections to preliminary confidential treatment. In large cases involving multiple issues and parties, it may be difficult for parties to evaluate the confidential designation of other parties on a timely basis prior to the due date.

Rather than requiring a party to seek the input of other parties on any objections to confidential treatment *before* the due date, INDIEC recommends instead that the Commission require any parties wishing to object to a preliminary confidential designation to file objections on an expedited basis *after* a motion for confidential testimony is submitted. Alternatively, INDIEC recommends that the following sentence be added as the last sentence of 170 IAC 1-1.1-4(a)(2):

Notwithstanding this provision, if a filing party's motion for confidential treatment will be supported by a supplemental motion for confidential treatment submitted by a providing party as described in 170 IAC 1-1.1-4(a)(1)(C), then only the providing party's supplemental motion for confidential treatment must indicate whether the parties to the proceeding object to preliminary confidential treatment of the information.

This new sentence would work in tandem with the new proposed language in Comment #3.

Comment #4: 170 IAC 1-1.1-5

The following sentence is proposed to be added to 170 IAC 1-1.1-5(c): "Commission review is generally limited to a review of the consumer affairs record as compiled during the review conducted under 170 IAC 16-1-5 and to the issues contained therein."

INDIEC respectfully recommends that this rule be clarified to expressly permit the record before the IURC to be supplemented when the complexity of a case or other factors make utilization of the discovery process appropriate. Discovery is not available in cases before Consumer Affairs. In particularly in complex cases, however, due process mandates that the parties be afforded the opportunity to obtain information necessary to their cases through the discovery process.

In addition, new events may occur or additional or new information may become available after a case moves from the Consumer Affairs Division to the full Commission. In those instances, administrative economy would not be served by requiring that the case before

the IURC be stayed in order to remand the case back to Consumer Affairs, for subsequent transfer back to the full Commission.

As such, INDIEC respectfully recommends that the proposed language of 170 IAC 1-1.1-5 be amended to expressly permit the Commission to review additional information beyond the Consumer Affairs Division record in contexts in which discovery is appropriate, when new events occur, or when new or additional information becomes available after a case has been transferred from Consumer Affairs to the full Commission.

INDIEC respectfully recommends the following language be added as the last sentence of 170 IAC 1-1.1-5: **“The Commission may permit supplementation of the Consumer Affairs Division record when the complexity of a case or other factors make utilization of the discovery process appropriate, or when administrative economy would be served by consideration of any new or additional information after transferal of the case from the Consumer Affairs Division.”**

Comment #5: 170 IAC 1-1.1-9(a)(8)

The Rule proposes a new subsection to 170 IAC 1-1.1-9(a) as follows:

(8) A proposed procedural schedule and a statement indicating whether the parties reasonably anticipated to participate in the proceeding are in agreement with the proposed procedural schedule for the pre-filing of evidence and the evidentiary hearing. The commission’s general administrative orders may provide guidance for determining an appropriate procedural schedule as follows:

(A) This must be followed for cases involving rate adjustment mechanisms, also known as trackers.

(B) For cases not involving rate adjustment mechanisms or trackers, an alternative to providing the proposed procedural schedule when filing the petition is to indicate that a proposed procedural schedule will be filed within thirty (30) days of the filing of the petition.

The word “This” in subsection 9(a)(8)(A) is ambiguous because it is not clear if “This” refers to both of the previous sentences in 9(a)(8) or only to the first sentence but not the second sentence. In other words, one interpretation is that the rule requires both that guidance from the GAO must be utilized in preparing a procedural schedule for tracker cases *and* that the petitioner in a tracker case must file a proposed procedural schedule along with a statement indicating whether the other likely participants agree to it. Under this interpretation, the permissive “may” in the first sentence of 170 IAC 1-1.1-9(a)(8) provides the Commission with discretion to determine whether to issue a GAO providing guidance for determining an appropriate procedural schedule and discretion to determine the contents of any such schedule, but does not provide the parties with discretion to vary from any GAO guidance once issued. Another interpretation is that the rule only mandates that the petitioner in a tracker case file a proposed procedural schedule along with a statement indicating whether the other likely participants agree to it. Under that interpretation, the GAO would be only guidance, but not a mandatory requirement.

This interpretation reads the “may” to allow the parties with discretion to vary from any GAO guidance issued. INDIEC respectfully requests clarification of this rule in favor of the latter interpretation.

In addition, to the extent that the rule is intended to mandate adherence to a GAO on proposed tracker procedural schedules, INDIEC respectfully requests the rule be changed. INDIEC believes that the presiding officers and the parties should have discretion to vary the procedural schedule from the GAO guidance, especially in tracker cases that do not involve statutory deadlines. Such discretion is important given that the complexity and financial impact of individual tracker cases may vary. Moreover, other issues may impact the procedural schedule, such as conflicts with other cases and state holidays.

Finally, for the same reasons, INDIEC believes that this rule should not mandate adherence to a GAO in non-tracker cases, either. INDIEC believes that the intent of this rule is not to require adherence to the GAO guidance in non-tracker cases, but additional language could clarify this point as well.

As such, INDIEC respectfully requests that 170 IAC 1-1.1-9(a)(8) be amended to add the adjective “non-mandatory” as follows:

A proposed procedural schedule and a statement indicating whether the parties reasonably anticipated to participate in the proceeding are in agreement with the proposed procedural schedule for the pre-filing of evidence and the evidentiary hearing. The commission’s general administrative orders may provide **non-mandatory** guidance for determining an appropriate procedural schedule, as follows:

In addition, INDIEC respectfully requests that 170 IAC 1-1.1-9(a)(8)(A) be amended as follows:

~~This~~ **The requirement that a petitioner submit a proposed procedural schedule and a statement indicating whether the anticipated parties to the case agree to the schedule** must be followed for cases involving rate adjustment mechanisms, also known as trackers.

Comment #6: 170 IAC 1-1.1-19.5

The new subsection 170 IAC 1-1.1-19.5 requires parties to a case that becomes a subdocket to resubmit their appearances and petitions to intervene in the subdocket. INDIEC respectfully requests that this rule be modified to empower the presiding officers with the discretion to waive this requirement when administrative economy would support such a waiver. INDIEC respectfully requests that the phrase “**unless the Presiding Officers waive this requirement**” to the end of subsections (b) and (c).

Comment #7: 170 IAC 1-1.1-23(c)

A new subsection (c) is proposed to be added to 170 IAC 1-1.1-23 which states as follows: “Posthearing briefs and proposed orders are not evidence and therefore are not part of the evidentiary record on which the commission may rely for support of its factual findings.” INDIEC respectfully recommends that this provision be clarified to specify that posthearing

briefs and proposed orders can be utilized as evidence to the extent the Commission is examining whether an issue has been raised in a previous case. INDIEC respectfully requests that the following sentence be added to the end of 170 IAC 1-1.1-23(c): **“This subsection only applies to the Commission’s review of the evidentiary record in that proceeding, and does not govern or prohibit reliance on posthearing briefs and proposed orders in other contexts, such as determining whether an issue has been raised or waived.”**

Comment #8: 170 IAC 1-1.1-21.5

170 IAC 1-1.1-21.5 represents a new section that includes many of the components in the existing Rule 21. One change is that subsection (f) now specifies that the Commission and the parties may cite to the Commission’s orders and rules without taking administrative notice of the documents. INDIEC supports this clarification as consistent with past practice.

Comment #9: 170 IAC 1-5

INDIEC respectfully requests that the Commission consider updating 170 IAC 1-5 on minimum standard filing requirements to conform to modern technology and practice, or to issue a new rule or GAO to address these issues. In particular, INDIEC requests that the Commission require that utilities provide electronic, remotely-accessible versions of their working papers, cost of service study, and determination of revenue requirement by customer class in electronic format with formulae intact. All source information utilized in the workpapers should be electronically linked and clearly identifiable.

INDIEC also respectfully requests that the Commission amend 170 IAC 1-5-4 to allow a longer period of time for other parties to determine whether a utility has complied with the MSFR requirements. Twenty days is insufficient to evaluate the breadth of information presented in a rate case, especially with respect to workpapers and cost of service studies.

Regards,

/s/ Joseph P. Rompala

Joseph P. Rompala

/s/ Tabitha L. Balzer

Tabitha L. Balzer