

Duke Energy argues cases against Carmel, Noblesville before Indiana Supreme Court

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Legal counsel for  Duke Energy argued two cases before the Indiana Supreme Court Thursday—from both sides of the courtroom—on separate matters relating to where it maintains its equipment and facilities.

In the first case, *City of Carmel, Indiana v. Indiana Utility Regulatory Commission, et al.*, high court justices will weigh on an earlier decision from the Indiana Utility Regulatory Commission that the energy company does not need to relocate some of its facilities underground—nor pay for the cost of doing so. That included the location of above-ground poles, wires and other structures.

In a separate case, *Duke Energy, Indiana, LLC v. City of Noblesville*, the parties' dispute is over new construction

proposed by the company.

Background on Carmel case

Carmel officials previously informed Duke that it needed to move its facilities underground due to the city's public works projects, but they could not agree on who would pay for relocation.

Alex Gude, an attorney for Carmel, maintained Thursday that municipalities are permitted to regulate utility operation in their right of ways. Doing so "necessarily involves" the shifting of some costs for compliance with those local ordinances to utilities.

"It is literally in the Indiana code. It says that municipalities can do this, and because it's there, they must be allowed to shift some costs over to the utility," Gude said. "But the IURC decision didn't conclude that the amount of cost shifting here—caused by these ordinances, specifically—was because of the number that it was, or because of the problems that it posed to Duke, was unreasonable. What they concluded was that you can never shift costs, and certainly that cannot be the rule of law."

Duke's counsel, Maggie Smith, pushed back, saying the company never demanded that Carmel pay any of the costs of undergrounding and relocation "that were necessary for safety or reliability concerns."

She said Duke agreed to pay those expenses, but took issue with cost differential "where Carmel wanted to bury those, and Duke said there is no utility purpose for doing so."

"The IURC correctly determined that the ordinances—and Carmel's refusal to pay the cost differential between

undergrounding versus above-grounding—unreasonably burdens ratepayers statewide with costs that have no connection to safety or reliability of service, and instead, benefits citizens and visitors in Carmel,” Smith said.

‘Beautification’ or justified concerns?

The legal matter stems back to two ordinances adopted by Carmel in 2019—one that prohibits the erection of above-ground public utility poles, lines, or structures in Carmel’s right-of-way unless authorized by the city, and another that outlines the procedures to be followed when a public utility facility must be relocated due to a road, street, sidewalk, trail or other project.

The city said it was acting [within an Indiana law](#) which permits municipalities to enact ordinances that determine the manner in which a public utility occupies space within the local jurisdiction.

After the adoption of the ordinances, Carmel began two improvement projects: the Guilford Road project and the 126th Street project. For both projects, several Duke facilities were identified as needing to be relocated. The city and Duke were unable to reach an agreement on which party should bear the costs of the relocation, however

The City of Carmel filed a complaint with the Indiana Utility Regulatory Commission, requesting that its ordinances be deemed reasonable, and for Duke to be ordered to pay the costs of relocating such facilities.

But the IURC later issued an order finding both ordinances to be “unreasonable and void,” citing conflicts with Indiana Department of Transportation regulations, and “extremely

vague” and “undefined terms and phrases” within the local rules.

Carmel officials appealed, and the IURC appeared and filed a brief in support of its order. The Court of Appeals of Indiana [ultimately reversed](#) in October 2022, finding both ordinances to be reasonable.

Gude asked Supreme Court justices on Thursday to decide if the IURC was wrong in its conclusions that the ordinances are unreasonable and void, and that Carmel’s rules “impermissibly” shift the cost of relocation to Duke’s customers statewide.

“The question is not whether any costs are imposed on a utility through an ordinance,” Gude said. “The question is whether such costs are reasonable to make that determination.”

Still, Smith maintained that the city’s concerns in this case come down to “beautification and aesthetics.” She held that such ordinances in Carmel should not come at a cost to ratepayers in other communities across Indiana.

“At the request of a municipality, Duke Energy will underground or relocate utilities when Duke determines it can do so safely and without adversely affecting utility service. And if that undergrounding or relocating is necessary for safety or reliability concerns, the cost to do so is borne by Duke and included in rates,” Smith said. “But when there are no safety or reliability concerns, or if roads are not involved, and undergrounding and relocating is a base for local beautification, Duke requires the municipality to bear those costs in its own tax base.”

Chief Justice Loretta Rush said from the bench that “the whole case is about the fact this is going to cost money.”

“Is Carmel going to pay, or is Duke going to pay? And if Duke pays, are they going to pass it on to ratepayers, as a rate increase?” she asked. “There is no dispute this case is going to cost more, because that’s why we’re here. Who’s gonna pay?”

Disagreements continue over Noblesville project

The other case involving Duke began in June 2020 with the company’s project plans in Noblesville, which required the demolition of a residential home and garage to make way for a new utility substation, as well as a large garage with attached offices.

Noblesville officials demanded that Duke comply with local ordinances for the demolition, which meant obtaining location improvement and building permits for the project.

Duke refused the demand, though. The City of Noblesville then filed a complaint in Hamilton Superior Court, seeking to enforce the permit requirements. Duke counterclaimed, arguing Noblesville had no authority to enforce the permit requirements against the energy company.

The Hamilton Superior Court granted summary judgment and awarded more than \$500,000 in penalties and fees to Noblesville. The Court of Appeals affirmed, finding the work that required permits did not involve “utility service” or the “location or use of a utility facility.”

The Court of Appeals also rejected Duke’s argument that the IURC has virtually unlimited authority over utility matters.

On Thursday, Duke’s legal counsel argued that the company is not subject to local ordinances unless the IURC says so, and that if Noblesville wished to challenge Duke’s non-compliance,

the city needed to file a complaint with the IURC, rather than the trial court.

“If you have a problem with what the utility is doing, municipality, you have a remedy in front of the IURC. Go use it,” Smith said. “Duke is not asserting that it can do whatever it wants. Duke’s position is that unless and until the IURC declares that its actions are unreasonable or unsavory ... Duke utilities are under no obligation to follow local ordinances unless and until the IURC declares.”

Jonathan Hughes, representing the City of Noblesville, the IURC is “a creature of statute” and is limited to what its statutes say. He held that Duke must abide by local ordinances and argued the trial court—not the IURC—is the proper venue to bring a civil action for a permitting issue like this.

“Noblesville was not saying that we’re regulating a phase of a project. They were just saying, ‘You’re demolishing a house—that’s not a utility facility,’” he said. “If you were demolishing a power station, that would be a different situation. If we’re demolishing a transmission line, that’s a different situation, because those are utility facilities.”

Even if this matter did involve a utility facility, Hughes noted that the regulations being imposed by Noblesville “do not concern how those facilities are used for the distribution, transmission or generation of power.”

Rush did not provide timelines for justices to issue opinions in either case.

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