

**STATE OF INDIANA  
INDIANA UTILITY REGULATORY COMMISSION**

<b>IN THE MATTER OF THE PETITION ) OF LONE OAK SOLAR LLC ) REQUESTING THE COMMISSION ) REASSERT JURISDICTION, IN ) PART, PURSUANT TO IND. CODE § ) AND FIX REASONABLE ) FOR THE CONSTRUCTION AND ) OPERATION OF LONE OAK'S ) FACILITY PURSUANT TO IND. ) §§ 8-1-2-61, 8-1-2-69, 8-1-2-101, 8-1-2- ) 101.2, 8-1-2-115, 36-7-2-8 AND ) RELATED STATUTES )</b>	<b>CAUSE NO. 45883</b>
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**MADISON COUNTY'S POST-HEARING BRIEF  
OPPOSING REASSERTION OF COMMISSION JURISDICTION**

Madison County Board of Zoning Appeals ("BZA") and Madison County Board of Commissioners (collectively, "Madison County" or the "County"), pursuant to Paragraph 5 of the Commission's docket entry dated July 3, 2023, in this Cause, file this post-hearing brief opposing Lone Oak Solar LLC's ("Lone Oak") request for the Commission to reassert jurisdiction pursuant to Ind. Code § 8-1-2.5-7.

Dated this 29<sup>th</sup> day of September, 2023.

Respectfully submitted,

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## INTRODUCTION

The issue in this case is whether the Commission or the judiciary should hear Lone Oak's challenge to the BZA's denial of its request to extend its construction deadline. The public interest would not be served by Commission reasserting jurisdiction in this case. The Commission previously found—based on a set of circumstances then existing—that the public interest would be best served by declining jurisdiction over Lone Oak. Except for Lone Oak's own disappointment in a BZA decision (which is not yet final due to Lone Oak's requested stay), none of the circumstances relevant to who should hear Lone Oak's complaint have changed. When Lone Oak originally requested the Commission to decline jurisdiction, it knew there was a pending remonstrator judicial review of the original BZA approvals, and Lone Oak's witness testified he would not be surprised that the entire judicial review process was a two-year process.

Lone Oak has not carried its burden of demonstrating an evidence-based change in circumstances that would affect the public interest relating to whether the judiciary or the Commission should hear its complaint. Despite Lone Oak's claims that this Commission is Lone Oak's only hope for saving its solar project from certain cancellation, its own witness admitted that the trial court and the Commission are "parallel potential paths to remedy the case." (Hill Testimony, Tr. B-36:14-18.) Indeed, Lone Oak willingly submitted to the judicial review process when remonstrators appealed the BZA's initial zoning approvals, which included

the original construction deadline. Lone Oak has failed to explain why the judiciary cannot competently adjudicate its appeal of the BZA’s denial of the extension, much less why it would be in the public interest for the Commission to reassert jurisdiction before the trial court has had opportunity to do so. Although Lone Oak claims the Commission has greater “expertise” and a more “efficient” process, those arguments were equally applicable back in 2019 when Lone Oak asked the Commission to decline to exercise jurisdiction over its solar project.

The most likely explanation for Lone Oak’s strategy change is that Lone Oak is selectively seeking to submit to whichever regulatory or adjudicatory body it believes suits its interests at the moment—classic forum-shopping. Although Lone Oak extols the virtues of Commission regulation, it seeks Commission jurisdiction for the limited purpose of granting Lone Oak’s request to invalidate a single BZA decision. In other words, Lone Oak wants the Commission to stay on the sidelines, only asserting jurisdiction when convenient to Lone Oak’s interests.

Granting Lone Oak’s selective jurisdiction request would reward its forum-shopping and set precedent encouraging other utilities to do so as well. However, allowing utilities to forum-shop their regulators and adjudicators is not in the public interest. Instead, the Commission should require Lone Oak to abide by its 2019 commitment to submit to local zoning authorities and follow the applicable statutory judicial review process, which has already handled one appeal of the BZA’s decision to Lone Oak’s satisfaction.

## **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

The original proceedings before both the Commission and the BZA in 2019 relate to and set the backdrop for the current proceeding.

### **A. The 2019 proceedings before the BZA and the Commission.**

#### **A.1. Lone Oak obtains BZA approval of zoning petitions, which are then challenged by remonstrators.**

In March 2019, Lone Oak applied to the BZA for a special use permit (2019-SU-001) and two zoning variances (2019-V-005, and 2019-V-006) related to its proposed solar project in Madison County. One of the variances, 2019-V-006, asked the BZA to extend the three-year time limit for starting construction of the project set by the County's solar ordinance. (Attachment SH-2 to County's Ex. 2, Hinton Direct, p. 12.) Although the Plan Commission staff recommended the BZA grant the variance, the staff cautioned against giving Lone Oak an "indefinite time" to initiate the project and recommended that a "definitively defined time should be established." (Attachment SH-1 to County's Ex. 2, Hinton Direct, p. 69.)

The BZA subsequently conducted public hearings on April 23, 2019, May 16, 2019, and May 28, 2019. (County's Request for Administrative Notice p. 2.) At the hearings, the project faced stiff opposition from some members in the community. At one hearing, a community member submitted a petition containing 586 signatures from community members opposing the project. (Attachment SH-1 to County's Ex. 2, Hinton Direct, pp. 17–18; Attachment SH-3 to County's Ex. 2, Hinton Direct, pp. 1–23.) Additionally, Lone Oak and the Plan Commission submitted testimony that construction on the project would likely begin in 2022 and

would likely be completed “by the end of 2023 at the latest.” (Attachment SH-1 to County’s Ex. 2, Hinton Direct, p. 68).

The BZA voted on Lone Oak’s three applications at the May 28, 2019 hearing. (County’s Ex. CX-3.) The motion to approve the 2019-SU-001 special exception included eighteen conditions of approval, including Condition No. 18, which required the project to be complete and operational by December 31, 2023. (Attachment SH-1 to County’s Ex. 2, Hinton Direct, pp. 26–33.) At the hearing, Lone Oak’s counsel raised concerns about Condition No. 7, which prohibited Lone Oak from constructing additional phases of the Lone Oak project; instead, Lone Oak’s counsel proposed amended language for the BZA’s consideration. The BZA amended Condition No. 7 to accommodate Lone Oak’s counsel’s concerns. (*Id.* at pp. 40–62.) However, Lone Oak raised no concerns or objections about Condition No. 18 or the project completion deadline. The BZA approved the special use exception subject to the eighteen conditions, including the December 31, 2023 project completion deadline. (Attachment MRK-1 to Kaplan Direct filed in Cause No. 45793, pp. 31–42.)<sup>1</sup>

The motion to approve Lone Oak’s variance request in 2019-V-006 incorporated the project completion deadline set by the 2019-SU-001 conditions. Lone Oak’s

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<sup>1</sup> All of the evidence previously filed in Cause No. 45793 was attached to the Verified Petition filed in the present cause; moreover, Petitioner’s Ex. 1 (Hill Pre-Filed Direct) in the present cause attached the Verified Petition—including all of its attachments—as Attachment MAH-1. For simplicity’s sake and to avoid confusion, this brief will cite to any such document as it was filed in Cause No. 45793.

counsel acknowledged that the BZA wanted “the project to be completed by the end of 2023” but again offered no objection to or other comment on the deadline. (Attachment SH-1 to Hinton Direct, pp. 70–71.) The BZA approved the variance request.

On June 27, 2019, a group of remonstrators filed a petition for judicial review, challenging the BZA’s approval of the special use exception and the variances. (County’s Ex. CX-3.)

**A.2. Lone Oak asks the Commission to decline to exercise jurisdiction over the project and waives its right to be exempt from local zoning.**

On July 8, 2019, almost two weeks after the remonstrators filed their judicial review petition, Lone Oak filed a petition in Cause No. 45255 asking the Commission to decline to exercise jurisdiction over the solar project. (County’s Ex. CX-3.) In its pre-filed testimony, Lone Oak represented to the Commission it did not need the power to be exempt from local zoning and would comply with local regulations. (County’s Ex. CX-1 at pp. 10:17–20 and 17:11–19.) Lone Oak’s witness acknowledged that waiving the zoning exemption was a common practice by renewable energy providers seeking a declination of jurisdiction. (*Id.*) Her testimony did not suggest the Commission was requiring such a waiver or that the Commission would not grant declination of jurisdiction without such a waiver. (*Id.*)

While Lone Oak’s petition for declination of jurisdiction was pending, Lone Oak applied to the BZA for a new set of variances and special use exception for additional parcels that had been added to its solar project. (County’s Ex. CX-3.) The BZA held a hearing on Lone Oak’s second set of applications on August 29, 2019,



and approved them on September 24, 2019, with the same project completion deadline it had imposed on May 28, 2019.<sup>2</sup> (County’s Ex. CX-3.)

On October 1, 2021, the Commission held an evidentiary hearing on Lone Oak’s petition for declination of jurisdiction. (County’s Ex. CX-3.) Lone Oak was already aware of substantial opposition and that remonstrators had filed a lawsuit challenging the BZA’s approval of the project. (County’s Ex. CX-3; Hill Testimony, Tr. A-59:4–61:17 and A-65:9–16.) Despite this knowledge, Lone Oak did not withdraw its waiver of the right to be exempt from local zoning or otherwise express concern about the project completion deadline. After the October 1 hearing, Lone Oak prepared and tendered its own proposed order to the Commission affirming its willingness to submit to local zoning and land use requirements and directing Lone Oak to refrain from exercising a utility’s right to be exempt from local land use requirements. (Hill Testimony, Tr. A-51:14–54:5; County’s Ex. CX-2, pp. 4, 12.)

The Commission issued its order on October 29, 2019. (Attachment MRK-1 to Kaplan Direct filed in Cause No. 45793.) The order acknowledged that Lone Oak had “submitted evidence that it has complied or will comply with local zoning and land use requirements... and will not rely on the public utility exemption from local zoning regulation.” (*Id.* at p. 22.) The Commission noted that “Madison County has a zoning ordinance governing the development of solar projects with which the Project will comply.” (*Id.*) Nothing in either the order or Lone Oak’s testimony

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<sup>2</sup> In the BZA’s approval of the new special use exception petition, the December 31, 2023 project completion deadline was listed as Condition No. 19.

suggested that the County’s Solar Ordinance was unreasonable. Further, the Commission observed that Lone Oak still needed to apply for “an Improvement Location permit and approval from the County Drainage Board” before starting construction. (*Id.*) The Commission concluded that declining to exercise jurisdiction over Lone Oak was in the public interest, and the Commission would not reassert jurisdiction “absent circumstances affecting the public interest.” (*Id.* at p. 29.) Finally, the order prohibited Lone Oak from “exercis[ing] an Indiana public utility’s rights, powers, and privileges of...exemption from local zoning, land use requirements, [and] land use ordinances.” (*Id.*)

**A.3. The judicial review process ends with the Indiana Supreme Court denying the Remonstrators’ Petition to Transfer.**

On November 2, 2020, the Madison Circuit Court affirmed the BZA’s decision to grant Lone Oak the special use exceptions and variances needed to proceed with the solar project. *Burton v. Bd. of Zoning Appeals of Madison Cnty.*, 174 N.E.3d 202, 209 (Ind. Ct. App. 2021). The remonstrators promptly appealed that decision to the Indiana Court of Appeals. *Id.* The Court of Appeals affirmed the decision of the trial court, and the Indiana Supreme Court denied transfer on October 21, 2021. *Id.* At this hearing in this cause, Lone Oak’s witness testified he did not find it surprising that the entire judicial review proceeding took about two years to complete. (Hill Testimony, Tr. A-65:18–66:4.)

**B. The 2022 proceedings leading to the present.**

**B.1. Lone Oak seeks an extension of the project completion deadline with the BZA and seeks judicial review of the BZA's denial.**

In May 2022—almost seven months after the Supreme Court denied transfer of the remonstrators' appeal—Lone Oak filed a petition with the BZA to modify the conditions of approval, requesting an extension of the condition imposing the project completion deadline to the later of (i) December 31, 2025, or (ii) two years after issuance of a final non-appealable order of a court of competent jurisdiction. (Attachment SH-4 to Hinton Direct filed in Cause No. 45793, p. 3.) At a hearing conducted on June 28, 2022, the BZA denied Lone Oak's Petition. (Attachment MRK-1 to Kaplan Direct filed in Cause No. 45793, p. 46.)

On July 28, 2022, Lone Oak filed a Verified Petition for Judicial Review challenging the BZA's decision. (County's Ex. CX-3.) In that petition, Lone Oak asked the trial court to find that Lone Oak had been prejudiced by the BZA's decision denying Lone Oak's extension request and to "[r]emand this case to the BZA with instructions to approve the Modification Petition." (Attachment MRK-1 to Kaplan Direct filed in Cause No. 45793, p. 59.)

**B.2. Lone Oak changes course by staying its own judicial review proceeding and seeking Commission involvement instead.**

Less than two months after filing its Petition for Judicial Review, Lone Oak changed both its legal counsel and its litigation strategy. On October 28, 2022, Lone Oak filed a Complaint with the Commission, asking the Commission to reverse the BZA. (*See* Cause No. 45793 Complaint.) Lone Oak also asked the trial court to stay the judicial review proceeding, including the deadline for filing the BZA record. The

trial court granted the stay, which remains in effect to this day. (Hill Testimony, Tr. B-2:4–13.)

On the County’s motion, the Commission dismissed Lone Oak’s Complaint for lack of jurisdiction, prompting Lone Oak to file the instant petition to reassert jurisdiction. Lone Oak’s Verified Petition in this cause requests the Commission to “[i]ssue a notice of the Commission’s intent to reassert jurisdiction over Lone Oak for the limited purposes of...[i]nvalidat[ing] Madison County’s ordinance provisions and BZA findings that require Lone Oak to commence construction and achieve operation by the dates specified in the ordinance.”<sup>3</sup> (Verified Petition, pp. 15–16.) Lone Oak further asked the Commission to narrowly limit its reasserted jurisdiction by “continuing to decline to exercise the Commission’s jurisdiction over Lone Oak consistent in all other respects with the Commission’s Order in Cause No. 45255.” (*Id.* at p. 16.)

The Commission’s Presiding Officers concluded that the proceedings should be “considered in two phases.” First, the Commission will consider “whether and to what extent, the Commission should reassert its jurisdiction over Petitioner.” (July

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<sup>3</sup> Although not at issue in Phase I of this proceeding, it is a condition of the BZA’s approval—not the Madison County ordinance—which has established the December 31, 2023 construction deadline. The solar energy ordinance requires that construction be started within three years of when the special use permit is granted. If the strict terms of the ordinance had been applied, rather than the variance granted, Lone Oak would have been required to start construction by May 28, 2022. Lone Oak asked for that deadline to be modified, and the BZA granted Lone Oak’s request in part, requiring construction to be completed by the December 31, 2023 deadline.

3, 2023 Docket Entry, p. 1.) “If the Commission reasserts jurisdiction over Petitioner, Phase II will proceed to consider the merits of Petitioner’s complaint.” (*Id.*)

## **ARGUMENT**

### **A. Legal Standard for Phase I—the Public Interest**

Ind. Code § 8-1-2.5-7 provides that the Commission may, “at the request of the affected energy utility...enter an order notifying [the] affected energy utility that the commission will proceed to...exercise jurisdiction over the energy utility or its retail energy service to the extent the public interest requires.” The Commission echoed this standard in its October 29, 2019 order by stating that it did “not intend to reassert jurisdiction absent circumstances affecting the public interest.”

(Attachment MRK-1 to Kaplan Direct filed in Cause No. 45793, p. 22.)

Although the statute does not expressly set out factors to guide the Commission’s evaluation of the public interest, it is logical for the Commission to turn to the factors set out in I.C. § 8-1-2.5-5(b), which guided the Commission’s decision to decline jurisdiction in 2019. Those factors include:

- (1) Whether technological or operating conditions, competitive forces, or the extent of regulation by other state or federal regulatory bodies render the exercise, in whole or in part, of jurisdiction by the commission unnecessary or wasteful.
- (2) Whether the commission’s [reassertion of]..., in whole or in part, its jurisdiction will be beneficial for the energy utility, the energy utility's customers, or the state.
- (3) Whether the commission’s [reassertion of], in whole or in part, its jurisdiction will promote energy utility efficiency.

(4) Whether the exercise of commission jurisdiction inhibits an energy utility from competing with other providers of functionally similar energy services or equipment.

I.C. § 8-1-2.5-5(b).

Lone Oak argues the Commission should also consider factors set out in I.C. § 8-1-2.5-1(1) and 8-1-2.5-1(6). However, that statute merely sets out the General Assembly's findings explaining why the legislature provided the Commission the option of creating alternative regulatory plans for utilities. It does not set out the specific factors the Commission should consider when evaluating whether to reassert jurisdiction. Instead, the Commission should focus on the § 8-1-2.5-5 factors, which subsume elements of the legislature's § 8-1-2.5-1 findings.

Applying these same factors, the Commission has already determined it was in the public interest to *decline* jurisdiction over Lone Oak. Lone Oak has failed to carry its burden of demonstrating that circumstances have changed affecting the public interest since the Commission's prior findings. Lone Oak's disappointment in a (not yet final) BZA decision is not a sufficient basis to reverse the Commission's prior findings of the public interest. Moreover, while delays such as COVID and supply chain issues might be an appropriate consideration in Phase II, such circumstances have no bearing on whether the Commission or the judiciary should hear Lone Oak's challenge to the BZA's decision.

**B. The Commission's reassertion of jurisdiction is not in the public interest because it is unnecessary and wasteful where the judiciary already has authority to award Lone Oak its requested relief.**

Lone Oak asserts the Commission's jurisdiction is necessary to invalidate the BZA's decision denying an extension of the special use permit and thereby save the

solar project. (Hill Direct Testimony, Petitioner’s Ex. 1, at 16:15–17.) As a threshold matter, throughout his prefiled testimony, Mr. Hill repeatedly asserted various supposed benefits that will inure to the public or to Lone Oak itself if the Commission reasserts jurisdiction. However, Mr. Hill also repeatedly conflated Phase I and Phase II of this proceeding and was unable to clearly articulate any public benefit without assuming as a foregone conclusion that Lone Oak would be successful in Phase II (if there is a Phase II). (See, e.g., Hill Direct Testimony, Petitioner’s Ex. 1 at 14:12–13) (“**Assuming the Commission finds that the Regulations are unreasonable** as applied to the facts presented, Lone Oak will benefit...); *id.* at 14:20–21 (“Lone Oak will also benefit financially if the Commission reasserts jurisdiction **and determines that the Regulations are an unreasonable barrier** to the Project.”); *id.* at 16:15–17 (“The only way for Lone Oak to produce the desired result of producing power for the ultimate consumption of the public is for the Commission to reassert jurisdiction **and determine that the Regulations are unreasonable.**”); *id.* at 20:7–10 (“Absent reassertion of jurisdiction by the Commission **and a finding that the Regulations are unreasonable**, Lone Oak’s competitors have an advantage over Lone Oak....”); *id.* at 20:20–23 (“First, it is essential that the Commission reassert jurisdiction **to give effect to the relief from unreasonable local government regulations....**”).)

The reasonableness or unreasonableness of the BZA’s decision, however, is not an appropriate consideration in Phase I of this proceeding. Rather, the appropriate consideration is whether it is in the public interest for the Commission to reassert

jurisdiction rather than continue the course previously set by both the Commission and Lone Oak to be subject to local zoning authorities, including the judicial review process that is currently pending and stayed.

When Lone Oak originally sought the Commission's declination of jurisdiction, Lone Oak committed to working with the local community to obtain the requisite approvals for its project. (Hill Testimony, Tr. A-51:2–54:5; County's Ex. CX-2, p. 4.) In making this commitment, Lone Oak must have recognized that if a dispute arose with local zoning authorities, the judicial review process was available pursuant to Ind. Code §§ 36-7-4-1600 *et seq.* In fact, Lone Oak demonstrated its satisfaction with the judicial review process when it submitted to the judiciary's jurisdiction over the remonstrator's appeal. Lone Oak should abide by the same regulatory framework it consciously chose four years ago and exhaust all remedies available to it under that framework.

Lone Oak's witness expressly acknowledged that the judiciary has the authority to invalidate the BZA's decision and enable Lone Oak to move forward with the project. (Hill Testimony, Tr. B-4:14–22.) While Mr. Hill stated a naked assertion that the judiciary was unlikely to award the relief that Lone Oak seeks, he offered no basis—whether on cross examination or redirect—for his speculation. He also conceded that the judiciary and the Commission are “parallel potential paths to remedy the case.” (Hill Testimony, Tr. B-36:14–18.)

Mr. Hill's concession is consistent with the statute governing judicial review. It provides that any person aggrieved by a BZA decision—including Lone Oak—has



the right to seek judicial review of that decision. Ind. Code § 36-7-4-1603. In conducting its judicial review, the trial court engages in a two-step evaluation of the BZA's decision. Ind. Code §§ 36-7-4-1600 *et seq.* First, the trial court determines whether the party appealing the BZA decision has been “prejudiced” by a BZA decision that is:

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) contrary to constitutional right, power, privilege, or immunity;
- (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (4) without observance of procedure required by law; or
- (5) unsupported by substantial evidence.

I.C. § 36-7-4-1614(d). Second, if the trial court finds that the party has been prejudiced by such a decision, then the trial court may “set aside the zoning decision” and either “remand the case to the board for further proceedings” or “compel a decision that has been unreasonably delayed or unlawfully withheld.” I.C. § 36-7-4-1615.

Lone Oak's own Petition for Judicial Review invoked this process, asking the trial court to “[r]emand this case to the BZA with instructions to approve the Modification Petition.” (Attachment MRK-1 to Kaplan Direct filed in Cause No. 45793, p. 13.) Lone Oak alleged that the evidence did not support the BZA's decision and that the BZA failed to follow appropriate rules of procedure when it voted on Lone Oak's requested extension. (*Id.* at pp. 10–11.) Therefore, according to Lone

Oak, the BZA’s decision violated all five factors under Section 1614(d) and prejudiced Lone Oak. (*Id.*)

Because Lone Oak seeks to change jurisdictional horses midstream, the public interest requires Lone Oak to explain what changed circumstances justify abandoning the judicial review proceeding in favor of the Commission’s jurisdiction. Lone Oak fails to identify any such changed circumstances. In his redirect testimony, Mr. Hill asserted that the Commission may consider certain factors that the judiciary does not—the statewide provision of reliable utility service as well as the impact of local regulation on statewide energy regulation. (Hill Testimony, Tr. B-36:14–37:9.) Even assuming for argument’s sake that his assertions are correct,<sup>4</sup> they would have also been true in 2019, when Lone Oak decided the judiciary could adjudicate the remonstrators’ appeal and was satisfied with the outcome. (Hill Testimony, Tr. B-3:22–25) (admitting that Lone Oak was “satisfied with the ultimate outcome of...[the remonstrators’] judicial review proceeding.”) Because Lone Oak’s project was equally in jeopardy in that proceeding, any concern for the broader utility market would have been equally relevant then too. Yet the judicial review standard provided in I.C. 36-7-4-1600 *et seq.* provided the judiciary sufficient authority to evaluate the claims.

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<sup>4</sup> If the Commission reasserts jurisdiction to hear Lone Oak’s Complaint, it must first determine the appropriate standard of review. The County has contended that in reviewing the “reasonableness” of the BZA’s decision, the Commission must limit its review to the evidence and record that was presented to the BZA. (*See* Madison County’s Objections to Lone Oak’s Pre-Filed Testimony, filed in Cause No. 45793 on Jan. 30, 2023, at pp. 2–5.)

Similarly, Lone Oak claims the Commission has more expertise with regulating energy utilities than the BZA or the judiciary. (Hill Direct Testimony, Petitioner’s Ex. 1 at 11:11–20). However, neither the Commission’s expertise nor the judiciary’s expertise have changed since 2019, when Lone Oak asked the Commission to decline to exercise jurisdiction and submitted to local zoning authority as well as the judiciary’s determination of the remonstrators’ appeal.

In fact, Lone Oak is asking the Commission to reassert jurisdiction specifically to perform an essentially judicial function. Lone Oak seeks Commission jurisdiction for the limited purpose of “consider[ing] the issues presented in Lone Oak’s complaint in Cause No. 45793” and “to decline its jurisdictions [sic] in all other respects.” (Petitioner’s Ex. 1 at 32:15–19.) In other words, Lone Oak does not seek the Commission’s jurisdiction for its energy expertise but rather to review the “reasonableness” of the decision of another administrative body—the BZA. With all due respect to the Commission, the judiciary routinely reviews decisions of administrative agencies of all types—including the Commission itself. *See*, Ind. Code § 8-1-3-1; Ind. App. R. 5(C) and 2(A). Because aggrieved parties routinely appeal land use decisions to the judiciary, it has abundant familiarity not only with administrative review generally, but also with the administrative procedure local zoning authorities must follow when making their decisions and applying the standards of review to those decisions. Lone Oak fails to explain why the judiciary’s expertise and standard of review is inadequate and should be abandoned midstream

in favor of the Commission's jurisdiction. The reassertion of Commission jurisdiction here would be wasteful and unnecessary.

Lone Oak's witness asserted that the Court of Appeals decision in *Duke Energy Indiana LLC v. Town of Avon*, 82 N.E.3d 319 (Ind. Ct. App. 2017) held that the Commission is "uniquely situated to weigh in and decide upon matters such as this." (Hill Testimony, Tr. B-34:3-9.) However, the *Duke Energy* case merely addressed the Commission's jurisdiction under I.C. §§ 8-1-2-101(a)(1) and -115 to settle disputes between a fully regulated utility and a Town. *Duke Energy*, 82 N.E.3d at 324-25. As the County explained in its Motion to Dismiss in Cause No. 45793, those statutes are inapplicable here. Section 101(a) addresses only a Town's authority to regulate a utility's access to "areas...along...the streets, highways, or other public property," and Section 115 only authorizes the Commission to "investigate" ordinance violations, not invalidate the ordinances themselves. Neither are applicable to whether it is in the public interest for the Commission to reassert jurisdiction.

Second, Lone Oak claims without elaboration that the Commission's process is more "efficient." However, like Lone Oak's "expertise" argument, it fails to explain why it believes the judiciary was able to effectively adjudicate the remonstrators' appeal but not Lone Oak's appeal here. Further, Lone Oak has not demonstrated that the judiciary's process is somehow less efficient than the Commission's. In the remonstrators' lawsuit, the trial court issued a decision thirteen months after the

remonstrators filed their second petition with the trial court.<sup>5</sup> Lone Oak filed its judicial review petition with the trial court on July 28, 2022. Assuming a similar timeline as the remonstrators' lawsuit, Lone Oak likely could have received a decision from the trial court by the end of August 2023, if not sooner.

The only "change" in circumstances identified by Lone Oak relating to jurisdiction is a decision from the BZA adverse to Lone Oak's interests.<sup>6</sup> Yet the BZA's decision does not affect the judiciary's competence to evaluate the reasonableness of the BZA's decision. As Mr. Hill acknowledged, "If the Commission declines jurisdiction or refuses to reassert jurisdiction in this case, Lone Oak could request that the stay is lifted and continue to pursue its judicial review of the BZA's decision." (Hill Testimony, Tr. B-4:4–5:2.) Lone Oak has not submitted any evidence on which the Commission could make a finding why judicial review was appropriate for the remonstrator's challenge to the BZA's 2019 but is not appropriate for Lone

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<sup>5</sup> The remonstrators filed their second petition on October 24, 2019. The trial court issued its order denying their petition for judicial review on November 2, 2020. *Burton*, 174 N.E.3d at 209.

<sup>6</sup> Lone Oak also claims that supply chain issues caused by the pandemic were also a "change" in circumstance. (Hill Testimony, Tr. B-16:7–11.) However, that "change" does not affect whether the judiciary or the Commission should hear Lone Oak's challenge to the BZA's decision. In fact, when asked what Lone Oak would have done differently had it known about alleged supply chain issues, Lone Oak's witness said that he would have negotiated a different construction deadline with the BZA. (Hill Testimony, Tr. B-26:21–27:9.) Tellingly, he did *not* say that Lone Oak would have altered its request for the Commission to decline jurisdiction over the project.

Oak’s challenge to the BZA’s 2022 decision.<sup>7</sup> Therefore, reassertion of the Commission’s jurisdiction would be unnecessary and wasteful in this case.

C. **The Commission’s reassertion of jurisdiction is not in the public interest because it would set a precedent incentivizing utilities to forum-shop.**

Reassertion of the Commission’s jurisdiction would also create a forum-shopping precedent prejudicial to the interests of energy utility customers and the state. I.C. § 8-1-2.5-5(b)(3). Forum-shopping—the “practice of choosing the most favorable jurisdiction or court in which a claim might be heard”—is generally disfavored by courts. FORUM-SHOPPING, Black’s Law Dictionary (11th ed. 2019); *see Stewart v. Vulliet*, 888 N.E.2d 761, 768 (Ind. 2008) (“[C]ourts disfavor forum shopping for a host of reasons important to the bench, the bar, and the public.”); *Todd by Todd v. Merrell Dow Pharms., Inc.*, 942 F.2d 1173, 1177 n.2 (7th Cir. 1991) (acknowledging that forum-shopping is an “evil” that courts must guard against).

Here, Lone Oak engaged in classic forum-shopping at its worst—changing forums midstream based on perceived changed political conditions. Lone Oak’s witness admitted that part of his role at Invenenergy is to “make choices...between...coordinated statewide direction and local control.” (Hill Testimony, Tr. B-9:19–20); *see also id.* 8:24–25 (“There’s always a...choice

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<sup>7</sup> Lone Oak’s witness tried to minimize Lone Oak’s decision to submit to the judiciary in 2019 by claiming it could not “control” the remonstrators’ litigation. (Hill Testimony, Tr. B-33:3–6.) However, under Lone Oak’s theory of the Commission’s declination/reassertion of jurisdiction, nothing would have prevented Lone Oak from requesting the Commission to reassert jurisdiction for the limited purpose of hearing the remonstrators’ challenge to the BZA’s approvals.

between...statewide...regulation and local control.”) Initially, Lone Oak made the “choice” of submitting to local zoning authorities and the judiciary because Lone Oak believed they favored Lone Oak’s interests. Lone Oak’s witness admitted that in 2019 Lone Oak considered this choice to be “the most efficient path of least resistance towards securing approvals needed to deploy our projects.” (Hill Testimony, Tr. B-26:3–11). His testimony also suggests that one of Lone Oak’s reasons for seeking declination of Commission jurisdiction in the first place were the “political conditions in the county itself.” (See, Hill Testimony, Tr. B-27:14–23 (“Q...What were those factors in the future that if you had known about it would have changed what you asked for [originally from the Commission]? A. The two factors that immediately come to mind would be change in political conditions in the county itself....”).) Lone Oak’s counsel also pursued a line of questioning suggesting Lone Oak was willing to “submit” to local zoning and the judicial review process only so long as the County was perceived as “coming alongside” Lone Oak and “aligned” with Lone Oak’s interests. (Hill Testimony, Tr. B-29:12–31:20.) The Commission should resist Lone Oak’s attempts to use the Commission’s declination/reassertion of jurisdiction as a tool of political convenience, as suggested by the testimony of Mr. Hill, who describes his role at Invenergy as “provid[ing] guidance upon -- regarding navigation of what can often be tricky political situations.” (Hill Testimony, Tr. B-10:15–17.) Such efforts run counter to the rule of law and erode confidence in the Commission’s role as an apolitical, neutral regulator of public utilities.

The extremely narrow scope of Lone Oak's request to reassert jurisdiction also highlights Lone Oak's strategic forum-shopping. Lone Oak asks the Commission to reassert jurisdiction only for the purpose of reviewing a single BZA's decision to deny the extension of the special use permit. (Verified Petition, pp. 15–16.) Lone Oak asks the Commission to continue to decline to exercise jurisdiction in all other respects. (*Id.* at p. 16.) In other words, Lone Oak wants the Commission to intervene to strike down a single decision while conveniently leaving the remainder of the project outside the Commission's jurisdiction. Such piecemeal regulation is not sound regulatory policy, as it allows utilities to pit regulatory bodies against each other. Although Lone Oak says it will submit to all other Madison County land use and permitting authority, it still needs to acquire a drainage permit, an Improvement Location Permit, and a Driveway Permit. (Hill Direct Testimony, Petitioner's Ex. 1, at 32:3–8; Attachment MRK-1 to Kaplan Direct filed in Cause No. 45793, p. 22 ¶ A.i.; Verified Petition, at p. 3 n.1.) If Lone Oak has any problems getting any of those permits, the Commission can expect to see yet another petition to reassert jurisdiction. This is another reason why Lone Oak's request for the Commission to reassert jurisdiction here does not promote efficiency.

Lone Oak acknowledges the Commission has never reasserted jurisdiction for the limited purpose of reviewing a local government decision. (Hill Direct Testimony, Petitioner's Ex. 1, at 8:3–6.) There are multiple good reasons why the Commission has not done so and should not do so here. Reasserting jurisdiction would set a negative precedent encouraging forum shopping. Wholesale utilities will



be able to ask the Commission to decline to exercise jurisdiction with the expectation that they can return at any time to strike down particular decisions they deem unfavorable or if they encounter a “change in political conditions,” as Mr. Hill put it. However, if the utility believes the judiciary will be more favorable to the utility’s interests, then the utility can appeal zoning decisions to the judiciary without being subject to any other Commission mandates. Allowing utilities to cherry-pick the Commission’s jurisdiction creates a wrong impression of who is really in control—the regulatory body, or the regulated entity?

Lone Oak asserts it should not be held to its prior commitment to submit to local zoning authorities because it could not have foreseen that it would have to come back to the BZA to obtain an extension of the project completion deadline. However, Lone Oak was aware the remonstrators had challenged the BZA’s approvals *before* Lone Oak asked the Commission to decline to exercise jurisdiction. Further, Lone Oak understood the litigation could take multiple years to resolve. (Hill Testimony, Tr. A-65:24–66:3) Therefore, it was entirely foreseeable that Lone Oak was not going to be able to complete the project by the December 31, 2023 deadline. Lone Oak could have asked the BZA to commence the project completion deadline upon completion of any appeals, just as it did in its 2022 Modification Petition, when it requested that the deadline be extended to two years after completion of any appeals. (Attachment SH-4 to Hinton Direct filed in Cause No. 45793, p. 3) In fact, Mr. Hill testified that Lone Oak frequently makes similar requests for a “longer timeline for deployment...if we have any inclination that

we're likely to encounter delay for whatever reason that might be." (Hill Testimony, Tr. B-27:3–9.) Alternatively, Lone Oak could have invoked the utility's right to be exempt from zoning requirements altogether and asked the Commission to retain jurisdiction over land use requirements.

Lone Oak did none of those things. Instead, with a clear-eyed understanding (or what should have been a clear-eyed understanding) of these risks, Lone Oak decided to pursue a strategy of declination of jurisdiction and attempt to comply with the December 31, 2023 project completion deadline in 2019, knowing of the deadline and of the remonstrators' pending judicial review proceeding.

Lone Oak also now complains about a "de facto" Commission rule requiring utilities who seek a declination of jurisdiction to comply with local zoning regulations. (*See*, Hill Direct Testimony, Petitioner Ex. 1, at 23:1–27:8.) Yet Lone Oak did not object to any so-called "rule" when it sought the Commission's declination but rather proposed this commitment itself. Lone Oak included this commitment in its pre-filed testimony, representing to the Commission that it did not need to be exempt from local zoning and would comply with local regulations. (County's Ex. CX-1 at pp. 10:17–20 and 17:11–19.) Lone Oak's witness acknowledged that waiving the zoning exemption was a common practice by renewable energy providers seeking a declination of jurisdiction. (*Id.*) Her testimony did not suggest the Commission was requiring such a waiver or that declination of jurisdiction was conditioned on such a waiver. (*Id.*) Moreover, after the October 1, 2019 hearing, Lone Oak prepared and filed its own proposed order affirming its

willingness to submit to local zoning and land use requirements and directing Lone Oak to refrain from exercising a utility's right to be exempt from local land use requirements. (Hill Testimony, Tr. A-51:14–54:5; County's Ex. CX-2, pp. 4, 12.)

By affirmatively and voluntarily representing it would comply with local zoning authorities and proposing an order providing for such, Lone Oak invited the Commission to enforce any “de facto” rule in this case. To the extent Lone Oak now claims this “de facto” rule is erroneous, Lone Oak invited that error by asking the Commission to enforce it. Under the “invited error” doctrine, a party may not “take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct.” *Hill v. State*, 51 N.E.3d 446, 451 (Ind. Ct. App. 2016). Additionally, “invited error precludes relief from counsel’s strategic decisions gone awry.” *Id.*

When Lone Oak filed its petition to decline jurisdiction with the Commission, it made a conscious decision to submit to local zoning authorities, which necessarily included the BZA and the judicial review process. The public interest dictates that Lone Oak should be held to this decision instead of being allowed to request the Commission’s intervention in order to forum-shop. Granting such a request would only encourage utilities to change regulators depending on their interests at any given time, a bad outcome for consumers, the public, and the state.

**D. The Commission’s reassertion of jurisdiction is not in the public interest because it is unnecessary to promote energy utility**

**efficiency where Lone Oak has an effective remedy with the trial court.**

Lone Oak claims that Commission reassertion jurisdiction will promote energy utility efficiency because it is the only hope for saving the Lone Oak project. (Hill Direct Testimony, Petitioner Ex. 1 at 16:13–15.) (“Lone Oak is and will remain completely inefficient (and effectively out of business) unless the Commission reasserts jurisdiction to evaluate the Regulations.”)

However, because Lone Oak has already appealed the BZA’s decision to the trial court, the Commission’s assertion of jurisdiction does not promote efficiency. In fact, Lone Oak’s attempts to hedge its bets in different jurisdictions have promoted an inefficient process that has led to multiple pending cases simultaneously.<sup>8</sup> Further, reassertion of jurisdiction would only promote uncertainty about which entity has regulatory authority over the local regulations governing Lone Oak. Lone Oak could choose whether to appeal decisions from those regulatory bodies to the judiciary or to seek reassertion of Commission jurisdiction. That uncertainty would lead to further inefficiency as Lone Oak could repeat its multiplicity of proceedings and pursue whichever proceeding it fancied at the moment while staying the others.

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<sup>8</sup> After the Commission dismissed Lone Oak’s Complaint in Cause 45793, the following related proceedings were pending at once: (1) the judicial review proceeding of the BZA decision pending before the trial court, which was stayed at Lone Oak’s request; (2) the judicial review proceeding of the Commission’s dismissal pending before the Court of Appeals, which was also stayed at Lone Oak’s request; and (3) the instant petition for reassertion of jurisdiction.

Lone Oak also claims that unless the Commission sets a precedent of intervening to overturn the BZA's decision, solar energy projects will be blocked across the state by obstructive local government regulations. However, Lone Oak's witness acknowledged that Lone Oak's developer, Invenergy is currently developing four other solar projects in the State of Indiana that are all proceeding to completion, and over which Invenergy asked the Commission to decline to exercise jurisdiction. (Hill Testimony, A-46:8–47:19.) Clearly, numerous solar projects are being developed under the current regulatory framework apart from the Commission's reassertion of jurisdiction in this case.

**E. The Commission does not need to reassert jurisdiction to enable Lone Oak to compete with other providers of functionally similar energy services.**

Under the current regulatory framework, Lone Oak is on a level playing field with other wholesale public utilities that have requested the Commission to decline to exercise jurisdiction over their operations. Just like Lone Oak, those entities must seek judicial review of any unfavorable decisions. The unprecedented nature of the relief Lone Oak is seeking demonstrates that these other utilities have not found it necessary to request the Commission to intervene into local affairs. Indeed, if the Commission intervenes in favor of Lone Oak, it will put Lone Oak on an *advantaged* footing relative to their other competitors who have utilized the judicial review process to adjudicate local zoning disputes.

## **CONCLUSION**

For the foregoing reasons, the County respectfully requests the Commission deny Lone Oak's request to reassert jurisdiction pursuant to Ind. Code § 8-1-2.5-7 but rather allow the judiciary to determine Lone Oak's challenge to the BZA's decision, and for all other just and proper relief.

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served on the following on September 29, 2023, by electronic transmission.

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