IN THE
INDIANA COURT OF APPEALS

CASE NO. 21A-EX-821

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR; CITIZENS ACTION COALITION OF INDIANA, INC.; VOTE SOLAR; ENVIRONMENTAL LAW & POLICY CENTER; SOLARIZE INDIANA; SOLAR UNITED NEIGHBORS 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.

REPLY BRIEF OF JOINT APPELLANTS INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR, CITIZENS ACTION COALITION OF INDIANA, ENVIRONMENTAL LAW & POLICY CENTER, INDIANA DISTRIBUTED ENERGY ALLIANCE, SOLAR UNITED NEIGHBORS, SOLARIZE INDIANA, AND VOTE SOLAR

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SUMMARY OF ARGUMENT

This case is about the single legal issue of the correct application of clear and unambiguous statutory language by the Indiana Utility Regulatory Commission ("Commission" or "IURC") and the respective roles of the General Assembly, the IURC, and the Appellate Courts regarding energy policy in the State of Indiana.

Each branch of government has a different role. The legislature creates energy policy by enacting statutes, the IURC implements the policy by applying those statutes in its orders and rules, and the Appellate Courts ensure that the IURC correctly applies those statutes by reviewing the Commission's orders and rules. The IURC does not possess the power to create new policy or interpret and implement statutes in a manner that conflicts with their plain meaning under the guise of "filling gaps" in the statutory framework. Rather, as the Commission itself noted, the IURC is a "creature of statute" that "derives its power and authority solely from statute." Final Order, at 31 (quoting *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 715 N.E.2d 351, 360 n.3 (Ind. 1999)).

In this case, the central dispute revolves around the correct, lawful application of the plain meaning of a key provision of the governing statute, Ind. Code §8-1-40-5 (2021), to the undisputed facts. Because the facts are undisputed, the legal dispute requires a *de novo* review by this court. *NIPSCO Industrial Group v. N. Indiana Pub. Serv. Co.*, 100 N.E.3d 234, 241 (Ind. 2018), *as modified on reh'g* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803)) IC § 8-1-40-5 sets forth a straightforward framework for

defining and calculating "excess distributed generation" ("EDG") to compensate customers that generate electricity using a range of distributed generation ("DG") resources. IC §8-1-40-5 states that EDG "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." The General Assembly spoke clearly when crafting this statute, using plain language that the IURC and the courts can easily understand and apply without reliance on specialized technical knowledge.

Instead of applying the plain language of IC §8-1-40-5, the IURC's Order adopts Vectren's convoluted, inconsistent, theory by which electricity supplied by the utility to the customer ("inflow") and electricity supplied by the customer to the utility ("outflow") are "netted instantaneously" inside Vectren's meters. The tariff language approved by the Commission uses "instantaneous netting" to transform the statutory difference between "inflow" and "outflow" into "outflow" alone. The DG customer is thus charged by Vectren the full retail rate for "inflow" and credited at the much lower EDG rate for "outflow." In reality, however, "instantaneous netting" is logically inconsistent with the fact that electricity only flows in one direction in any given instant. This is a fact conceded by all parties, and recognized by the Commission. The phrase "instantaneous netting" is simply semantic gymnastics to disguise the fact that Vectren's proposed tariff does not calculate the difference between the two statutory elements as IC §8-1-40-5 requires.

As Justice Scalia colorfully put it, the legislature does not "hide elephants in mouseholes", *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468, 121 S. Ct. 903, 910, 149 L. Ed. 2d 1 (2001) . If the legislature had intended to determine "excess distributed generation" based solely on the energy supplied by the customer to the utility ("outflow"), it would have said so; but it did not. Instead, the plain language of the statute requires the calculation of the difference between energy flowing to, and from, a distributed generation customer. Vectren's tariff does not do that, instead hiding behind the disguise of "instantaneous netting". Here, the Court should not look past the legislative intent so obviously expressed in the plain language of the statute.

The IURC and Vectren try to reshape the standard of review in their favor by portraying this case as one in which the Court must rely on the Commission's technical expertise to resolve a factual dispute with respect to the operation of Vectren's electric meters. There is, however, no factual dispute that requires the Court to defer to the Commission's expertise in this case. As explained in Section II.A below, there is no material dispute of fact about how Vectren's electric meters work or the how the laws of physics dictate the movement of electricity. The real dispute between the Appellants and Appellees remains a legal one — specifically, whether Vectren's tariff complies with the clear statutory requirement to calculate the "difference between" energy supplied to, and energy supplied by, its DG customers. This does not hinge on a question of fact; it is a purely legal dispute.

Appellees argue that the DG Act "eliminated" the pre-existing billing mechanism based on netting the difference between energy provided to and from a customer with customer owned generation. (Vectren Br. at 7, IURC Br. at 8, IEA Br. at 5). The plain language of IC Chapter 8-1-40 as a whole, however, demonstrates that this was not the "intent" of the legislature. What the statute specifically modifies is the *rate* that utilities must pay DG customers for EDG, changing from a credit equivalent to the retail rate for energy to one equal to 125% of the wholesale rate for energy. Yet, the statute includes nearly identical language to define "excess distributed generation" as is used in the IURC's own rules to define the net metering billing mechanism. Indeed, IC § 8-1-40-21 explicitly states the IURC's rules and standards on net metering "remain in effect and apply to…distributed generation under this chapter." If the General Assembly had intended to entirely eliminate the existing net metering billing mechanism, it would not have retained the net metering rule to remain in effect and apply to excess distributed generation.

Read as a whole, then, nothing in the DG Act indicates a legislative intent to fundamentally alter Indiana's netting regime for distributed generation. The Appellees and Amicus unquestionably disagree with the policy expressed in the plain language of the DG Act, but neither are free to ignore that plain language of the statute.

Appellees and Amicus provide extensive policy discussion supporting their position. The IURC and Amicus Indiana Energy Association ("IEA") argue that approval of Vectren's tariff improves public policy and conforms to legislative

intent by eliminating alleged "subsidies" inherent in net metering for DG customers. (IURC Br. at 9, 24; IEA Br. at 7-15). Further, both assert a monthly netting billing mechanism is inappropriate, claiming the OUCC is arguing for such a mechanism as a matter of policy. (IURC Br. at 24; IEA Br. at 27-28). That is not the case. The OUCC did not make this argument in its initial brief and is not asking the Court to make that specific determination now.

These policy questions are not, however, relevant to the Court's review and should not be considered in its determination. What is before this Court is the pure legal question of whether Vectren's proposed methodology for calculating "excess distributed generation," as approved by the IURC, is consistent with the plain meaning of IC §§8-1-40-5 and 21. When the language of the statute is clear on its face, policy arguments have no role in interpreting the statute.

The Commission committed an error of law when it deviated from the language of IC § 8-1-40-5 to approve Vectren's EDG tariff. Accordingly, the Court should reverse and remand the Commission's April 7, 2021 Order for this error to be corrected.

ARGUMENT

I. The Appellees' Arguments for a Deferential Standard of Review Fail Because the Dispute is Over a Pure Question of Law

"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. Grp.,* 100 N.E.3d at 241. Thus, the Court's role in this case is to interpret *de novo* the governing statutory language using traditional rules of statutory interpretation. *See Indiana Bell Tel. Co.*, 715 N.E.2d at 354.

The legislature set out the definition of EDG using clear, simple language. This proceeding simply involves the legal application of the statute to Vectren's proposal. The plain language of the statue is clear, there are no statutory gaps for the Commission to fill, and there is no area in which the technical expertise of the Commission demands deference. Accordingly, the Court must review the legal question *de novo*.

The Commission's Order, which approves Vectren's EDG tariff, disregards the clear statutory language of IC § 8-1-40-5 in favor of a methodology that is inconsistent with the statute and policy adopted by the General Assembly. This is not the proper role of the Commission, nor this Court: "neither the Commission nor this Court is free to legislate its own policy." *Indiana Bell Tel. Co.*, 715 N.E.2d at 358. Rather, the role of the Commission is to implement the policy enacted by the General Assembly. The role of this Court is to ensure the Commission's order conforms to the requirements of the statutes enacted by the General Assembly. It is wholly within this Court's power to reverse the

Commission's Order as it stepped outside of its statutory authority and committed an error of law. *NIPSCO Indus. Grp.*, 100 NE3d at 241 ("In discharging our constitutional duty, we pronounce the statutory interpretation that is best and do not acquiesce in the interpretations of others"). The Court should conduct a *de novo* review of the IURC's application of IC § 8-1-40-5 according to its plain language, which reflects the policy enacted by the General Assembly.

The briefs submitted by the Commission, Vectren, and the IEA spend little time on the actual text of the DG Act. Instead, those briefs devote many pages to policy arguments and unsubstantiated "factual disputes" that are divorced from the statutory text. Notably, their briefs fail to rebut, or even address, the "plain language" discussion of IC § 8-1-40-5 appearing on pages 24-26 of Appellants' opening brief.[1] The Appellees' failure to grapple with these textual arguments reveals the fatal flaw of the IURC's Order.[2]

But, when the dispositive statutory language is plain, clear, and unambiguous, the Court need not, indeed cannot, resort to policy arguments or additional principles of statutory construction to discern the intent of the legislature as urged by the Appellees and Amicus. Rather, the Court's review

[1] The Appellants' Brief methodically reviews each word that appears in the statute, applying the common English language dictionary definitions to the statutory phrases such as "difference between" and "supplied." *See* Appellants' Br. at 24-26.

[2] When interpreting a statute, the Court must "presume that the legislature uses undefined terms in their common and ordinary meaning," *NIPSCO Indus. Grp.*, 100 N.E.3d at 242 (quoting *In re S.H.*, 984 N.E.2d 630, 635 (Ind. 2013)). "In order to determine the plain and ordinary meaning of words, courts may properly consult English language dictionaries." *City of Greenwood v. Town of Bargersville*, 930 N.E.2d 58, 68 (Ind. Ct. App. 2010).

should begin and end with the language of the statute. *Indiana Bell Tel. Co.*, 715 N.E.2d at 354 ("The first and often the last step in any effort to interpret a piece of legislation is to examine the language of the statute."); *NIPSCO Indus. Grp.*, 100 N.E.3d at 241 ("In discharging our constitutional duty, we pronounce the statutory interpretation that is best and do not acquiesce in the interpretations of others."); *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 704 (Ind. 2002) ("Clear and unambiguous statutory meaning leaves no room for judicial construction."); *Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc.*, 746 N.E.2d 941, 947 (Ind. 2001) ("Our first step in interpreting any Indiana statute is to determine whether the legislature has spoken clearly and unambiguously on the point in question.").

Ultimately, the Court should apply the plain language of the statute to ensure the Commission has adhered to the legislative policy established by statute. It must do so by applying *de novo* review to the Commission's interpretation of the relevant statute.

II. The Dispositive Issue Involves a Question of Law Not a Dispute As to How Vectren's Meters Work.

This proceeding involves the application of clear and unambiguous statutory language to the proposed tariff submitted by Vectren. However, instead of focusing on the plain meaning and application of the statute, a question of law, Vectren attempts to manufacture a dispute over a question of fact, "the mechanical operation of Vectren's smart meters." *See, e.g.,* Vectren Br. at 23, 28. To support this argument Vectren asserts that "the OUCC is asking the Court to

substitute its judgment for that of the Commission which, in a complex evidentiary issue such as the mechanical capabilities of Vectren's smart meters, the Court has previously recognized is best left to the technical expertise of the Commission." Vectren Br. at 24.

This is not so. Appellants have no material disagreement with Vectren or the Commission about "the mechanics of Vectren's smart meters." Vectren Br. at 32. Instead, Appellants dispute that Vectren's tariff as approved by the IURC will calculate EDG in a manner compliant with the statutory provisions of IC § 8-1-40-5. Compliance with the statute rests not only on how electricity flows, but also on Vectren's tariff language. These are not "highly technical" matters calling for deference to the Commission's expertise. They are questions of law and a simple matter of determining whether the Commission's order approved a tariff that actually calculates the "difference between" two values — as required by IC § 8-1-40-5.

A. There is no factual dispute about the mechanics of Vectren's smart meters.

There is no disagreement about the mechanics of Vectren's smart meters. The parties agree that Vectren's meters separately measure and record "inflow" and "outflow" in a manner consistent with the language of the statute and the laws of physics. Here is the IURC's own description of how Vectren's meters work:

> Vectren's meters "measure either an inflow (where the customer is consuming more electricity than the customer is supplying and therefore drawing electricity from the utility), an outflow (where a customer is consuming less electricity than the customer is supplying and therefore sending electricity to the utility), or a net zero (where consumption and supply match)."

IURC Br. at 10. No party disagrees with this explanation. Indeed, the IURC relies on the same "Inflow/Outflow" metering schematic (at p. 11) that Appellants included in their own brief (at p. 10) to illustrate how Vectren's meters work, and there is no dispute among the parties as to the accuracy of the schematic's depiction of "inflow" and "outflow".

Second, all parties agree that electricity can only flow in one direction on an instantaneous basis.[3] This fact is recognized in the Commission's Final Order. (Order at 36). If there is flow of electricity in one direction, there cannot be flow of electricity in the other direction at the same moment. That means that, at any given instant, Vectren's meters measure only either (1) power inflow, (2) power outflow, or (3) net zero. *See* IURC Br. at 10; Appellants' Br. at 9; IURC Order at 36.

Third, all parties agree that outflow occurs when DG customers are producing more electricity from their on-site DG resources than what they are using inside of their homes at any given time. As stated by Vectren's witness Rice:

> When the customer is producing more energy than what they're using, there's an outflow. When there's customers utilizing or consuming more energy than what they're producing, there's an inflow.

Vectren Br. at 36.

Appellants' expert witness Douglas Jester agreed with Mr. Rice:

[3] Vectren acknowledged this fact in testimony. Ex. Vol. 1 at 18, ll. 14-17; Tr. Vol. 2 at 30, ll. 17-25.

> When the amount of power supplied from the distributed generation is greater than the amount required by the customer's load, the excess distributed generation will flow from the customer's premises to the utility; this is referred to as outflow in Vectren South's Petition.

Ex. Vol. 2 at 239.[4]

Viewed in totality, there is no factual disagreement about how Vectren's smart meters work. The meters measure and record inflow and outflow through two separate channels. Inflow occurs when a DG customer is consuming more power than they are producing on-site. Outflow occurs when a DG customer is producing more power than they're using on-site. No party disagrees with this, and the Court should not accept Vectren's attempt to manufacture a factual dispute when none exists. What is in dispute is the legal issue of the application of IC § 8-1-40-5 to Vectren's proposed "instantaneous netting" methodology and tariff language, which is inconsistent with both the plain language of the statute and the undisputed facts set forth above.

Instead of adhering to the plain language of the statute, Vectren's tariff states unequivocally that the calculation it will perform to credit customers for excess distributed generation is what the customer supplies to the system, not

[4] Vectren's makes much of Mr. Jester's use of the term "excess distributed generation" in this quoted excerpt of Jester's testimony. *See, e.g.*, Vectren Br. at 36-37. Vectren claims, unpersuasively, that Mr. Jester's use of this term somehow concedes the *lawfulness* of Vectren's EDG tariff. *Id.* But this argument is a red herring. Mr. Jester is an economist, not a lawyer. His testimony was simply describing the *mechanics* of Vectren's EDG tariff using the same terms Mr. Rice used in his testimony. Far from conceding the lawfulness of Vectren's EDG tariff, Mr. Jester's testimony tends to confirm that there is no factual dispute about the mechanics of Vectren's smart meters.

the difference between what is supplied to the customer and what is supplied by the customer. Indeed, the tariff itself makes plain that Vectren is not complying with the statute by calculating any form of difference between the energy supplied to, and by, a distributed generation customer. Rather, Vectren's tariff explicitly ties the compensation paid to distributed generation to customers to only the "outflow" from the customer. As stated in the tariff, the "Excess EDG kWh (Outflow) will for the Month shall be multiplied by the Marginal DG Price to determine the Rider EDG Billing Credit." (Ex. Vol. 1 at 78). Under the tariff, excess distributed generation is not the result of the difference between energy flowing to and from the customer (as the statute requires), but only energy that flows from the customer to Vectren. This makes it plain that how the meter measures inflow and outflow is irrelevant because all that Vectren proposes to compensate customers for is the "outflow". This is of consequence for the customer because it takes away the dollar-for-dollar credit the customer receives when the differential is calculated. Indeed, if this language were not plain enough, Vectren's tariff essentially reiterates it, stating that the "EDG Billing Credit" will be "determined by taking the Outflow multiplied by the Marginal DG Price." (Ex. Vol. 1 at 77).

Nowhere, throughout Vectren's tariff, does the Company propose, as required by statute, to multiply "excess distributed generation" calculated as the difference between inflow and outflow by the "Marginal DG Price." It only proposes to measure outflow and inflow separately, and then compensate customers for the outflow at the "Marginal DG Price." This lays bare the

subterfuge of Vectren's proposal for "instantaneous netting" and the Company's insistence on focusing on the mechanics of its meters. There is no factual issue here. There is only a deviation from the plain language of the statute. The Commission's adoption of Vectren's proposed tariff, is, therefore, an error of law and should be reversed.

B. Because this case involves an error of law, Vectren's cases involving IURC's "technical expertise" and "fact-finding" duties are not relevant here.

By attempting to characterize this case as a dispute about facts, Vectren seeks to apply the wrong standard of review. Questions of law are reviewed *de novo*, without deference to the Commission. *NIPSCO Indus. Grp.* 100 N.E.3d at 241. Where an agency's interpretation of the relevant statute is reasonable, Indiana courts have traditionally afforded it great weight. *See Moriarity v. Indiana Dep't of Nat. Res.*, 113 N.E.3d 614, 619 (Ind. 2019). However, this Court remains the ultimate arbiter of the law. *Id.* at 620. If an agency's interpretation is "contrary to the statute," it is "necessarily unreasonable", and the Court must reject it. *Id.*

The cases cited by Vectren regarding the "technical expertise" and "fact-finding" duties of IURC are not applicable when the core issue in dispute is a question of law. For example, Vectren cites, at page 25 of its brief, *Mullett v. Duke Energy*, 103 N.E.3d 661, 664 (Ind. Ct. App. 2018). But that case primarily turned on a question of fact, namely whether there was sufficient evidence in the administrative record to support a utility's request to recover lost production costs from ratepayers from a wind energy contract. *Id.* ("The Commission has the

expertise to analyze and weigh the evidence in this case, and, after our review of the record, we conclude that there is substantial evidence to support its decision to approve Duke's recovery from ratepayers.") That is not the case here.

Vectren also cites *Citizens Action Coalition vs. NIPSCO*, 76 N.E.3d 144 (Ind. Ct. App. 2017), *NIPSCO Industrial Group v. NIPSCO*, 125 N.E.3d 617 (Ind. 2019), and *NIPSCO v. U.S. Steel Corp.*, 907 N.E.2d 1012 (Ind. 2009)). Vectren Br. at 25-26. But all three of these cases turn primarily on the "substantial deference owed to the Commission" when a Court is asked to review an IURC-approved settlement agreement (*e.g., Citizens Action Coalition vs. NIPSCO,* 76 N.E.3d at 152), which is also not the case here.

At page 32 of its brief Vectren surprisingly cites *United Rural Elec. Membership Corp. v. Indiana & Michigan Elec. Co.*, 549 N.E.2d 1019, 1021 (Ind. 1990), a case in which the Supreme Court *reversed* because the Commission strayed beyond the plain language of the law. In that case, the Court noted that "[t]he commission can only exercise power conferred upon it by statute" and that "any such doubt about such authority" should be resolved *against* the Commission. *See id.* at 1021. Appellants agree that the Commission can only follow the explicit language of the statute, which was not done in this proceeding.

Similarly, in *Hamilton Southeastern Util. v. Ind. Util. Reg. Comm'n*, 115 N.E.3d 512 (Ind. Ct. App. 2018), cited at page 32 of Vectren's brief, the court *reversed* IURC's order disallowing a utility rate increase, finding that the Commission's order "was not supported by substantial evidence, was not reasonable, and was arbitrary." *Id.* at 515.

Taken together, these cases do not support Vectren's position that the Commission's order is entitled to deference. Vectren Br. at 33. Instead, they stand for the important principle that the Commission is limited to administering the law "devised by the legislature" and should not stray beyond its statutory authority.

The cases cited at pages 20-23 of Appellants' opening brief—particularly *NIPSCO Indus. Grp.,* 100 N.E.3d at 241—are directly on point here. "Indiana courts review questions of law de novo." *Indiana Bell Tel. Co.*, 715 N.E.2d at 354. An agency's interpretation of law is only entitled to great weight if it is reasonable and consistent with the governing law. *Moriarity,* 113 N.E.3d at 621. An agency's interpretation that is inconsistent with the statute is "necessarily unreasonable" and must be reversed. *Id.* (citing *Chrysler Group, LLC v. Review Bd. of Ind. Dep't of Workforce Dev.*, 960 N.E.2d 118, 123 (Ind. 2012)).

III. The IURC's Approval of Vectren's Proposal to Calculate EDG Billing Credits Based Solely on Outflow Violates the Plain Language of the Statute.

Applying the appropriate *de novo* standard of review, the Court can turn to the key legal question presented by this case: Does Vectren's proposal to calculate EDG billing credits "based solely on Outflow" comply with IC § 8-1-40-5? Appellants explain why the answer to that question is "no" at page 26 of their opening brief:

> 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.

Appellants' Br. at 26.

Vectren falsely characterizes this as a *factual dispute*. *See* Vectren Br. at 30. It's not. As explained above, there is no factual dispute. Because electricity only flows in one direction on an instantaneous basis, it is not possible to calculate the difference "instantaneously." Moreover, Vectren's tariff, plainly compensates customers only for "outflow" rather than for "excess distributed generation" as required by statute. Because the statute requires the difference of both "inflow" and "outflow" to calculate EDG, on an instantaneous basis, Vectren cannot lawfully calculate EDG billing credits "based solely on Outflow." However, Vectren's EDG tariff calls expressly for this calculation.[5] Vectren's proposed tariff explicitly defines only "Outflow" as "Excess Distributed Generation"[6] and exclusively applies the "Marginal DG Price" to the "Excess DG kWh (Outflow)" to determine the EDG billing credit.[7] Vectren witness Rice admits it.[8] The "Statement of Facts" in IURC's legal brief explains it.[9] And the IURC's Order confirms, beyond all doubt, that, under the Vectren tariff, "the electricity that flows through the meter and registers as outflow" is "the EDG produced by a DG customer for purposes of Section 5." Order at 36.

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[5] Ex. Vol. 1 at 77.
[6] *Id.*
[7] Ex. Vol. 1 at 78.
[8] "The total outflow amount for the billing period will be priced at the Rider EDG credit rate." (Ex. Vol. 1 at 18, ll. 23-25)
[9] "Under Rider EDG, the total inflow amount for the billing period will be priced at the applicable tariff rate for the customer, while the total outflow amount will be priced at the Rider EDG credit rate." (IURC Br. at 15, Statement of Facts).

Thus, all parties agree that Vectren's tariff calculates EDG billing credits "based solely on Outflow." The key question in this appeal remains the question of law: *Does Vectren's proposal to calculate EDG billing credits based solely on Outflow comply with IC § 8-1-40-5?*

The answer, clearly, is no. IC § 8-1-40-5 requires Vectren to calculate EDG as "the difference between" inflow and outflow, and Vectren's tariff therefore only applies half of the statutory equation. The IURC, Appellee Vectren and Amicus IEA all fail to persuasively rebut the clear presentation of this legal error at pages 26-30 of Appellants' opening brief.

In fact, IURC's brief tends to confirm its own legal error. On page 11 of its brief, IURC acknowledges that "outflow" occurs when a solar customer is producing more electricity from its own solar panels than the customer is using inside their home. Specifically, "[t]he difference between the amount of electricity generated by a customer's solar panels and the amount of electricity then being utilized by that customer" is recorded on Vectren's meters as "outflow." IURC Br. at 11.

The problem, for Vectren and the IURC, is that this uncontested explanation of "outflow" does not match the statutory definition of EDG. The statute requires Vectren to measure the difference between electricity "supplied by" the utility to the customer and "supplied back" by the customer to the utility. IC § 8-1-40-5. Measuring the difference between the electricity "supplied by" the utility and "supplied back" by the customer (the statutory EDG definition) is not the same as measuring the difference between the electricity "generated by a

customer's solar panels" and the electricity "then being utilized by that customer" (IURC's Outflow definition). Thus, the Commission's approval is based on Vectren's proposal to rely on two non-statutory factors (consumption and generation on the customer side of the meter) when the statute requires two different factors to be measured (supply to the customer and supply back to the utility) and the difference between them calculated. (*See e.g.*, Ex. Vol. 1 at 49).

Vectren's decision to describe this non-statutory methodology as "instantaneous netting" does nothing but confuse the issue. Vectren's tariff is clear. The Tariff specifically defines EDG as "Outflow". Nowhere does the tariff use the term "instantaneous netting" or describe the "difference" between inflow and outflow as required by IC § 8-1-40-5. "Instantaneous netting" is an invention to provide Vectren's tariff the veneer of conformity with the statute, which, by requiring a calculation of the difference between outflow and inflow, calls for netting.

Similarly, the IURC's analogies of "Buckets" and "Opposing Forces" in its Order, confuse the issue and never once appeared in the evidentiary record.[10]

[10] "Essentially, the meter counts what is going through the meter and puts it into either the inflow or the outflow 'bucket,' but to get into the outflow 'bucket,' the meter has computed the difference between the two components under Section 5." (IURC Order at 35). "[I]t is useful to conceptualize the difference at each instant of time, where the electricity supplied by the supplier and the customer's distributed generation meet at the meter as opposing forces, with the stronger force determining the direction of the flow. If the customer needs less electricity than its distributed generation is supplying, the statute terms the excess or difference between what is being supplied at that instant by Vectren South and what is flowing from behind the customer's meter as EDG." (IURC Order at 36).

The same is true with the "system of pipes" and "well pumps" analogies that appear, now, for the first time in the IURC's brief. *See* IURC Br. at 20. The IURC's reliance on justifications and arguments on appeal that did not appear in its Order or record is both unfair to the parties and constitutes legal error. The Court should not accept technical arguments authored by attorneys that appear for the first time in legal briefs. These "post hoc rationalizations" cannot substitute for evidence in the agency record and are not adequate to support agency action. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, (1962).

Rather than becoming distracted with Vectren's invented "instantaneous netting" justification for its tariff, the Court should instead focus on what the statute's plain language requires, and what the approved tariff *actually does* when addressing the clear legal error at the heart of this case.

IV. The Plain Language of IC Ch. 8-1-40 Does Not Eliminate the Method of Calculating Compensation Paid for Customer Produced Energy.

The IURC and Vectren each devote a section of their respective briefs to presenting their views of the "purposes" and "intent" of the DG Act. IURC Br. at 21; Vectren Br. at 43. In their view, the DG Act was intended as a "transition away from net metering," and they therefore assert that the General Assembly "could not have intended" to create a new EDG billing regime that "differs only slightly" from the former net metering regime. *Id.*

The text of the statute the General Assembly enacted does not evidence the intent to dramatically alter the net metering regime as suggested by the IURC and Vectren. The plain language of IC. ch. 8-1-40 contradicts this view as the statute does not re-write the mechanism for computing compensation to EDG customers. Through IC § 8-1-40-21, the statute preserves the IURC's net metering rule; and the text of IC § 8-1-40-5 preserves the basic structure of the pre-existing net metering regime. What the statute does do, most notably, is alter the rate at which customers are compensated for energy produced through DG installations. This is a far cry from eliminating the mechanics of net metering altogether.

A. The text of the DG Act explicitly preserves the Commission's net metering rule.

The first step in determining the will of the legislature is to assess the plain language of the statute, and so, the Court should start any analysis by looking at the actual text of the statute. The DG Act changes the prior net metering regime in several respects, most notably by allowing utilities to change the credit rate for excess distributed generation from the retail rate for energy to a lower rate based on the wholesale price of energy. IC § 8-1-40-17. However, there is no evidence that the legislature sought to fundamentally alter the metering and billing mechanics established by the Commission's net metering rule.

Indeed, a comparison of the text of the Distributed Generation Act with the Commission's net metering rule reveals that the legislature explicitly *preserved* the existing netting regime to calculate EDG bill credits. Section 7 of

the Commission's existing Net Metering Rule (170 IAC 4-4.2-7(2)) provides how "net metering" is calculated:

> The investor-owned electric utility shall measure **the difference between** the amount of electricity **delivered by the investor-owned electric utility** to the net metering customer and the amount of electricity generated by the net metering customer and **delivered to the investor-owned electric utility** during the billing period ….

Section 5 of the DG Act (IC § 8-1-40-5) defines EDG thusly:

> 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.

The bolded text of the net metering rule and the DG Act are nearly identical. Using terms that are materially identical, both require the utility to measure the "difference between" two values: (1) the electricity delivered by the utility to the customer; and (2) the electricity delivered to the utility by the customer.[11]

The net metering rule pre-dates the DG Act. Thus, the Court must presume that the General Assembly was aware of the existing netting regime when it enacted the DG Act. *Poehlman v. Feferman*, 717 N.E.2d 578, 582 (Ind. 1999). If the legislature had intended to change the netting mechanics as dramatically as suggested by the IURC and Vectren it could have done so. But it

[11] *Compare* "supply" meaning "to make available for use; provide," (https://www.merriam-webster.com/dictionary/supply) *with* "deliver" meaning "to take (something) to a person or place." (https://www.merriam-webster.com/dictionary/deliver)

did not. Instead, the Legislature used materially identical language to define how utilities must calculate EDG under the new law.

When the same words are used in the same manner in different places of a regulatory regime, they should be given the same meaning. *Dep't of Treasury of Indiana v. Muessel*, 32 N.E.2d 596, 599 (Ind.1941). This holds true even where the legislature chooses a slightly different word where the "ordinary meaning of the words is the same." *Id.* In this case, the DG Act and the net metering rule use the same structure and use nearly identical words ("delivered" and "supplied") with the same ordinary meaning. One must presume the legislature chose this intentionally, not accidentally. Thus, the argument that the legislature intended to eliminate the prior netting regime when it adopted the DG Act has no support in the statutory text.

Additionally, IC § 8-1-40-21(a) explicitly references and preserves the Commission's net metering rules at 170 IAC 4-4.2:

> **IC 8-1-40-21 Commission's net metering and interconnection rules; application to distributed generation; permitted changes to rules**
>
> (a) Subject to subsection (b) and sections 10 and 11 of this chapter, after June 30, 2017, the commission's rules and standards set forth in:
>
> (1) 170 IAC 4-4.2 (concerning net metering); and
> (2) 170 IAC 4-4.3 (concerning interconnection);
>
> remain in effect and apply to net metering under an electricity supplier's net metering tariff and to distributed generation under this chapter.

IC § 8-1-40-21(a) (emphasis added).

Thus, the Commission's existing Net Metering Rules are to continue in effect both as to net metering and to distributed generation, subject only to Sections 10 and 11 (not applicable in this case) and Section 21 (b) of the DG Act. This language preserved, and incorporated, the existing Commission net metering rule into the new regime, in contrast to the arguments of the IURC and Vectren.

Section 21(b) of the DG Act does provide that "the commission may adopt changes" to the net metering rules "only as necessary to: (1) update fees or charges; (2) adopt revisions necessitated by new technologies; or (3) reflect changes in safety, performance, or reliability standards." To date, the Commission has not adopted any rule changes pursuant to Section 21(b). Instead, in 2019, the Commission re-adopted its net metering rule without change.[12]

B. The Commission Order cannot disregard Section 7 of its own net metering rule.

Appellee Vectren quotes Appellants' Joint Brief:

> "When the long-established and well-understood principles of statutory construction employed by Indiana appellate courts are applied, the required result is a legal conclusion that the Indiana General Assembly intended the "billing period" "netting interval" in use under Net Metering to continue for Excess Distributed Generation – at least *until the Commission has conducted a rulemaking and promulgated a formal rule authorizing a change to a different interval."* (App. Vol. 2 at 135-36) (emphasis added).

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

Vectren then baldly asserts, citing no authority whatever, "If the Commission can approve a netting period other than a monthly period in rulemaking, it follows that it can approve such a period in a fully docketed Commission proceeding." Vectren Br., p. 41, n.12.

Vectren's position encourages this Court to pursue a legally erroneous path. Properly adopted administrative rules and regulations, like the Commission's net metering rule, have the force and effect of law. *Ward v. Carter*, 90 N.E.3d 660, 663-65 (Ind. 2018), *cert. denied*, 139 S. Ct. 240, 202 L. Ed. 2d 161 (2018); *Union Twp. School Corp. v. State ex rel. Joyce,* 706 N.E.2d 183, 186 n.3 (Ind. Ct. App. 1998); *Miller Brewing Co. v. Bartholomew County Beverage Co.*, 674 N.E.2d 193, 205 (Ind. Ct. App. 1996). Such rules, with the effect of law, cannot be summarily discarded by the Commission. Rather, administrative agencies are creatures of the legislature whose powers are strictly limited to their authorizing statutes.

> When conducting a proceeding specifically described by law, the Commission must take care to exercise its power in conformity with the statute. 'Where the statute prescribes specifically how an act shall be performed by a statutory board, or prohibits its performance under certain conditions by such board, an act in direct violation thereof is absolutely void.'

Town of Merrillville v. Lincoln Gardens Utils. Co., 351 N.E.2d 914, 919-20 (Ind. Ct. App. 1976) (quoting *Campbell v. Brackett,* 90 N.E. 777, 778 (Ind. Ct. App. 1910)). Here, the specific power vested in the Commission was to amend its net metering rules through a formal rulemaking process, not to modify them through a litigated proceeding as Vectren suggests.

Beyond that, however, is the important implication of properly adopted administrative rules and regulations as having the force of law. Any such rule or regulation is an integral part of the statute under which it is made, just as though it were prescribed in the terms of the statute. *Coleman v. City of Gary*, 44 N.E.2d 101, 107 (Ind. 1942); *Wallace v. Dohner*, 165 N.E. 552, 553 (Ind. Ct. App. 1929). Thus, when rule-making powers have been granted to and properly exercised by an agency, that agency must follow and the courts enforce the rules and regulations which have been duly promulgated in compliance with the relevant statute. *Van Allen v. State*, 467 N.E.2d 1210, 1213 (Ind. Ct. App. 1984). Moreover, having been promulgated, a valid rule or regulation retains the force and effect of law from its promulgation date until its modification or repeal by the agency in the manner provided by law. *Crouch v. State*, 638 N.E.2d 861, 864 (Ind. Ct. App. 1994); *Van Allen v. State*, 467 N.E.2d at 1213.

The only rule or regulation prescribing a netting interval for either Net Metering or Distributed Generation previously promulgated by the Commission which is currently in force and effect is 170 IAC 4-4.2-7. IC § 8-1-40-21(a). This rule has not been modified or repealed by the Commission subsequent to the passage of the DG statute in 2017; instead, it was readopted verbatim by the Commission in 2019. The appellate courts "cannot rationalize and approve the application of rules which have not been adopted in the manner provided by law." *Crouch,* 638 N.E.2d at 864. In short, the Commission must follow 170 IAC 4-4.2-7 and the Court "cannot rationalize and approve" the Commission's

disregard of that rule in its order under review because no superseding rule has been adopted "in the manner provided by law."

C. The Court should disregard speculation about legislative "intent" that does not appear in the text of the statute.

Without pointing to any support in the text, the IURC boldly states that the "purpose" of the DG Act was "the policy decision to discontinue net metering's subsidy to customers who own distributed generation." IURC Br. at 24. The Court should reject this speculative assertion of legislature's intent. The Commission and the Court are both bound not by assumptions of what the legislature "intended", but by the clearest evidence of intent demonstrated through what the statute actually says. *Crowel v. Marshall Cty. Drainage Bd.*, 971 N.E.2d 638, 646 (Ind. 2012) ("The best indicator of legislative intent is the statutory language.") Where, as here, the statute is "clear and unambiguous," the courts must "apply it as drafted" without accepting an interested party's unsupported characterizations of "intent." *Id.*

The Indiana Supreme Court has made clear that courts are to look first at the language of the governing statute before resorting to any extrinsic evidence of intent. Only if it a statute is deemed ambiguous may courts then resort to extrinsic sources and rules of statutory construction to discern legislative intent. *See*, *e.g.*, *Indiana Bureau of Motor Vehicles v. McClung*, 138 N.E.3d 303, 311 (Ind. Ct. App. 2019) (reversing trial court's reliance on legislative history where statutory language was unambiguous).

In this case, not only is the language of IC § 8-1-40-5 clear and unambiguous, but the IURC failed to support its view of the "intent" of the DG Act with any kind of evidence. There are no citations to the statutory language in IURC's brief or its Order to support its argument on the Legislature's "intent". The Commission simply declares its assessment of the legislature's "purpose" and then argues that the most logical and straightforward reading of the statute conflicts with it.

At page 36 of its Order, the Commission states that it "[does] not believe the General Assembly enacted the Distributed Generation Statutes to sunset net metering and replace it with a construct that achieves a similar outcome." Order at 36. The Commission's "belief", however, about the General Assembly's intent has nothing to do with this Court's review of whether Vectren's EDG tariff adheres to the statutory requirements, or whether the IURC acted within the scope of its authority in approving a tariff that conflicts with the plain language of the statute. The Court must look to the text of the statute as the best evidence of the General Assembly's intent, not what the IURC "believes" or Indiana's utilities "wish" it intended. Moreover, calculating the "difference" as required by IC §8-1-40-5 does not achieve a "similar outcome" to net metering financially. Rather, if the EDG customer has any end of month "difference," that "difference" in kWh is monetized at the rate specified in IC § 8-1-40-17 to create a bill credit in dollars and cents carried forward to offset monetary charges for future net energy use. *See* IC § 8-1-40-18. By contrast, under net metering, such a "difference" would have been carried forward in kWh to offset the next month's

energy use on a kWh for KWh basis. This monetization of the "difference" under the DG Statute results in a lower bill credit to the customer being carried forward than under net metering.

V. Policy Arguments Have No Place in This Legal Dispute.

The IEA, a trade association of electric power and natural gas companies, has filed an amicus brief filled with arguments that have no basis in the statutory language. Under headings such as "Rooftop Solar Panels Often Generate Unpredictable 'Extra' Electricity That Is Difficult To Put To Use," (IEA Br. at 6), and "Indiana Subsidizes Solar-Panel Installation By Requiring Utilities To Pay Rooftop-Solar Owners For Their Extra Electricity" (IEA Br.at 7), the IEA asserts policy arguments which do not appear in statute.

The policy viewpoints in the IEA's brief are not relevant to the Court's determination, are one-sided and disputed. For example, the IEA states that "[the] relatively small and unpredictable supply of electricity [from rooftop solar] does not provide any real benefit to the utility or its other customers." IEA Br. at 7. That statement, along with the many other anti-DG attacks in the IEA's brief, flies in the face of the significant evidence of benefits that DG can provide to the grid, and by extension to all utility customers. For example, the testimony of Will Kenworthy and Douglas Jester explain that rooftop solar can help the grid in numerous ways, including by reducing the utility's "peak" demand, which tend to drive the highest utility costs. (Ex. Vol. 2, pp. 242-243; Ex. Vol. 3, pp. 63-68). Further, the record below shows that HEA 1278, passed by the 2019 General Assembly, directed the Commission to conduct a comprehensive study to inform

the work of the State's 21st Century Energy Policy Task Force. HEA 1278, §10 (2019).[13] Included in that study was a report by the Lawrence Berkeley National Laboratory (LBNL) which documents the many potential benefits of distributed solar generation, including 8% system savings with broad DG penetration. (Ex. Vol. 3, pp. 129-131). This is much more credible evidence of the value of distributed solar to the grid than the unsourced generalizations from utility industry lawyers advanced in the IEA's *amicus brief.*

The Court, however, need not evaluate, much less determine whose policy arguments are more credible or accurate. This is because the IEA's various positions on DG "subsidies" and "incentives" reflect not a legal debate but an economic policy debate, which is to be decided by the legislature, not the Courts. The IEA's policy arguments therefore have no place in resolving the legal question of the Commission's erroneous interpretation of the plain language of the DG Act.

Moreover, the IEA's attacks on DG replicate arguments already made and rejected by the legislature. If the legislature had truly intended to eliminate netting as prescribed and practiced at the time that the DG Act became law, it would have said so clearly in the Act. It did not, and the IEA is attempting to rewrite the Act by asking this Court to make policy the legislature rejected.

[13] *See* http://iga.in.gov/legislative/2019/bills/house/1278#document-0c4d5d63; *see also* HEA 1278 Energy Study, https://www.in.gov/iurc/research-policy-and-planning-division/hea-1278-energy-study

Importantly, "considerations of policy divorced from the statute's text and purpose [can] not override its meaning." *In re Howell*, 27 N.E.3d 723, 728 (Ind. 2015) (quoting *United States v. Tohono O'odham Nation*, 563 U.S. 307, 317, 131 S. Ct. 1723, 1731 (2011)). "Neither the Commission nor this Court is free to legislate its own policy." *Indiana Bell Tel. Co.*, 715 N.E.2d at 358. In this respect, the IEA's brief is irrelevant. The General Assembly spoke clearly and plainly through the text of the DG Act to achieve the policy it thought best. It is not appropriate, in the face of plain and unambiguous statutory language, to use policy arguments to overturn the will of the General Assembly.

CONCLUSION

IURC's constitutional role as an Executive branch agency is to implement the policies handed down by the legislature. In this case, the Commission disregarded the plain language of IC § 8-1-40-5 to approve Vectren's proposal. Accordingly, Joint Appellants respectfully request that the Court reverse the IURC's April 17, 2021 Order, and remand to the Commission with instructions to conform its Order to the plain language of the DG Act.

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Above signed counsel is authorized to represent that it is authorized to sign and file this Reply Brief on behalf of all the identified parties.

WORD COUNT CERTIFICATE

I verify that this brief contains no more than 8,500 words as permitted in the Court's Order of November 12, 2021.

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CERTIFICATE OF SERVICE

I certify that on December 16, 2021, I electronically filed the foregoing *Reply Brief of the Joint Appellants* using the Indiana E-Filing System (IEFS).

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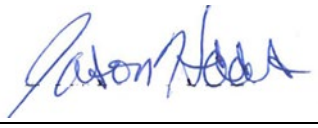

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