

December 9, 2019

Sent via e-mail to:

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Re: RM 18-02 Revisions to IURC's Procedural & Ex Parte Rules

Dear Ms. Poon:

The Indiana Office of Utility Consumer Counselor ("OUCC") was pleased to observe that some areas of concern discussed during the pre-rulemaking phase of RM 18-02 were adequately addressed in the Commission's final proposed version of RM 18-02. Examples include the effective date of e-filings (i.e., filed on "the date reflected in the notice of receipt") (170 IAC 1-1.1-3(a)); the time of day by which e-filings must be completed on their scheduled due dates (i.e., "before midnight") (170 IAC 1-1.1- 3(a)); and a new provision confirming that parties can cite to Commission rules and orders without having to request administrative notice (170 IAC 1-1.1-21.5(f)). However, some of the language in the Commission's current proposed rule still needs to be addressed. The OUCC will discuss those areas below, but before proposing additional changes, the OUCC expresses its support for requested changes or additions to the Commission's most recent draft of RM 18-02, and for changes suggested by several other commenters, together with further red-lined edits recommended by the OUCC.

170 IAC 1-1.1-3(g) – Technical Problems that Prevent Timely e-Filings

Attorney Nikki Gray Shoultz' 11-19-19 e-mail to Ms. DeAnna L. Poon, the Commission's Assistant General Counsel in charge of this rulemaking, recommended adding a new subsection "(2)" to 170 IAC 1-1.1-3(g), and renumbering the remaining subsections, as needed. The following language which Ms. Shoultz recommended is supported and adopted by the OUCC, with a few red-lined changes noted below:

(2) The presiding officer shall extend the time allowed for a filing and may make such other adjustments to the procedural schedule as appropriate ~~under the~~
~~circumstances:~~

(a) where a party notifies the presiding officers and other parties to the proceeding that timely electronic or hard copy filing was not possible due to technical problems or other emergency conditions ~~not caused by the party~~ **beyond the commenting party's control**; or

(b) for any other good cause, as determined by the presiding officer(s).

The OUCC realizes there may be times when it is obvious that a technical problem was rooted in the IURC's own e-filing system. However, it is also possible that system errors preventing timely e-filings will not clearly or accurately identify the source(s) of the technical problem(s), making it unclear whether a filing is blocked due to the filer's system not working properly or to the IURC's e-filing system or the State of Indiana's network not operating as they should. Because of that inherent uncertainty, and because other emergency conditions could yield the same result (e.g., a power outage rendering the sending &/or receiving parties' e-filing capabilities useless), it is both prudent and necessary to add a catch-all provision such as the above modified red-lined version of the language Ms. Shoultz proposed.

The OUCC also supports and adopts several proposed changes recommended to Ms. Deanna L. Poon by Attorney Joseph P. Rompala in a letter dated December 6, 2019.

170 IAC 1-1.1-4(a)(1) – Filing Protected Information Others Claim to Be Confidential

Mr. Rompala's first recommended change concerns the deadline for filing motions and affidavits claiming that certain information or documents are confidential and should be protected from public disclosure. The difficulty addressed stems from parties including information or documents obtained from another party who claims the requested information or material is entitled to protection from public disclosure under Indiana law. The Commission's proposed change to 170 IAC 1-1.1-4(a)(1) would require the producing party to file a motion seeking confidential treatment before filing the protected information or documents, thereby allowing them to be filed with the Commission under seal, under a preliminary finding of confidentiality.

Instead of requiring such a filing to be made before the requesting party's filing date, Mr. Rompala recommends keeping language in the current rule that allows the filing to be made on or before the requesting party's filing date. The OUCC supports that recommendation. Parties should not be required to disclose the intended content of their testimony to adverse parties before the testimony is filed. Retaining the words "on or" could protect the requesting party's litigation strategy or allow sufficient time for the requesting party to obtain all necessary client approvals before revealing the intended content of prefiled testimony to the providing party. It is critical that parties be given the opportunity to make such filings "on or before" (not simply "before") the date when testimony is filed with the Commission. However, the OUCC can also envision times when such a filing might need to occur after redacted testimony is filed. The OUCC believes the phrase "as soon as practicable", which also appears in the current and the proposed rule could be sufficient without any additional time limitation, allowing such filing to occur before, on or after the requesting party's filing date. There may be times when parties

receive information obtained through discovery too close to a filing date to permit the advance filing of a motion for protective order by the party producing information claimed to be entitled to protection from public disclosure under Indiana law. Parties realize the Commission requires all intended evidence, including information identified as confidential by the producing party, to be provided to the Commission sufficiently in advance of the scheduled evidentiary hearing to provide adequate time for the presiding officers and Commission advisory staff to digest the protected information while preparing for the scheduled evidentiary hearing. Given the statutorily compressed time afforded the OUCC and intervenors in cases involving utility requests for enormous increases in base rates and other trackers, the OUCC believes the Commission should consider removing such time limitations in 170 IAC 1-1.1-4(a)(1), as follows, which would allow such motions to be filed on, before or after the date the testimony is filed:

(a) If a party desires to file with or submit to the commission a writing, paper, report, study, map, photograph, book, card, tape recording, or other material that the party believes is confidential in accordance with IC 8-1-2-29 and IC 5-14-3, the party shall do the following:

(1) Apply for a finding by the commission as soon as practicable ~~before the date (if any) that~~ the information ~~is~~ required to be filed, ~~that the information~~ is confidential.

If the Commission retains the word “before” it should also include “on or before”, as Mr. Rompala recommended, or (preferably), “before, on or after” - i.e., not simply “before”.

The OUCC agrees with Mr. Rompala that the requesting party should not be required to include information in its motion indicating whether any other parties object to the providing party’s confidentiality claim. The following red-lined language is an alternative to Mr. Rompala’s proposed edits, but also places the duty to report other parties’ positions on the requested confidential treatment on the providing party asserting a confidentiality claim:

...[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”), **but not previously filed with the Commission under a protective order**, and the providing party **is in the position to obtain and file affidavit(s) required to present and support** ~~wishes to submit its own supporting its~~ motion for confidential treatment. ~~In this~~ **Under such** circumstances, the providing party must **file submit its a supported** ~~ing~~ motion for confidential treatment **as soon as practicable after learning the information is to be used as evidence by another party, recognizing that any delay might impact the existing procedural schedule. within X number of days after the deadline of the filing party’s submission.** ~~The providing party’s motion should indicate whether~~ **any of** the other parties to the proceeding object to **the**

requested preliminary confidential treatment of the information. If the providing party cannot determine all of the other parties' positions before its motion is filed, the providing party shall file a status report with the Commission, either in the motion or within two (2) business days of filing the motion, indicating which parties were reached and whether any of them objected to the motion, and identifying any parties whose positions were not made known to the providing party before its status report was filed. Any parties so identified in the status report must file notice of their position with the Commission within five (5) business days of the status report being filed, unless a different response time is set by the presiding officers. Any parties failing to file timely notice of their position with the commission shall be deemed to have waived any objection to the requested preliminary confidential treatment of the information.

Whether the Commission adopts Mr. Rompala's proposed language or the above language recommended by the OUCC, the time periods specified in 170 IAC 1-1.1-4(b) (currently 5 days) and the time periods in 170 IAC 1-1.1-4 (c)(1) and (2) (currently 30 days) will have to be adjusted accordingly.

170 IAC 1-1.1-5 – Discovery & Supplementing Record in Appeals from CAD Decisions

The OUCC supports and adopts Mr. Rompala's recommended addition of a final sentence to 170 IAC 1-1.1-5, concerning discovery and supplementing the Consumer Affairs Division's record. The additional sentence would read as follows:

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.

170 IAC 1-1.1-7(a)(8) – New Provision Regarding Procedural Schedules

Like Mr. Rompala, the OUCC also urges the Commission not to add the new subsection it proposed as 170 IAC 1-1.1-7(a)(8). In a number of trackers where parties previously agreed to follow a standing procedural schedule, the set schedules often had to be changed to accommodate then-existing scheduling conflicts. Some trackers have statutory turn-around dates. Others do not. Some trackers began as quarterly or semi-annual filings, but over time were moved to an annual filing schedule. When quarterly filings were involved, it made sense to agree upon a standing, somewhat compressed procedural schedule that ensured all statutory deadlines could be met. However, since many of the newer trackers have been transitioned to annual filing schedules, there is no need to expedite their handling. They should be treated the same as any other docketed Commission proceeding. The Commission's current approach in docketed cases is to notify the parties that they have until a certain date to submit an agreed

schedule. In the vast majority of cases, such agreements are easily reached and promptly filed with the Commission. That has been an efficient approach, and one most parties have appreciated. Absent an agreement on dates, the Commission schedules a prehearing conference, which will be conducted pursuant to notice and open to all intervenors and other interested members of the public. In recent years, the number and identity of intervenors has increased in large electric utility cases. The convenience of avoiding a prehearing conference and establishing a procedural schedule by agreement is less compelling and could become problematic in cases likely to draw multiple intervenors. The Commission's current approach seems to be working well in most cases. Building in forced uniformity ignores the realities of existing scheduling conflicts and statutorily expedited cases. The OUCC would encourage the Commission to withdraw the newly proposed subsection (8) in its entirety, allowing scheduling matters to be handled with needed flexibility, as the Commission is currently doing. Therefore, the OUCC's recommended change is 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.~~

Parties have done well communicating with each other and with assigned administrative law judges to identify filing and hearing dates that are mutually convenient, given the many, varied scheduling conflicts that need to be avoided. Since the Commission's current approach is working well, the OUCC recommends not trying to fix something that isn't broken. Rigid uniformity might work when all cases and calendars are the same, but that is rarely true given the number and complexity of proceedings every year. The filing parties (usually the utilities) control when a case is filed. They know whether there is a "drop dead" date for an order and should file early enough to be able to meet that date without unduly inconveniencing the Commission, the OUCC, and any potential intervenors,

170 IAC 1-1.1-19.5 – Requiring New Appearances in Sub-Dockets

The OUCC's past experience in generic telecommunications cases such as Cause No. 42144 and its various sub-dockets supports adding the Commission's new subsection 170 IAC 1-1.1-19.5, which would require new appearances for parties to participate in sub-dockets of older cases involving long-term settlement commitments. Experience has shown that after 10 or 15 years, many of the original parties may no longer exist (e.g., many having been merged into other entities) and many of the attorneys once involved in an active main docket were not retained to

appear for their clients in subsequent sub-dockets. However, in sub-dockets where all support recipients or payors are expected to participate, the Commission sends notice to the full service list from the main docket (or to a somewhat smaller updated service list from the last similar sub-docket), inviting interested parties to participate and have their attorneys enter appearances in the new sub-docket. Original service lists grow stale if all recent activity has occurred in sub-dockets. The presiding officers in the various sub-dockets of Cause No. 42144 were able to force updates to retained counsel, their law firms, or firm addresses by requiring appearances to be entered for each new sub-docket. The OUCC supports the Commission's proposed new subsection 170 IAC 1-1.1-19.5, but agrees with Mr. Rompala that the presiding officers should have the discretion to require new appearances to be entered in all new sub-dockets or to issue a notice that all appearances from the main docket (or a recent, similar sub-docket) will automatically be placed on the Commission's service list, absent contrary notice from affected parties. Accordingly, the OUCC supports adding the phrase "**unless the Presiding Officers waive this requirement**" to the end of subsections (b) and (c).

170 IAC 1-5 – Minimum Standard Filing Requirements

The OUCC also supports Mr. Rompala's recommended changes to 170 IAC 1-5 on Minimum Standard Filing Requirements that apply to statutorily expedited base rate cases. The language should make it clear that:

In order to meet MSFR requirements, utilities are required to 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 as part of their case-in-chief, and that all source information utilized in the workpapers must be electronically linked and clearly identifiable.

The OUCC also supports and adopts Mr. Rompala's recommendation that the Commission amend 170 IAC 1-5-4 to allow a longer period of time for other parties to analyze whether a utility has complied with all MSFR requirements. The current twenty (20) day review period is insufficient to evaluate the adequacy and breadth of information presented in a rate case, including whether the above requirement was met for workpapers and cost of service studies in 170 IAC 1-5. The time period specified in 170 IAC 1-5-4 should be increased as follows:

Within ~~twenty (20)~~ **a reasonable period of time, but not less than sixty (60)** calendar days of the date an electing utility has filed its:

- (1) petition;
- (2) case-in-chief; and
- (3) working papers

Other Areas of Concern to OUCC:

The OUCC had a number of other questions or concerns regarding language in the Commission's new proposed procedural rules, discussed below.

170 IAC 1-1.1-2 -- Multiple Definitions of Different Types of Hearings:

In 170 IAC 1-1.1-2(11), located on page 3 of the proposed rule, the Commission added a definition of "Public field hearing" which, in turn refers to an "evidentiary hearing" or a "formal public hearing" contemplated under Indiana's small utility rate statute. Neither of the two referenced terms are defined in 170 IAC 1-1.1-2.

In the definitions in the Commission's ex parte rule (170 IAC 1-1.5-1(d) on page 31 of the proposed rule), the term "formal public hearing" is tied to IC 8-1-2-61.5, as is the term "public field hearing".

The definition of "public field hearing" in 170 IAC 1-1.5-1(f) indicates that a public field hearing is not an evidentiary hearing or a formal public hearing under IC 8-1-2-61.5.

The OUCC found the above references confusing and also wondered whether a single set of definitions could be used, or whether multiple definitions are necessary since 170 IAC 1-1.5 is a separate Commission rule. The OUCC does not have specific changes to suggest, but recommends the above sections be checked for clarity, accuracy and consistency.

170 IAC 1-1.1-7(a) & 170 IAC 1-1.1-19.5(b) – Filing Separate Appearances:

The OUCC has not historically filed separate appearances, since the Utility Consumer Counselor is a statutory party to all proceedings and since parties filing anything at the Commission are required to serve a copy on the UCC. Rather than suggesting a change, the OUCC is simply asking the Commission to confirm that past practice is not being changed, meaning that the only appearance sheets required from the OUCC are those submitted to the Commission at evidentiary hearings.

170 IAC 1-1.1-11(d) – Petitions to Intervene

The use of the word "shall" on the third line of subsection (d) changes the meaning of that section. The OUCC proposes the following change:

(d) If a petition to intervene satisfies this section and shows the proposed intervenor has a substantial interest in the subject matter of the proceeding or a part thereof, and the proposed intervenor's participation ~~shall not~~ **is not expected to** unduly broaden the issues or result in unreasonable delay of the proceeding, the presiding officer may grant the prayer for leave to intervene, in whole or in part and, thereupon, the intervenor becomes a party to the proceeding with respect to the matters set out in the intervention petition.

170 IAC 1-1.5-3(c) and 170 IAC 1-1.5-4(b) – Ex Parte Rule - Exemption for Commission re Appeals from Consumer Affairs Division Decisions:

The OUCC is concerned that the exemption from ex parte communication restrictions only apply to communications between the CAD and Commissioners or members of the Commission’s technical staff in appeals from CAD decisions. If the exemption is not applied equally to all parties, the OUCC recommends that language be added requiring advance notice to all parties and an opportunity to participate in meetings or other discussions between the CAD and others at the Commission involved in the appeal.

170 IAC 1-1.5-4(b) – Ex parte Rule - Commission Technical Staff Serving in a Testimonial Rather than Advisory Role:

The OUCC has a level of discomfort with the use of the term “testimonial party” to describe members of the technical staff not serving in an advisory capacity to the commission. The use of the term “party” assigned to Commission staff seems inappropriate. The OUCC does not want disqualification requests made against the Commission or members of its technical staff. Since this is a unique provision that is rarely used, perhaps the Commission could obtain approvals from the Attorney General’s Office before proposing this change.

Respectfully submitted,

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