IN THE

INDIANA COURT OF APPEALS

CASE NO. 21A-EX-821

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR; CITIZENS ACTION COALITION OF INDIANA, INC.; ENVIRONMENTAL LAW AND POLICY CENTER; SOLAR UNITED NEIGHBORS; VOTE SOLAR; INDIANA DISTRIBUTED ENERGY ALLIANCE; SOLARIZE INDIANA, INC. Appellants (Statutory Representative and Intervenors Below), v. SOUTHERN INDIANA GAS AND ELECTRIC COMPANY and INDIANA UTILITY REGULATORY COMMISSION, Appellees (Petitioner and Administrative Agency Below).	Appeal from the Indiana Utility Regulatory Commission IURC Cause No: 45378 Hon. James F. Huston, Chairman Hon. David L. Ober, Sarah E. Freeman, Stefanie N. Krevda and David E. Ziegner, Commissioners Hon. Carol Sparks Drake, Senior Administrative Law Judge.

BRIEF OF APPELLANT
INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR

William I. Fine, Atty No. 6830-45
Indiana Utility Consumer Counselor

Thomas J. Haas, Atty No. 34983-29
Deputy Consumer Counselor

Randall C. Helmen, Atty No. 8275-49
Chief Deputy Consumer Counselor

Indiana Office of Utility Consumer Counselor
115 W. Washington Street, Suite 1500 South
Indianapolis, IN 46204
Telephone: (317) 232-2494

Counsel for Statutory Party and Appellant Indiana Office of Utility Consumer Counselor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

REGULATIONS

I. STATEMENT OF THE ISSUES

Whether the Indiana Utility Regulatory Commission ("IURC" or "Commission") committed an error of law by interpreting the statutory definition of "excess distributed generation" ("EDG") set forth in Indiana Code § 8-1-40-5 in manner that violates the plain language of the statute and other well-established rules of statutory interpretation.

II. STATEMENT OF THE CASE

This is an appeal of an April 7, 2021 Order of the Indiana Utility Regulatory Commission ("IURC" or "Commission")) under Title 8, Article 1, Chapter 3 of the Indiana Code. I.C. ch. 8-1-3 ("Judicial Review of Utility Regulatory Commission Decisions."). In its April 7 Order, the Commission approved a new tariffed rate ("Rider EDG") for the procurement of "excess distributed generation" from customers that operate solar panels and other small on-site generators. *See generally* I.C. ch. 8-1-40 ("Distributed Generation"). Southern Indiana Gas and Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc. ("Vectren"), filed Rider EDG pursuant to the requirements of I.C. § 8-1-40-16.

Multiple consumer advocate and environmental group intervenors and the Indiana Office of Utility Consumer Counselor ("OUCC"), the statutory representative of the public under I.C. § 8-1-1.1-4.1 (collectively "Appellants"),

participated in the IURC proceedings below.[1] The Appellants filed testimony that opposed aspects of Rider EDG, including Vectren's application of the term "excess distributed generation," as the term is defined in I.C. § 8-1-40-5. E.g., Ex. Vol. 1 at 249-250—Ex. Vol. 2 at 4-11.

On September 17, 2020, the Appellants filed a motion for summary judgment arguing that Vectren's Rider EDG does not calculate EDG in accordance with I.C. § 8-1-40-5 and, therefore, Vectren's proposal cannot be approved as a matter of law. *See* App. Vol. 2 at 62-76. On October 15, 2020, the Presiding Officers issued a docket entry denying Appellants' motion for summary judgment. The Appellants appealed to the Full Commission. *See* App. Vol. 2 at 101-111.

On April 7, 2021, the IURC issued its final order (1) granting Vectren South's petition and approving proposed Rider EDG, and (2) affirming the Presiding Officers' denial of Appellants' motion for summary judgment. *See* Order at 34-37 (App. Vol. 2 at 49-52). The OUCC timely appealed on May 6, 2021, which was timely joined by the other Appellants.

[1] Intervening parties before the IURC were Citizens Action Coalition of Indiana, Inc., Environmental Law and Policy Center, Vote Solar, Solar United Neighbors, Solarize Indiana, Inc., the Indiana Distributed Energy Alliance, and Performance Services, Inc. All intervening parties are joining in this appeal except for Performance Services, Inc.

III. STATEMENT OF THE FACTS

Distributed Generation

This is a case about solar energy and other forms of electricity that customers generate on their own premises, defined by Indiana law as "Distributed Generation" ("DG").[2] Historically, households had only one option for electricity—homes and businesses relied on their local electric utility for 100 percent of their electricity needs. Today, that is changing. With dramatic improvements and cost reductions in distributed generation technologies, customers can choose to install solar panels, small wind turbines, or other advanced technologies to serve some or all of their needs using their own on-site generation.

"Inflow" and "Outflow"

DG customers remain connected to their electricity supplier to serve the full extent of their electricity needs. When DG customers generate electricity from on-site distributed generation, the customers will use some of that electricity in their own homes, but any self-generated electricity not used by the customers will flow back through that customers' electricity meters to the grid. The electricity that DG customers supply back to the grid is then delivered and sold by the electricity supplier (in this case Vectren) to other electricity customers.[3]

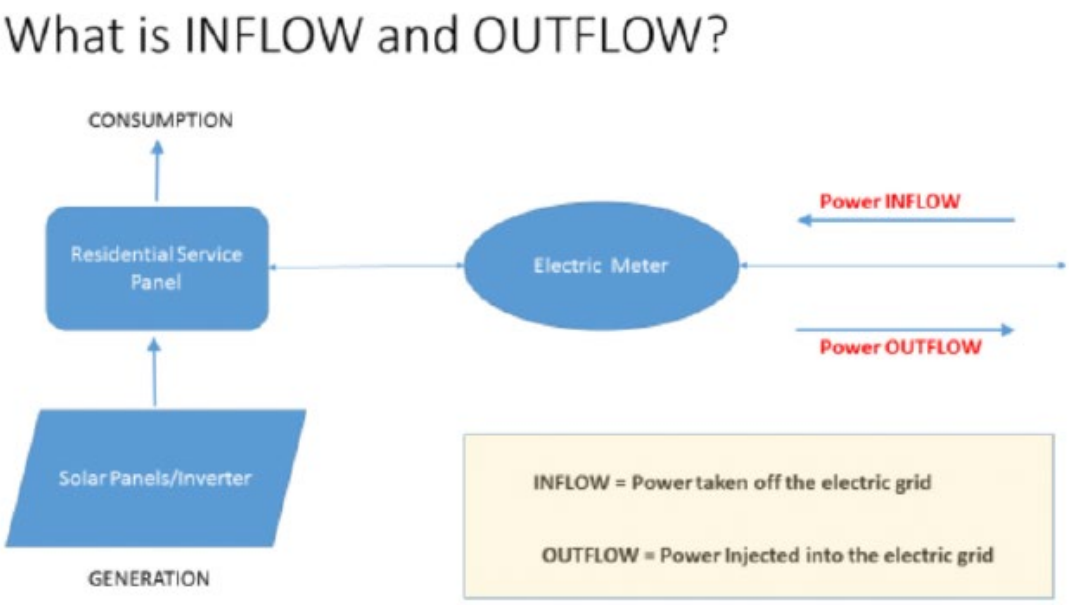
---

[2] I.C. § 8-1-40-3.

[3] Vectren serves retail electricity customers in the Southwest corner of Indiana, in and surrounding Evansville. The full name of the Company, as captioned in this case, is Southern Indiana Gas and Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc. Vectren was recently acquired by CenterPoint Energy of Houston and no longer uses the Vectren name. For clarity, CenterPoint Energy is referred to as "Vectren" for the purposes of this case.

By the laws of physics, electricity can only flow in one direction at a time across a customer's electricity meter. This fact is acknowledged by Vectren. Ex. Vol. 1 at 18, ll. 14-17; Tr. Vol. 2 at 30, ll. 17-25. The Commission also acknowledges this fact in its Order. *See* Order at 36 (App. Vol. 2 at 51). Therefore, at any given moment in time, Vectren is either supplying electricity to a DG customer **or** the customer is supplying electricity back to Vectren.[4] Vectren's electricity meters are capable of separately measuring the power flows to and from a customer's premises. Ex. Vol. 1 at 18, ll. 14-17. Tr. Vol. 2 at 30, ll. 17-25. When power is flowing from Vectren to the customer, Vectren registers that power flow as "Inflow" on the customer's meter. When power is flowing from the customer back to the grid, Vectren registers that power flow as "Outflow" on the meter. This flow of electricity can be visualized by reference to Vectren's Figure 1:[5]

[4] In the infrequent event that a customer's on-site generation perfectly matches its usage, the power flow across the customer's meter would be zero. Ex. Vol. 1 at 18, ll. 14-17.
[5] Ex. Vol. 1 at 50.



The generation and consumption of electricity that takes place on the customer's own property (the area on the left side of Figure 1, above)[6] are not recorded by the customer's Vectren electric meter. Only Inflow (the electricity supplied by Vectren) and Outflow (the electricity the customer supplies back to Vectren) are recorded on the utility's meter.

"Excess Distributed Generation"

Indiana law requires electricity suppliers (like Vectren) to procure a customer's "excess distributed generation" at a statutory rate. I.C. § 8-1-40-15. This section defines "excess distributed generation" as follows:

> As used in this chapter, "excess distributed generation" means the difference between:
>
> (1) the electricity that is supplied by an electricity supplier to a customer that produces distributed generation; and

[6] The generation and consumption of electricity that takes place on a DG customer's own property is often referred to as "behind the meter" generation because it takes place "behind" that customer's meter, entirely on private property, and does not involve any public utility transactions or equipment.

> (2) the electricity that is supplied back to the electricity supplier by the customer.

I.C. § 8-1-40-5.

With reference to Figure 1, above, the arrow labeled "Power Inflow" corresponds with the first statutory component of EDG ("electricity that is supplied by an electricity supplier to a customer") and the arrow labeled "Power Outflow" corresponds with the second statutory component of EDG ("electricity that is supplied back to the electricity supplier by the customer"). As explained by Vectren witness Matthew Rice at the evidentiary hearing:

> Q: Do you see the arrow labeled "Power INFLOW" on Figure 1?
> A: I do.
>
> Q: And that arrow represents electricity that is **supplied by Vectren to a customer that produces distributed generation**; correct?
> A: Correct.[7]
> ….
> Q: Okay. Do you see the arrow labeled "Power OUTFLOW"?
> A: I do.
>
> Q: And that arrow represents electricity that is **supplied back to Vectren by the customer**; right?
> A: That is correct.[8]

Per the statute, the determination of EDG must constitute the "difference between" these two power flows I.C. § 8-1-40-5.

"Net Metering"

For customers that installed distributed generation prior to the effective date of Rider EDG, Vectren bills customers pursuant to the Commission's Net Metering Rule, 170 Ind. Admin. Code 4-4.2. The definition in the IURC's rules

[7] Tr. Vol. 2 at 28, l. 23 – p. 29, l. 4 (emphasis added).
[8] Tr. Vol. 2 at 29, ll. 19-23 (emphasis added).

for "net metering" is similar to the statutory definition of "excess distributed generation," and states: "'Net metering' means measurement of the difference between the electricity that is supplied by the investor-owned electric utility to a net metering customer and the electricity that is supplied back to the investor-owned electric utility by a net metering customer." 170 I.A.C. 4-4.2-1(i). The rule also provides for measuring the difference and determining the manner of its billing during the billing period, which is generally a monthly period. 170 I.A.C. 4-4.2-7(2). Under net metering, customers shall be credited in the next billing cycle for the kWh difference if the kWh generated by the customer and delivered to the electric utility exceed the kWh supplied to the electric utility during the billing period. *Id.* IURC adopted rules for net metering in September 2004, requiring the state's electricity suppliers subject to Commission jurisdiction to offer net metering to select electric customers, an offer which was extended to all electric customers of jurisdictional utilities in 2010 for solar DG facilities of one megawatt or less. 170 I.A.C. 4-4.2-4. The Commission re-adopted this rule on April 11, 2019, and it was republished in the Indiana Register on May 8, 2019.[9]

Indiana Senate Enrolled Act 309 (2017)

In 2017, the Indiana Legislature passed a law that changed the method to compensate distributed generation customers from a kilowatt-hour credit to a monetary credit. This change effectively replaced compensation for the credited kilowatt-hours from the *retail* rate (as per net metering) to a significantly lower

[9] 20190508 IR 170190136RFA (May 8, 2019)
http://iac.iga.in.gov/iac//20190508-IR-170190136RFA.xml.html

wholesale rate multiplied by 1.25.[10] I.C. § 8-1-40-17.[11] Electricity suppliers were directed to calculate and file this new EDG rate with the IURC by "[n]ot later than March 1, 2021." I.C. § 8-1-40-16. Additionally, before July 1, 2022, if an electric supplier anticipates that the aggregate amount of net metering facility nameplate capacity under the net metering tariff will equal at least 1.5% of the most recent summer peak load, the electric supplier will petition the Commission for approval of an EDG rate. I.C. § 8-1-40-10.[12] I.C. § 8-1-40-5, as described above, also provided for the definition of "excess distributed generation." Additionally, different expiration dates were set between June 30, 2022, and June 30, 2047, for net metering tariffs for new and existing net metering customers. I.C. §§ 8-1-40-11, 8-1-40-13, 8-1-40-14. Finally, the Commission is directed to approve the EDG rate, after notice and a public hearing, if the rate "was accurately calculated" per the statutory formula, by no later than July 1, 2022. I.C. § 8-1-40-17. Nowhere does it state in I.C. ch. 8-1-40 that the billing period netting of distributed generation customer outflow and inflow prescribed under the Commission's current Net Metering Rule should be replaced with Vectren's invented "instantaneous" netting.

[10] Vectren's *wholesale* rates are the rates by which Vectren purchases electricity from the market, which are lower than the *retail* rates that Vectren charges its customers for delivery of that electricity to their home.
[11] The new rate must "equal[] the product of: (1) the average marginal price of electricity paid by the electricity supplier during the most recent calendar year; multiplied by (2) one and twenty-five hundredths (1.25)." I.C. § 8-1-40-17.
[12] Vectren filed its petition prior to the March 1, 2021 deadline pursuant to this section.

Vectren Rider EDG Filing

On May 8, 2020, Vectren filed a petition seeking approval of a new tariff rate (Rider EDG) pursuant to I.C. ch. 8-1-40.[13] Rider EDG provided for a new EDG credit rate per the statutory formula. However, Vectren proposed to "instantaneously" measure the flow of energy, and instead of measuring the difference between the electricity supplied to a DG customer and electricity supplied back to Vectren, through Rider EDG Vectren proposed to calculate EDG billing credits solely on the basis of "Outflow" by ***multiplying every kWh of customer "Outflow"*** by the new EDG billing rate while charging DG customers the full retail rate for every kWh of "Inflow."[14] As stated in Rider EDG:

> **BILLING**
>
> During the Month, Company shall measure the total kWh amount of Inflow and the total kWh amount of Outflow.
>
> The Inflow kWh for the Month shall be billed in accordance with the Customer's standard Rate Schedule, with all applicable rates and charges (heretofore defined as *Standard Charges*).
>
> The Excess DG kWh (Outlfow)[sic] for the Month shall be multiplied by the Marginal DG Price to determine the Rider EDG Billing Credit.[15]

[13] Vectren provided a copy of Rider EDG as Petitioner's Exhibit 2 (Attachment MAR-2) to the Direct Testimony of Vectren witness Matthew Rice. Ex. Vol. 1 at 26-30. On rebuttal, Mr. Rice sponsored amendments to Rider EDG. The amended Rider is Petitioner's Exhitib [sic] No. 3 (Attachment MAR-R1) to the Rebuttal Testimony of Matthew Rice (Record 077-082). Ex. Vol. 1 at 77-82.
[14] *See* Ex. Vol. 1 at 77 (Rider EDG, revised) (defining the "Rider EDG Billing Credit" as "the credit determined **by taking the Outflow** multiplied by the Marginal DG Price") (emphasis added). Rider EDG defines "Outflow" as "the measurement of energy delivered by Customer to Company." *Id.*
[15] Ex. Vol. 1 at 27 (Rider EDG, original); Ex. Vol. 1 at 78 (Rider EDG, revised).

Vectren's Rider EDG's proposal to separately measure and bill customer Inflow and Outflow, instead of netting the "difference between" them, drastically reduces the value of Vectren EDG customers' solar generation. Ex. Vol. 3 at 48-54; Ex. Vol. 3 at 219-20.

Appellants' Expert Testimony

Appellants pre-filed verified expert testimony opposing Vectren's decision to calculate EDG billing credits based solely on customer Outflow. Appellants' witnesses testified that Vectren's treatment of EDG as *equivalent* to customer Outflow (without any regard for Inflow) violated the plain language of I.C. § 8-1-40-5, which defines "excess distributed generation" as "***the difference between***: (1) the electricity that is supplied by an electricity supplier to a customer that produces distributed generation; and (2) the electricity that is supplied back to the electricity supplier by the customer." (emphasis added). Appellants' expert testimony also demonstrated that Rider EDG would significantly decrease compensation for Vectren's DG customers, reducing customer adoption of solar DG and thereby harming the emerging rooftop solar market and industry in Vectren's service territory. E.g., Ex. Vol. 3 at 48-54; Ex. Vol. 3 at 219-20.

Vectren's Rebuttal Testimony

On September 11, 2020, Vectren pre-filed rebuttal testimony defending Rider EDG. In response to Appellants' concerns, Vectren amended Rider EDG by inserting a new definition of "Excess Distributed Generation" that mirrored the statutory language at I.C. § 8-1-40-5.[16] Despite this cosmetic change, the updated tariff did not change Rider EDG's proposed calculation of EDG billing

[16] *See* Ex. Vol. 1 at 77.

credits. Vectren's revised Rider EDG contains identical billing terms to the original Rider EDG.[17] They both calculate EDG billing credits ***based solely on customer Outflow*** in violation of I.C. § 8-1-40-5.[18]

Appellants' Motion for Summary Judgment

On September 17, 2020, the Appellants filed a motion for summary judgment arguing that Vectren's decision to calculate EDG billing credits based solely on customer "Outflow" does not determine "excess distributed generation" in accordance with I.C. § 8-1-40-5, and therefore, Vectren's proposal cannot be approved as a matter of law. App. Vol. 2 at 62-76. Appellants argued that summary disposition was appropriate because the statutory interpretation of the legal term "Excess Distributed Generation," as defined by I.C. § 8-1-40-5, is a pure question of law. The Appellants also argued there was no factual dispute that Vectren's tariff calculates EDG billing credits based solely on "Outflow", and, therefore, there was no genuine issue of material fact relevant to the lawfulness of Vectren's tariff. The Appellants thus argued the case should be determined as a matter of law by comparing Rider EDG's undisputed method for calculating EDG billing credits with the plain language of Indiana law. App. Vol. 2 at 62-76.

Notwithstanding this showing, the Presiding Officers denied Appellants' summary judgment motion and set the case below for an evidentiary hearing, a ruling which Appellants subsequently appealed to the full Commission. App. Vol.

[17] *Compare* Ex. Vol. 1 at 77-78 (billing terms from revised Rider EDG) *with* Ex. Vol. 1 at 27 (billing terms from original Rider EDG).
[18] *Id.* ("The Excess DG kWh (Outlfow)[sic] for the Month shall be multiplied by the Marginal DG Price to determine the Rider EDG Billing Credit.").

2 at 98-111. The full Commission deferred ruling on Appellants' appeal until entry of its final order following the evidentiary hearing.

Cross-Examination of Vectren Witness Matthew Rice

On November 17, 2020, Appellants cross-examined Vectren witness Matthew Rice during the evidentiary hearing. Mr. Rice confirmed, under oath, that EDG billing credits are determined solely by taking the Outflow multiplied by the EDG rate. Mr. Rice further confirmed that "Outflow" represents "***the electricity that is supplied back to Vectren by the customer***." Tr. Vol. 2 at 29, ll. 19-23 (emphasis added).[19] Mr. Rice's description of "Outflow" precisely matches the second clause of the statutory definition of Excess Distributed Generation. *Compare* Tr. Vol. 2 at 29, ll. 19-23 (Mr. Rice's cross-examination) *with* I.C. § 8-1-40-5, which states:

> As used in this chapter, "excess distributed generation" means the difference between:
>
> (1) the electricity that is supplied by an electricity supplier to a customer that produces distributed generation; and
>
> (2) ***the electricity that is supplied back to the electricity supplier by the customer.***

(emphasis added). This admission confirms that Vectren calculates EDG billing credits using only one-half of the statutory equation and that there are no genuine issues of material fact for trial.

[19] *See also* Ex. Vol. 1 at 18, ll. 23-25, "The total outflow amount for the billing period will be priced at the Rider EDG credit rate, ***as it represents excess distributed generation*** from the customer to the Company." (emphasis added).

IURC's April 7, 2021 Order

On April 7, 2021 the IURC issued an Order granting Vectren's petition for approval of Rider EDG and affirmed the denial of the Appellants' motion for summary judgment. The Commission approved Rider EDG even though the tariff, by its own terms, calculates EDG billing credits based solely on customer Outflow.[20]

This Appeal

The OUCC filed a notice of appeal on May 6, 2021, which was timely joined by Citizens Action Coalition of Indiana, Inc., Environmental Law and Policy Center, Vote Solar, Solar United Neighbors, Solarize Indiana, Inc., and the Indiana Distributed Energy Alliance. Appellants contend that the IURC committed an error of law by approving a billing methodology for excess distributed generation that violates the plain language of I.C. § 8-1-40-5 and is not otherwise provided for in I.C. ch. 8-1-40.

IV. SUMMARY OF THE ARGUMENT

The IURC erred as a matter of law by departing from the plain language of a governing Indiana statute to implement a new policy for DG compensation that the Indiana legislature did not create. The definition of "excess distributed generation" in Section 5 is clear and unambiguous. The plain language of the statute defines excess distributed generation as a the "difference between: (1) the energy that is supplied by an electricity supplier to a customer that produces distributed generation; and (2) the electricity that is supplied back to the

[20] *See* Order at 34-37 (App. Vol. 2 at 49-52).

electricity supplier by the customer." I.C. § 8-1-40-5. The plain and ordinary reading of the statute, therefore, requires an actual calculation of the actual difference between the amount of electricity a utility supplies to a distributed generation customer (Inflow), and the amount of electricity that same customer supplies back to the utility (Outflow).

Despite this clear, simple, and unambiguous definition, the Commission approved Vectren's contrary interpretation of EDG based on a convoluted theory of "instantaneous netting." Order at 34-37 (App. Vol. 2 at 49-52). The Commission erroneously adopted the practice of "instantaneous netting" by relying on conclusory statements provided by Vectren's witnesses that are not only incorrect, but were directly contradicted by the testimony of witnesses for the OUCC, intervenors, and the Company itself.

The Court need not grapple with the inconsistencies and logical gaps in Vectren's "instantaneous netting" theory. This is not a disputed policy or factual matter. It is a legal controversy. Ultimately, the IURC's interpretation of I.C. § 8-1-40-5 must comply with the plain language of the statute. That statute requires utilities to measure EDG by taking the "difference between" Inflow and Outflow. *Id.* The practical effect of Vectren's so-called "instantaneous netting" approach, however, is that what is truly measured as "excess distributed generation" is only the electricity supplied to the utility (i.e. only Outflow); not the actual difference between what is supplied to, and supplied by, the customer as required by I.C. § 8-1-40-5. The Commission, accordingly, erred by deviating from the plain language of I.C. § 8-1-40-5.

"Indiana courts review questions of law de novo, *Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm'n*, 715 N.E.2d 351, 354 (Ind. 1999) (citation omitted), and accord the administrative tribunal below no deference." *NIPSCO Indus. Group v. N. Ind. Pub. Serv. Co.*, 100 N.E.3d 234, 241 (Ind. 2018), *modified on reh'g* (Sept. 25, 2018). If a statute is clear and unambiguous, as it is here, a court will "not apply any rules of construction other than to require that words and phrases be taken in their plain, ordinary and usual sense." *Ind. Bureau of Motor Vehicles v. McClung*, 138 N.E.3d 303, 307-08 (Ind. Ct. App. 2019); *St. Vincent Hosp. & Health Care Ctr. v. Steele*, 766 N.E.2d 699, 703-04 (Ind. 2002) ("Clear and unambiguous statutory meaning leaves no room for judicial construction."). By approving Vectren's proposal to calculate EDG billing credits using only one-half of the statutory equation, the Commission's Order renders the entire first clause of I.C. § 8-1-40-5 superfluous. This violates the cardinal rule of statutory interpretation requiring courts to avoid constructions that render parts of the statute "mere surplusage." *See ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1199 (Ind. 2016).

The Commission's interpretation of "excess distributed generation" conflicts with the core role of the Commission, to ensure the establishment of just and reasonable rates. The role is part of the Commission's statutory charge. I.C. § 8-1-2-4. Here, the Commission adopted an interpretation of "excess distributed generation" directly at odds with the statute, approving rates that are not "just and reasonable." In short, in all respects, the Commission committed reversible error in approving Vectren's Rider EDG. It committed an error of law

by interpreting a plain and unambiguous statute in a manner directly at odds with the statutory text.

Each branch of government has a different role. "Crafting our State's utility law is for the legislature; implementing it is for the executive acting through the Commission; and interpreting it is for the courts." *NIPSCO Indus. Group,* 100 N.E.3d at 241. While the IURC has discretion to "fill gaps" in the statutory framework, it may not create new policy or interpret statutes in a way that conflicts with the plain language of the statute. *Ind. Bell Tel. Co.,* 715 N.E.2d at 358 (holding that "neither the Commission nor this Court is free to legislate its own policy."). In this case, the IURC overstepped its authority by departing from the plain language of a governing Indiana statute to implement a policy contrary to the statute.

For all of these reasons, the Commission's decision should be reversed and remanded with instructions to enter summary judgment for the Joint Appellants.

V. ARGUMENT

A. THE COURT REVIEWS QUESTIONS OF LAW USING A *DE NOVO* STANDARD OF REVIEW

This case presents a question of law: whether the Commission properly interpreted the definition of "excess distributed generation" as set out in plain and unambiguous language in I.C. § 8-1-40-5. Questions of law are reviewed *de novo*, without deference to the Commission. *NIPSCO Indus. Group,* 100 N.E.3d at 241. In *NIPSCO Industrial Group*, the Indiana Supreme Court explained that the

duty of courts to review questions of law using a *de novo* standard of review is rooted in principles of separation of powers:

> We review questions of law de novo, *Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm'n*, 715 N.E.2d 351, 354 (Ind. 1999) (citation omitted), and accord the administrative tribunal below no deference. To do otherwise would abdicate our duty to say what the law is. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803). Such plenary review is "constitutionally preserved" for the judiciary, *United States Steel*, 907 N.E.2d at 1016, and considers whether the disputed "decision, ruling or order is contrary to law." *Citizens Action Coal. of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 485 N.E.2d 610, 613 (1985) (citation omitted). Such legal questions are for the courts to resolve and turn on "whether the Commission stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision, ruling, or order." *United States Steel*, 907 N.E.2d at 1016.
>
> Separation-of-powers principles do not contemplate a "tie-goes-to-the-agency" standard for reviewing administrative decisions on questions of law. In discharging our constitutional duty, we pronounce the statutory interpretation that is best and do not acquiesce in the interpretations of others. Deciding the scope of the Commission's authority under the [governing] Statute falls squarely within our institutional charge. ***Crafting our State's utility law is for the legislature; implementing it is for the executive acting through the Commission; and interpreting it is for the courts.***

(emphasis added). Thus, the Court's job in this case is to interpret I.C. § 8-1-40-5 using traditional tools of statutory interpretation and a *de novo* standard of review. The Court must reverse the Commission's order if it is based on a flawed interpretation of law, without deference to the agency's interpretation.

When conducting this *de novo* review, Indiana courts have traditionally afforded "great weight" to an agency's interpretation of a statute it is tasked with enforcing, so long as the agency's interpretation is "reasonable" and is not otherwise contrary to law. *See Moriarity v. Ind. Dep't of Natural Res.*, 113 N.E.3d 614, 621 (Ind. 2019). Importantly, however, this "great weight" standard applies

only where the court finds that the agency's interpretation is consistent with the governing law. *Id.* at 619. "[A]n agency's interpretation that is inconsistent with the statute itself does not receive 'great weight.'" *Id.* (citing *Chrysler Group, LLC, v. Review Bd. of Ind. Dep't of Workforce Dev.*, 960 N.E.2d 118, 123 (Ind. 2012)). If an agency's interpretation is "contrary to the statute," it is "necessarily unreasonable." *Id.* Thus, both *NIPSCO Industrial Group* and *Moriarity*, read together, affirm Justice Marshall's bedrock rule that it is emphatically the province and duty of the courts to "say what the law is." *NIPSCO Indus. Group*, 100 N.E.3d at 241 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) at 176)).

The IURC's interpretation of I.C. § 8-1-40-5 is a question of law. The Court is therefore on firm footing applying a *de novo* standard of review to the interpretation of the relevant statute, and affording the Commission's extra-statutory interpretation no deference. The Court should vacate the IURC's Order and direct the Commission to enter summary judgment in favor of Appellants because there is no genuine issue of material fact and the Appellants are entitled to judgment as a matter of law. *Bushong v. Williamson*, 790 N.E.2d 467, 473 (Ind. 2003) (citing Ind. Trial Rule 56(C)); *see Bd. of Sch. Comm'rs of City of Indianapolis v. Pettigrew*, 851 N.E.2d 326, 330 (Ind. Ct. App. 2006), *trans. denied* (explaining that "[t]he purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law") (citing *Bushong*, 790 N.E.2d at 474)).

B. IURC'S INTERPERTATION OF "EXCESS DISTRIBUTION GENERATION" VIOLATES THE PLAIN MEANING OF I.C. § 8-1-

40-5.

1. When a Statute is "Clear and Unambiguous," the Reviewing Court Takes the Words and Phrases in Their "Plain, Ordinary, and Usual Sense."

"The first step in interpreting any Indiana statute is to determine whether the legislature has spoken clearly and unambiguously on the point in question." *St. Vincent Hosp. & Health Care Ctr.,* 766 N.E.2d at 703-04 (citing *Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc.*, 746 N.E.2d 941, 947 (Ind. 2001)); *Ind. Bell Tel. Co.*, 715 N.E.2d at 354. "When a statute is clear and unambiguous, we need not apply any rules of construction other than to require that words and phrases be taken in their plain, ordinary and usual sense." *McClung*, 138 N.E.3d at 307–08 (citing *Poehlman v. Feferman*, 717 N.E.2d 578, 581 (Ind. 1999)). "Clear and unambiguous statutory meaning leaves no room for judicial construction." *St. Vincent Hosp. & Health Care Ctr.*, 766 N.E.2d at 703-04.

2. The Language of I.C. § 8-1-40-5 is "Clear and Unambiguous."

The governing statutory language upon which this appeal turns is plain, clear, and unambiguous. I.C. § 8-1-40-5 states:

> As used in this chapter, "excess distributed generation" means the difference between:
>
> (1) the electricity that is supplied by an electricity supplier to a customer that produces distributed generation; and
>
> (2) the electricity that is supplied back to the electricity supplier by the customer.

In defining "Excess Distributed Generation," the legislature chose simple words, with common and ordinary meanings. The only technical words in this statute —"distributed generation"— is specifically defined in I.C. § 8-1-40-3. The other words and phrases in Section 5— "the difference between," "electricity," "supplied," "customer," "produces," and "supplied back"— are all common English words with plain and ordinary meanings and should be treated by the Court as such.

When interpreting a statute, the Court must "presume the legislature uses undefined terms in their common and ordinary meaning." *NIPSCO Indus. Group*, 100 N.E.3d at 242 (quoting *In re S.H.*, 984 N.E.2d 630, 635 (Ind. 2013)). In *NIPSCO Industrial Group*, the Indiana Supreme Court was tasked with interpreting common English words, like "designate" and "update," that were embedded in a complex utility statute administered by IURC.[21] To determine the legislature's intended meaning, the Court referred to the dictionary and common English usage in other contexts, such as in Major League Baseball's designated-hitter rule. *Id.* at 242-43. The Court concluded that the legislature intended to use the word "designate" in its common and ordinary sense—by specifically *identifying* TDSIC projects in a plan and not merely *describing* the kinds of projects it might undertake in the future. *Id.* at 243.

Similarly, here, the meaning of I.C. § 8-1-40-5 can be easily determined with reference to common English usage. "Supplied" means "to make available,"

[21] *NIPSCO Industrial Group* involved the statutory interpretation of the so-called "TDSIC Statute" at I.C. ch. 8-1-39. *See NIPSCO Indus. Group,* 100 N.E.3d at 238.

"to provide for," or "to furnish."[22] The phrase "difference between," as used in a mathematical or other context, means "the degree or amount by which things differ in quantity or measure."[23] These words are not technical or complex. The clear and unambiguous text demonstrates the legislature's intent for electricity suppliers to calculate Excess Distributed Generation by comparing two different values — (1) the electricity that the electricity supplier "furnishes" to a DG customer, and (2) the electricity that the DG customer "makes available" or "furnishes back" to the electricity supplier. *See* I.C. § 8-1-40-5. EDG represents the "difference between" these two values. To calculate this "difference," the electricity supplier must measure both statutory components and then calculate "the degree or amount by which [they] differ in quantity or measure."[24] Any approach that ignores one of these terms, fails to calculate "the difference between" two values, or otherwise conflicts with the plain and obvious meaning of the statute is invalid. "We will read a clear and unambiguous statute to mean what it says, and we will neither enlarge nor restrict its plain and obvious meaning." *In re S.H.*, 984 N.E.2d at 635.

As described further below, Rider EDG does not calculate the "difference between" the two statutory components of Excess Distributed Generation. Instead, it calculates EDG billing credits based solely on Outflow, which represents only half of the statutory equation — the electricity that the DG customer "supplies back" to Vectren. The IURC's approval of Rider EDG therefore

[22] *Supply*, MERRIAM–WEBSTER'S DICTIONARY AND THESAURUS (11th ed. 2021).
[23] *Difference*, MERRIAM–WEBSTER'S DICTIONARY AND THESAURUS (11th ed. 2021).
[24] *Id.*

violates the plain, ordinary, and usual meaning of I.C. § 8-1-40-5, and it must be reversed.

3. IURC's Order Conflicts with the Clear and Unambiguous Language of I.C. § 8-1-40-5.

A simple comparison of Rider EDG and the plain language of I.C. § 8-1-40-5 demonstrates that Vectren's tariff does not measure "the difference between" two values and, instead, calculates EDG billing credits based solely on Outflow, which represents only one half of the statutory formula.

First, Rider EDG is crystal clear that billing credits are based on Outflow, alone. Here is the verbatim language from the "Billing" section of Vectren's revised EDG tariff: "The Excess DG kWh (Outlfow) [*sic*] for the Month shall be multiplied by the Marginal DG Price to determine the Rider EDG Billing Credit."[25]

Second, Vectren witness Matthew Rice confirmed, unequivocally, that the word Outflow, as used in Rider EDG, "represents ***electricity that is supplied back to Vectren by the customer***."[26] Mr. Rice's description of Outflow is identical to the second clause of I.C. § 8-1-40-5, bolded below:

> As used in this chapter, "excess distributed generation" means the difference between:
>
> (1) the electricity that is supplied by an electricity supplier to a customer that produces distributed generation; and
>
> (2) the ***electricity that is supplied back to the electricity supplier by the customer.***

[25] Ex. Vol. 1 at 77-78 (Rider EDG, revised). "Outflow" is defined as "the separate meter channel measurement of energy delivered by Customer to Company as Excess Distributed Generation." *Id.*

[26] *See* Statement of Facts at pp. 17, *supra* (including excerpt of Matthew Rice testimony from IURC's evidentiary hearing) (emphasis added).

(emphasis added).

The perfect match confirms, beyond all doubt, that Vectren calculates EDG Billing Credits using only the second part of the statutory formula. Even without Mr. Rice's concession at the evidentiary hearing, the definition of Outflow in Rider DG ("energy delivered by Customer to Company")[27] is a good match for the statutory phrase ("electricity that is supplied back to the electricity supplier by the customer"). The word "delivered," as used in Rider EDG, means the same thing as "supplied back," as used in the statute. *Compare Deliver*, MERRIAM–WEBSTER'S DICTIONARY AND THESAURUS (11th ed. 2021) (to "hand over," "leave for another," "convey," or "make accessible to someone") *with Supply*, MERRIAM–WEBSTER'S DICTIONARY AND THESAURUS (11th ed. 2021)**Error! Bookmark not defined.** ("to make available," "to provide for," or "to furnish"). And the "Company," as used in Rider EDG, is Vectren, the very same "electricity supplier" referred to in the statute.

Vectren's decision to equate EDG with Outflow cannot be squared with the plain language of the statute and must be reversed. This conclusion flows directly from the clear and unambiguous language of I.C. § 8-1-40-5, which "leaves no room" for a contrary construction. *St. Vincent Hosp. & Health Care Ctr.*, 766 N.E.2d at 703-04.

4. The IURC's Interpretation Renders Half of the Governing Statute Meaningless or "Mere Surplusage."

[27] *See* Ex. Vol. 1 at 77 (Rider EDG, revised, definition of "Outflow").

The statute defines EDG as the "difference between" two values: (1) electricity supplied to a customer, and (2) electricity supplied back to the electricity supplier. I.C. § 8-1-40-5. As explained in Argument Section A.3 above, Rider EDG calculates billing credits based solely on Outflow, which Vectren witness Matthew Rice concedes is equivalent to the second statutory component of EDG. As a result, Vectren's application of EDG ignores the first component of the statutory definition entirely, rendering half of the statutory language meaningless. *See* pp. 27-29, *supra.*

This presents yet another reason why the Commission's interpretation of law is unreasonable and must be rejected. Indiana courts "generally presume that all statutory language is used intentionally," so that "[e]ach word should be given effect and meaning where possible." *In re Howell*, 27 N.E.3d 723, 726 (Ind. 2015) (quoting *AlliedSignal, Inc. v. Ott*, 785 N.E.2d 1068, 1079 (Ind. 2003)); *see also Spaulding v. Int'l Bakers Servs., Inc.*, 550 N.E.2d 307, 309 (Ind. 1990) ("Where possible, every word must be given effect and meaning, and no part is to be held meaningless if it can be reconciled with the rest of the statute."). The Court must reject the Commission's interpretation of I.C. § 8-1-40-5 because it renders half of the statutory formula meaningless or "mere surplusage." *See ESPN, Inc.*, 62 N.E.3d at 1199 (citing "the surplusage canon" of statutory construction which holds "that, if possible, every word and every provision in a legal instrument is to be given effect") (quoting BLACK'S LAW DICTIONARY 1672 (10th ed. 2014)).

Because an agency's statutory interpretation is entitled to no weight if it is incorrect or contrary to law, *Ind. Gas Co. v. Office of Util. Consumer Counselor*,

610 N.E.2d 865, 869 (Ind. Ct. App. 1993), and because the Commission's Order adopts an interpretation that is plainly at odds with the statutory language, it should be reversed.

5. The Commission Erred by Failing to Consider What the EDG Statute Does Not Say

Indiana courts have recognized that it is "just as important to recognize what the statute does not say as it is to recognize what it says." *State v. Dugan*, 793 N.E.2d 1034, 1036 (Ind. 2003). Indeed, even when reviewing unambiguous statutes, courts presume that the legislature is capable of crafting statutory language to achieve a specific result. *See, e.g.*, *KS&E Sports v. Runnels*, 72 N.E.3d 892, 899-90 (Ind. 2017) (While reviewing a statute that is "clear, unambiguous and not susceptible to multiple interpretations", the court concluded that legislature "knows how to craft" statutory restrictions if it so chooses).

Those rules apply here. I.C. ch. 8-1-40 changed the compensation paid to distributed generation customers from a kilowatt-hour credit to a monetary credit. This change effectively replaced compensation for the credited kilowatt-hours from the *retail* rate. No language in I.C. ch. 8-1-40, however, requires or calls for a change in the method of calculating the number of credited kilowatt hours. Had the legislature intended such a change, it could have done so, just as it established a the new EDG rate. With clear and unambiguous language, the Commission should have considered that while I.C. ch. 8-1-40 materially changed the rate to compensate EDG customers, it did nothing to alter the number of kilowatt hours to which the billing credit would apply. It is clear the legislature could have done so if it desired that result, but it did not. The

Commission, then, erred in determining a change to Vectren's "instantaneous netting" methodology was intended. That error calls for reversal.

VI. CONCLUSION

The Commission's constitutional role as an Executive branch agency is to *implement* the policies handed down by the legislature. The Court's job in this case, as in all administrative review cases, is to ensure that the agency faithfully implements the legislature's intent by, first, carefully reviewing the statutory language and, if necessary, applying the traditional judicial tools of statutory interpretation. *NIPSCO Indus. Group*, 100 N.E.3d at 241 ("Crafting our State's utility law is for the legislature; implementing it is for the executive acting through the Commission; and interpreting it is for the courts.").

The Indiana Supreme Court has repeatedly held that IURC is a "creature of statute" that "derives its power and authority solely from the statute." *Ind. Bell Tel. Co.*, 715 N.E.2d at 354 n.3 (quoting *Gen. Tel. Co. of Ind., Inc. v. Pub. Serv. Comm'n of Ind.*, 238 Ind. 646, 154 N.E.2d 372, 373 (Ind. 1958) (quoting *Chicago & E.I.R. Co. v. Pub. Serv. Comm'n of Ind.*, 49 N.E.2d 341 (1943))). Thus, "[t]he Commission can exercise only power conferred upon it by statute." *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1015 (Ind. 2009).[28] As explained by the Court in a 1990 case:

> The manner by which Indiana's electrical utilities are regulated is largely in the hands of the legislature. The Utility Regulatory Commission, which was created by the General Assembly, is

[28] The Commission even cited the "creature of statute" principle in its April 17, 2021 Order, although the approach taken by the Commission in this case did not follow it. *See* Order at 31 (App. Vol. 2 at 46).

> primarily a fact-finding body with the technical expertise to administer the regulatory scheme devised by the legislature.

United Rural Elec. Membership Corp. v. Ind. & Mich. Elec. Co., 549 N.E.2d 1019, 1021 (Ind. 1990).

In light of this overwhelming precedent, the Commission should have relied on the plain language of I.C. ch. 8-1-40 when reviewing Rider EDG. Instead, it disregarded the statutory text to implement "instantaneous netting," a policy that finds no support in the plain language of the law and, in fact, renders key statutory language meaningless.

Cases like *Indiana Bell Telephone*, 715 N.E.2d at 358, and *NIPSCO Industrial Group*, 100 N.E. 3d at 241, are directly on point and control the outcome here. "Neither the Commission nor this Court is free to legislate its own policy." *Ind. Bell Tel. Co.*, 715 N.E.2d at 358. The Court must take seriously its "constitutional duty" to interpret the law de novo to ensure that IURC does not exceed its statutory authority. *NIPSCO Indus. Group*, 100 N.E. 3d at 241. In order to accomplish this, the Court must review the **actual language** of Chapter 40.

This is not a policy dispute involving contested facts. The case turns on IURC's interpretation of a statute — a pure question of law. "Such legal questions are for the courts to resolve and turn on 'whether the Commission stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision, ruling, or order." *Id.* (citing *U.S. Steel*, 907 N.E.2d at 1016). Because the Commission's Order is "contrary to the statute," it is "necessarily unreasonable" and entitled to no weight. *Moriarity*, 113 N.E.3d at 619; *see also Ind. Bd. of Pharmacy v. Elmer*, No. 20A-PL-2200, 2021 WL

2325310, at *6 (Ind. Ct. App. June 8, 2021) (citing *Moriarity* for the applicable *de novo* standard of review and reversing the statutory interpretation of the Board).

Accordingly, the Court should vacate the IURC's April 17, 2021 Order and remand to the agency with instructions to enter summary judgment on behalf of the Joint Appellants.

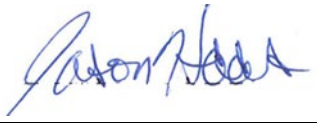
Respectfully submitted,

Thomas J. Haas, Atty No. 34983-29
Deputy Consumer Counselor
Indiana Office of Utility Consumer Counselor
115 West Washington Street, Suite 1500 South
Indianapolis, IN 46204
Main Office: (317) 232-2494
Direct: (317) 232-3315

Counsel for Statutory Party and Appellant
Indiana Office of Utility Consumer Counselor

WORD COUNT CERTIFICATE

I verify that this brief contains no more than 14,000 words.



Thomas J. Haas, Atty No. 34983-29
Deputy Consumer Counselor

CERTIFICATE OF SERVICE

I certify that on August 20, 2021, I electronically filed the foregoing *Brief of Appellant Indiana Office of Utility Consumer Counselor* using the Indiana E-Filing System (IEFS).

I also certify that on August 20, 2021, the foregoing *Brief of Appellant Indiana Office of Utility Consumer Counselor* was served upon the following persons via IEFS:

Southern Indiana Gas and Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc., a CenterPoint Energy Company Heather Watts Justin Hage CENTERPOINT ENERGY, INC. Heather.Watts@centerpointenergy.com justin.hage@centerpointenergy.com ***CenterPoint Energy, Inc.*** Derek Molter Steven W. Krohne ICE MILLER LLP derek.molter@icemiller.com steven.krohne@icemiller.com ***Citizens Action Coalition of Indiana, Inc.*** Jennifer A. Washburn CITIZENS ACTION COALITION OF INDIANA, INC. jwashburn@citact.org ***Indiana Distributed Energy Alliance*** Robert M. Glennon ROBERT GLENNON & ASSOC., P.C. robertglennonlaw@gmail.com ***Solarize Indiana, Inc.*** Joseph P. Rompala LEWIS & KAPPES, P.C. JRompala@Lewis-Kappes.com	***Solar United Neighbors*** Jennifer A. Washburn CITIZENS ACTION COALITION OF INDIANA, INC. jwashburn@citact.org ***Vote Solar*** Bradley Klein ENVIRONMENTAL LAW & POLICY CENTER bklein@elpc.org ***Vote Solar*** Jennifer A. Washburn CITIZENS ACTION COALITION OF INDIANA, INC. jwashburn@citact.org ***Environmental Law & Policy Center*** Bradley Klein ENVIRONMENTAL LAW & POLICY CENTER bklein@elpc.org ***Environmental Law & Policy Center*** Jennifer A. Washburn CITIZENS ACTION COALITION OF INDIANA, INC. jwashburn@citact.org ***Solarize Indiana, Inc.*** Russell L. Ellis russell_ellis@sbcglobal.net

Indiana Utility Regulatory Commission Theodore E. Rokita, Attorney General Aaron T. Craft, Section Chief, Civil Appeals OFFICE OF THE INDIANA ATTORNEY GENERAL efile@atg.in.gov Aaron.Craft@atg.in.gov	***Indiana Utility Regulatory Commission*** Beth E. Heline, General Counsel Jeremy Comeau, Assistant General Counsel Steve Davies, Assistant General Counsel INDIANA UTILITY REGULATORY COMMISSION bheline@urc.in.gov jcomeau@urc.in.gov sdavies@urc.in.gov

Thomas J. Haas, Atty No. 34983-29
Deputy Consumer Counselor

Indiana Office of Utility Consumer Counselor
115 West Washington Street, Suite 1500 South
Indianapolis, IN 46204
(317) 232-2494 (Main Office)
(317) 232-3315 (Direct)