

**POSITION PAPER OF INDUSTRIAL CONSUMERS
ON SERVICE AREA ASSIGNMENTS ACT**

**Indiana Industrial Consumers, Inc.
Indiana Industrial Group**

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This paper is submitted on behalf of Indiana Industrial Energy Consumers, Inc. (“INDIEC”) and Indiana Industrial Group, an ad hoc group of large electric users operating industrial facilities in Indiana (collectively the “Industrial Consumers”). In its present form, the Service Area Assignments Act imposes rigid restrictions that impede innovative and economical energy solutions for large employers in Indiana. The Industrial Consumers therefore propose statutory amendments to support more flexible energy arrangements.

A. Summary

The Service Area Assignments Act, Ind. Code ch. 8-1-2.3 (“SAAA”), was enacted in 1980 in an effort to eliminate pervasive boundary disputes between electric suppliers and thereby promote economical and efficient electric service. The SAAA establishes geographic territories within which a given electric utility has exclusive service rights. That status differs from pre-SAAA conditions that continue today for natural gas utilities, which do not have statutory monopolies and for which the Indiana Utility Regulatory Commission (“Commission”) retains greater flexibility to authorize alternative service arrangements.

In a number of contexts, the monopoly service rights under the SAAA and related threat of litigation have hindered the economical and efficient service it was meant to promote:

- Use of private infrastructure by industrial facilities to distribute electricity within their operations and property has been challenged;
- Developers of private generation resources face a risk of litigation if they work with industrials in Indiana on behind-the-fence projects;
- Suppliers of renewable energy resources such as wind and solar power cannot sell directly to industrial consumers;

- Large volume consumers cannot pursue efficiencies through joint venture projects, aggregated metering or competitive supply alternatives;
- The flexible regulation mechanism available to energy utilities under Indiana law is not available to large volume consumers; and
- Potential mitigation of emissions from utility power plants in Indiana is being discouraged while expensive utility compliance options are being aggravated.

Electric rates have become a serious impediment to industrial productivity and economic development in Indiana. In the past decade, Indiana has gone from having the 5th lowest industrial electric rates in the nation to a ranking of 27th. Indiana's rates are now higher than those in Illinois and Ohio. The steep rise is getting worse, with further increases of some 30% projected in the next decade. The strength and vitality of Indiana's manufacturing and industrial base is directly attributable to its traditional status as a low-cost energy state, but Indiana's former energy advantage has become a liability. Industrial operations are energy-intensive and vulnerable to competition, making the availability of cost-effective energy resources a key priority in retaining and attracting large employers in Indiana.

The rigid framework of monopoly service rights under the SAAA no longer advances the legislative goal of promoting economical and efficient electric service in Indiana. The Industrial Consumers support amending the SAAA to provide broader authority to the Commission to approve alternative energy arrangements, in order to encourage innovation, increase efficiency and expand energy options for large consumers.

B. The SAAA Elevated Monopoly Service into a Utility Property Right

Prior to 1980, when the SAAA was enacted, there was an excess of boundary disputes between electric suppliers, particularly between investor-owned public utilities and rural electric membership corporations (REMCs). As the Indiana Supreme Court described the history:

The [SAAA] emerged from a long history of boundary disputes between the rural cooperatives and investor-owned utilities. The original REMC Act passed in 1935 did not afford any protection to REMC territory. As a result, REMC territory was subject to eminent domain by privately owned utilities. These boundary disputes created constant litigation. Before the 1980 legislation, as many as 51 separate boundary disputes were pending in this state's judicial system.¹

The legislative solution involved mapping the entire state and establishing fixed boundaries for assigned electric suppliers. *See* SAAA §3, Ind. Code §8-1-2.3-3. The General Assembly believed that doing so would encourage the orderly development of coordinated electric service, avoid unnecessary duplication and waste, and “promote economical, efficient, and adequate electric service to the public.” *See* SAAA §1, Ind. Code §8-1-2.3-1. “The promotion of economic and efficient service is an express purpose of the Act.”²

In addition to establishing service territory boundaries, the SAAA further provided that electric suppliers would have the “sole right” to furnish all retail service within their assigned territories and prohibited any other supplier from rendering or extending service absent written consent and Commission approval. *See* SAAA §4(a), Ind. Code §8-1-2.3-4(a). The exclusive service rights under the SAAA are enforceable through trial court litigation, by which the electric

¹ *United REMC v. Indiana & Michigan Electric Co.*, 549 N.E.2d 1019, 1021 (Ind. 1990). *See also United REMC v. Indiana & Michigan Power Co.*, 716 N.E.2d 1007, 1011 (Ind. App. 1999), *transfer denied*, 735 N.E.2d 229 (Ind. 2000); *Knox County REMC v. PSI Energy, Inc.*, 663 N.E.2d 182, 185 (Ind. App. 1996).

² *City of Columbia City v. Indiana Utility Regulatory Commission*, 618 N.E.2d 21, 26 (Ind. App. 1993). *Accord United REMC*, 716 N.E.2d at 1014; *Knox County REMC*, 663 N.E.2d at 191.

utility can secure injunctive relief, a damages award of gross revenues derived from the violation and an award of attorney fees. *See* SAAA §4(b), Ind. Code §8-1-2.3-4(b). The monopoly service rights created by the SAAA, consequently, have become a form of utility property. “Thus, the assignment of a service area constituted property belonging to the assigned supplier.”³

The structure under the SAAA – monopoly territories, exclusive service rights, litigation enforcement, elevation of customer service into a form of utility property – stands in contrast to the status of electric service in Indiana prior to 1980. The statutory protections for monopoly electric service in Indiana also differ from the status of most other United States markets. Before the SAAA was enacted, electric utilities held only an “indeterminate permit” to provide electric service in a given territory.⁴ Such a permit is subject to termination by the State and is not a property right requiring compensation for any encroachment.⁵

The pre-SAAA status for electric utilities continues today for natural gas utilities. “[G]as providers do not have monopoly service areas in the same way electricity providers do, and there is no provision in the gas transportation statute for damages parallel to the electric service area’s damages provision of I.C. § 8-1-2.3-4(b).”⁶ “[T]here is no such thing as an exclusive gas service territory under Indiana law.”⁷ In contrast to electric utilities, with regard to gas utilities the Commission retains authority to grant overlapping or replacement service rights and to approve

³ *Indiana & Michigan Electric Co. v. Jay County REMC*, 510 N.E.2d 225, 227 (Ind. App. 1987). *See also Paoli Municipal Light Dept. v. Orange County REMC*, 904 N.E.2d 1280, 1283 (Ind. App.), *transfer denied*, 919 N.E.2d 548 (Ind. 2009).

⁴ *See Decatur County REMC v. Public Service Co.*, 261 Ind. 128, 133-36, 301 N.E.2d 191, 195-96 (1973). *See also* Ind. Code §8-1-2-92.

⁵ *Id.*

⁶ *United States Steel Corp. v. Northern Indiana Public Service Co.*, 951 N.E.2d 542, 564 (Ind. App. 2011), *transfer denied*, 963 N.E.2d 1119 (Ind. 2012) (*quoting* Commission order).

⁷ *Id.* at 564.

customer-specific arrangements, under a standard of public convenience and necessity.⁸ The Commission also has authority to require gas utilities to provide transportation service, by which customers may use the utility's distribution system to transport customer-owned natural gas as an alternative to purchasing gas only from the utility.⁹

C. Contrary to Its Purpose, the SAAA Has Become an Impediment to Economical and Efficient Service

Although the purpose of the SAAA was to promote economical and efficient electric service by eliminating wasteful boundary disputes, the monopoly service rights and litigation enforcement mechanism of the SAAA have chilled the development of energy resources and impaired the ability of large volume consumers to pursue effective energy arrangements. The segregated ratemaking for each utility has resulted in wide variations in rate structure even for adjacent territories, without any corresponding difference in the quality of service provided. By treating customer service as a utility property right and furnishing litigation tools to discourage innovation and alternatives, the SAAA has become an impediment to the benefits it was designed to advance. Examples include the following:

- Electric utilities have used the SAAA to challenge industrials and large volume consumers attempting to achieve efficiencies and cost savings by utilizing private infrastructure to distribute energy within their operations and property.¹⁰

⁸ See Ind. Code §§8-1-2-86, 8-1-2-87.5; *United States Steel*, 951 N.E.2d at 560-61.

⁹ See Ind. Code §8-1-2-87.7.

¹⁰ See *Paoli Municipal Light*, 904 N.E.2d at 1281-84 (municipality delivering power to municipal sports complex outside city limits); *United States Steel*, 951 N.E.2d at 556-57 (industrial using private infrastructure to deliver power to tenant operation); *BP Products North America, Inc. v. Office of Utility Consumer Counselor*, 947 N.E.2d 471, 473-76, 481 (Ind. App.), *mod'd on rehearing on different grounds*, 964 N.E.2d 234 (2011), *transfer dismissed*, 963 N.E.2d 1120 (Ind. 2012) (industrial using private infrastructure to deliver power to tenant operation); *United REMC*, 716 N.E.2d at 1009-15 (municipality seeking to develop industrial park); *Knox County REMC*, 663 N.E.2d at 193-96 (coal company distributing electricity)

- Developers of power generation resources face a risk of litigation if they work with industrials in Indiana on private energy projects.¹¹
- Industrials and large volume consumers cannot purchase directly from providers of renewable energy resources such as wind or solar power, and instead the assigned electric utility must be utilized as a middleman.
- Large volume consumers must forego opportunities for efficient and economical energy arrangements, such as: joint ventures with other consumers or developers to construct private energy facilities; aggregated metering by which related facilities in multiple locations (industrial operations, school districts, retail chains) can achieve efficiencies and economies of scale through joint procurement; and purchased power arrangements with alternative suppliers.
- Under existing Indiana law, the Alternative Utility Regulation Act (“AUR Act”), electric utilities may seek Commission approval for alternative regulatory plans allowing for greater flexibility and relaxation of traditional regulation, but

throughout mining operation); *United States Steel Corp. v. Northern Indiana Public Service Co.*, 482 N.E.2d 501, 504-06 (Ind. App), *rehearing denied*, 486 N.E.2d 1082 (1985) (industrial sharing power over private line between two facilities in different territories).

¹¹ In a case involving an on-site cogeneration facility serving an industrial operation, the electric utility questioned eligibility for the favorable treatment applicable to such facilities under Indiana law because the cogeneration unit was owned by a third party provider. *See* https://myweb.in.gov/IURC/eds/Modules/Ecms/Cases/Docketed_Cases/ViewDocument.aspx?DocID=0900b6318011f25b at pp. 4-6. In HEA 1423, enacted in 2014 with the endorsement of the Indiana Energy Association, the favorable treatment available to large cogeneration facilities is limited to those owned by the industrial customer or already in existence in 2014, preserving an option for incumbent utilities to launch legal challenges to new private generation projects involving a third party developer. *See* Ind. Code §8-1-2.4-2(g).

industrials and large volume consumers do not have access to that mechanism to propose flexible and innovative alternatives beneficial to consumers.¹²

- Potential mitigation of emissions from utility power plants – through promotion of efficient, low-emission private generation projects, development of renewable energy resources, and purchase of energy generated in other states – is being discouraged in favor of high-cost utility compliance options.

D. Indiana’s High Electric Rates Are a Serious Problem for Industrials and for Economic Development in the State

Industrial operations are critical to the Indiana economy. Manufacturing in Indiana accounts for both the highest percentage of gross domestic product and the highest percentage of employment of any state in the nation.¹³ The historic success of industrial employers in Indiana is attributable in substantial part to Indiana’s traditional status as a low-cost energy state. The reason is because industrial operations are both energy-intensive and highly competitive. Industrials in Indiana consume nearly half the electricity in the State and pay more than \$3 billion annually for that electricity.¹⁴ Power costs, accordingly, are a major component in the overall cost of production. At the same time, industrial businesses operate in highly competitive national and global markets, where variations in relative energy costs play a significant role in competitive position and hence in performance and productivity.

¹² See Ind. Code §8-1-2.5-1 *et seq.* See also *id.* §§4, 5(a), 6(a) (providing that only an “energy utility” may file a petition under the Act and propose an alternative regulatory plan); *id.* §§6(e), 6(f) (providing for utility veto by which utility may withdraw plan if it is materially modified by the Commission).

¹³ See *Indiana Leads the U.S. in Manufacturing Production, Employment*, available at <http://imaweb.com/indiana-leads-u-s-manufacturing-production-employment/>.

¹⁴ See U.S. Energy Information Administration, *Electric Power Monthly* (with year-to-date data through December 2013) (February 2014), Tables 5.4.B & 5.5.B, available at <http://www.eia.gov/electricity/monthly/>.

Indiana, however, is no longer a low-cost energy state. In 2003, Indiana enjoyed the 5th lowest industrial electricity prices in the nation, but as of 2013 that ranking has dropped to 27th. *See Exhibit A*, attached hereto. As shown in the chart attached as Exhibit B, Indiana for many years had a significant cost advantage for industrial electricity compared to the national average, but in the past five years, with steep increases in Indiana, that advantage has all but disappeared. Compared to neighboring states, Indiana's industrial electric rates are now higher than Illinois, Ohio and Kentucky. *See Exhibit C*, attached hereto.

The adverse trend, moreover, is expected to continue to get worse. The State Utility Forecasting Group has projected a 30% increase in Indiana electric rates over the next decade, assuming no new environmental regulations and all available measures to extend the life of utility power plants in the State.¹⁵ With any additional EPA regulations or more power plant retirements, the projected increase over the coming decade will be even higher. The problem is especially acute for industrial operations in Indiana, which have borne the brunt of the increases and have been forced to pay monopoly rates higher than a cost-based foundation.

Given the key importance of electricity prices to industrial operations in Indiana, and the precipitous increases both in the past decade and into the projected future, industrial electric prices have become a serious impediment to productivity and economic development in the State. As Indiana falls progressively lower in ranking for energy costs, the State becomes less and less attractive as a location for new businesses, for expansion of existing operations, and for industrial investment. Decisions on where to source production, where to cut back on less competitive operations and where to lay off employees are materially impacted by access or lack of access to efficient and economical energy resources. Indiana's traditional success as a

¹⁵ *See State Utility Forecasting Group, Indiana Electricity Projections: The 2013 Forecast* (December 2013) at 3-6.

manufacturing state is directly tied to its history of low-cost energy. The future of the State's essential industrial base hinges on regaining that energy cost advantage.

E. The SAAA Should be Amended to Permit Greater Flexibility and to Expand Energy Options for Large Volume Consumers

At a time when efficient and economical electricity options are essential to address the challenges posed by rising industrial rates in Indiana, the SAAA stands as an obstacle to flexibility, innovation and creative energy solutions. The tools the SAAA provides to electric utilities to enforce monopoly service rights, combined with a lack of Commission authority to approve alternatives, have the effect of stifling potentially advantageous initiatives and chilling the development of more diverse energy resources. In order to better align the SAAA with its original purpose of promoting efficient and economical service, the SAAA should be amended to expand the energy options available to large volume consumers.

In its current form, the SAAA provides the Commission with very limited authority to review and approve beneficial energy arrangements. Even with Commission approval, an alternative supplier cannot extend service into a given territory without the utility's written consent.¹⁶ The utility, on the other hand, can enforce its monopoly service rights and recover damages and attorney fees through trial court litigation, without any Commission oversight at all.¹⁷ In only three limited circumstances does the Commission have authority to alter the boundaries of assigned service territories: (1) a municipal annexation; (2) by mutual agreement between two suppliers; and (3) where a single tract of land, a single structure or a single

¹⁶ See SAAA §4(a), Ind. Code §8-1-2.3-4(a). Conversely, in *BP Products*, the Commission construed the SAAA as prohibiting a private arrangement between an industrial and its tenant *even with the utility's consent*, where the industrial did not have its own assigned service territory. See 947 N.E.2d at 475-76. The Commission felt constrained to order the industrial to cease delivering electricity to its tenant, which was providing essential services to the industrial operation that were required for environmental compliance. *Id.*

¹⁷ See SAAA §4(b), Ind. Code §8-1-2.3-4(b).

governmental, industrial or institutional operation is intersected by a boundary line.¹⁸ In all other instances, a large volume consumer seeking to implement an alternative energy arrangement has no recourse to seek regulatory approval, and the utility has the exclusive prerogative and every incentive simply to say no.

The restrictions and barriers imposed by the SAAA, accordingly, can be effectively addressed by amendments expanding the authority of the Commission to approve alternative arrangements. The elements of a fair statutory process would involve a large volume consumer petitioning for approval of a given energy project or arrangement, an opportunity for the affected utility and any other interested party to present evidence on the merits of the proposal, and a determination by the Commission based on reasonableness, public interest, and the promotion of economical and efficient energy service. The Commission has the regulatory expertise and capability to decide on a case-by-case basis whether to approve a given proposal.

Amending the SAAA to allow for greater flexibility would provide a mechanism for the Industrial Consumers and other large volume consumers to undertake proactive initiatives to manage rising energy costs and improve the efficiency and productivity of Indiana operations. The amendments would preserve the SAAA objective of avoiding boundary disputes, while providing the Commission with the same kind of authority that it exercised pre-SAAA with electric utilities and continues to exercise today with gas utilities. It would balance the flexible regulation option presently available only to energy utilities under the AUR Act with a corresponding remedy for large volume consumers. It would also encourage creative solutions to energy challenges, promote investment in private energy resources, enhance competitiveness

¹⁸ See SAAA §6, Ind. Code §8-1-2.3-6.

of Indiana businesses, advance economic development, and assist in regaining Indiana's energy advantage as a location of choice for large employers.

F. Conclusion

In order to better align the SAAA with its original purpose of promoting economical and efficient electric services, the SAAA should be amended to expand the authority of the Commission to approve alternative energy projects and arrangements.

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Exhibit A

Average Industrial Electricity Prices by State

State	State Rank - Lowest to Highest			Industrial Price - Cents per kwh		
	2013	2012	2003	2013	2012	2003
Washington	1	1	25	4.22	4.13	4.76
Oklahoma	2	3	21	5.34	5.09	4.59
Montana	3	4	9	5.37	5.10	4.01
Kentucky	4	6	1	5.40	5.35	3.21
Iowa	5	5	12	5.66	5.30	4.16
Illinois	6	13	29	5.73	5.80	4.91
Oregon	7	10	23	5.86	5.59	4.63
Arkansas	8	12	11	5.88	5.76	4.04
Utah	8	11	3	5.88	5.62	3.79
District of Columbia	10	7	38	5.89	5.46	5.61
Louisiana	10	2	37	5.89	4.76	5.57
South Carolina	12	17	8	5.92	6.02	4.00
Texas	13	9	34	5.93	5.57	5.27
Alabama	14	19	7	5.99	6.22	3.98
Ohio	15	20	26	6.10	6.24	4.79
Georgia	16	16	10	6.11	5.98	4.02
Idaho	17	8	12	6.12	5.48	4.16
Missouri	18	15	19	6.14	5.89	4.49
West Virginia	19	22	4	6.24	6.33	3.81
New York	20	30	41	6.29	6.70	7.14
New Mexico	21	14	30	6.32	5.83	4.95
North Carolina	22	24	26	6.34	6.42	4.79
Wyoming	23	18	2	6.41	6.03	3.65
Tennessee	24	34	16	6.44	7.08	4.29
Mississippi	25	20	18	6.45	6.24	4.48
Nevada	26	25	42	6.52	6.48	7.30
Indiana	27	23	5	6.59	6.34	3.92
Virginia	28	31	15	6.65	6.72	4.23
Arizona	29	26	35	6.69	6.53	5.38
South Dakota	30	29	20	6.93	6.57	4.51
Pennsylvania	31	36	39	7.00	7.23	6.14
Minnesota	32	27	17	7.06	6.54	4.36
Kansas	33	35	22	7.07	7.09	4.61
North Dakota	34	28	6	7.20	6.55	3.96
Colorado	35	32	32	7.22	6.95	5.10
Nebraska	35	33	14	7.22	7.01	4.18
Wisconsin	37	37	24	7.54	7.34	4.71
Florida	38	40	36	7.70	8.04	5.41
Michigan	39	38	31	7.85	7.73	4.96
Maine	40	39	40	8.27	7.87	6.35
Maryland	41	41	28	8.38	8.12	4.89
Delaware	42	42	33	8.50	8.34	5.15
Vermont	43	43	46	10.14	9.96	8.05
New Jersey	44	44	43	10.77	10.54	7.47
California	45	45	50	11.28	10.73	9.85
New Hampshire	46	47	49	11.37	11.82	9.39
Rhode Island	47	46	47	11.62	10.86	9.06
Connecticut	48	48	45	12.66	12.76	7.92
Massachusetts	49	49	48	13.13	12.91	9.11
Alaska	50	50	44	15.66	16.75	7.86
Hawaii	51	51	51	29.81	30.77	12.20

Rank lowest electricity price to highest electricity price

Sources: US Energy Information Administration - Electric Power Monthly, Table 5.6B, February 2014 and March 2005

Exhibit B

Industrial Electricity Prices for Indiana and U.S. Total

(1997-2013)

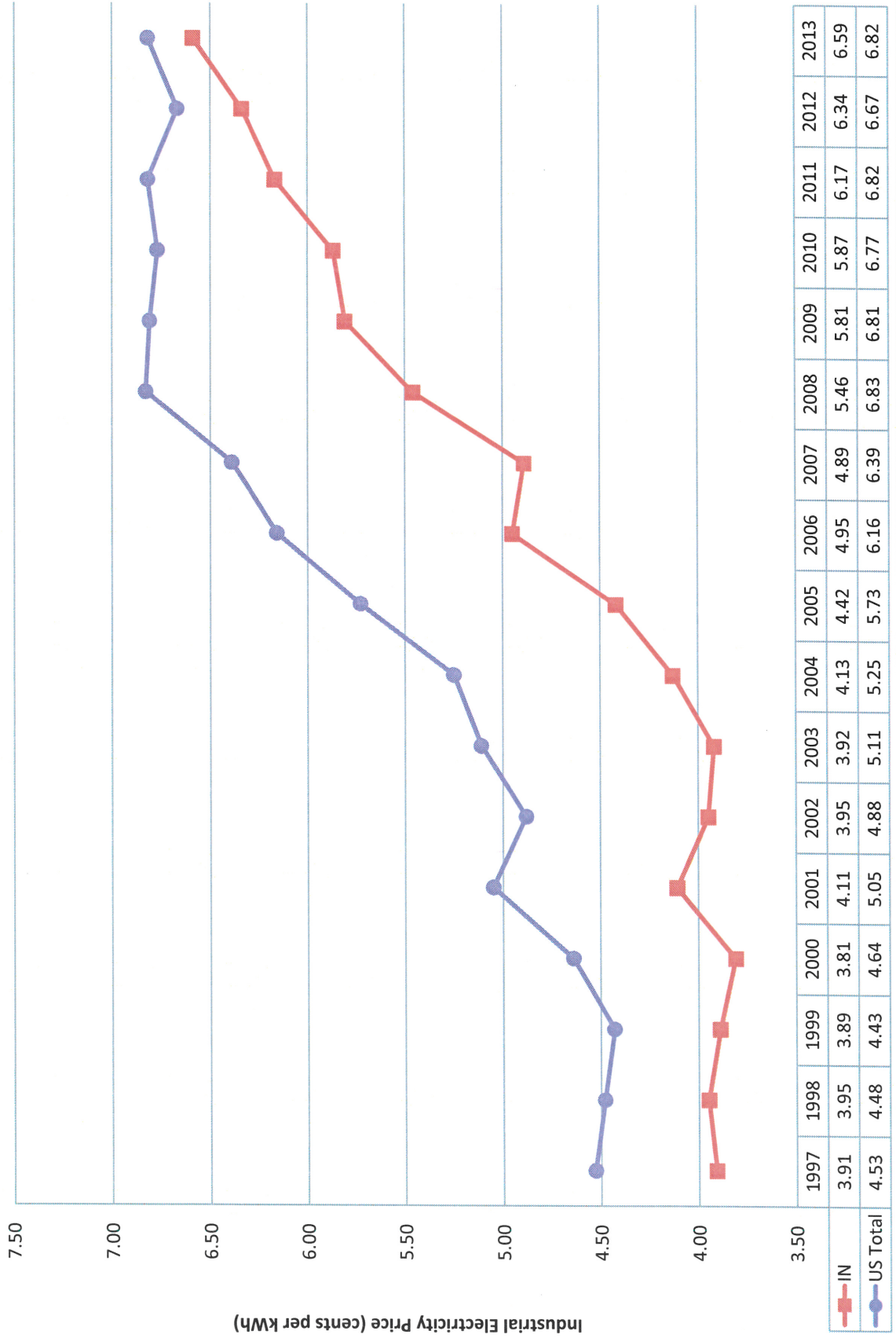
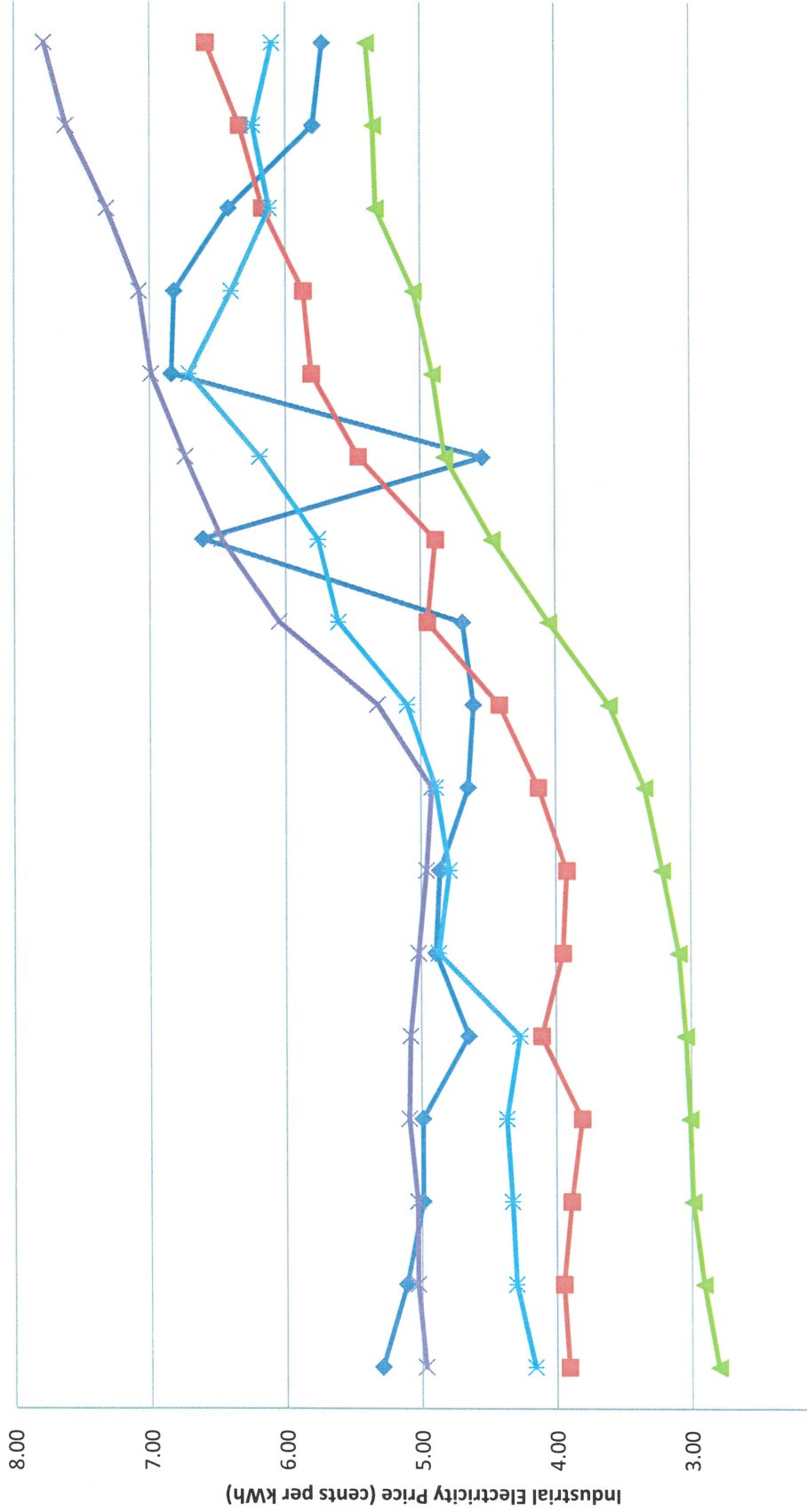


Exhibit C

Industrial Electricity Prices of Indiana and Neighboring States



	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
IL	5.29	5.11	4.99	4.99	4.65	4.89	4.86	4.65	4.61	4.69	6.61	4.54	6.84	6.82	6.42	5.80	5.73
IN	3.91	3.95	3.89	3.81	4.11	3.95	3.92	4.13	4.42	4.95	4.89	5.46	5.81	5.87	6.17	6.34	6.59
KY	2.80	2.91	2.99	3.01	3.04	3.09	3.21	3.34	3.60	4.05	4.47	4.82	4.91	5.05	5.33	5.35	5.40
MI	4.97	5.03	5.03	5.09	5.08	5.02	4.96	4.92	5.32	6.05	6.47	6.74	6.99	7.08	7.32	7.62	7.78
OH	4.16	4.30	4.33	4.37	4.27	4.87	4.79	4.89	5.10	5.61	5.76	6.19	6.71	6.40	6.12	6.24	6.10