IN THE
INDIANA COURT OF APPEALS

Case No. 21A-EX-00821

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR, et al.,	)	Appeal from the Indiana Utility Regulatory Commission
Appellants,	)	No. 45378
v.	)	Hon. James F. Huston, Chairman,
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY and INDIANA UTILITY REGULATORY COMMISSION,	)	Hon. David Ober, Hon. Sarah E. Freeman, Hon. Stefanie N. Krevda, Hon. David E. Ziegner, Commissioners
Appellees.	)	Hon. Carol Sparks Drake, Senior Administrative Law Judge

BRIEF OF APPELLEE SOUTHERN INDIANA GAS AND ELECTRIC COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES & RULES **PAGES**

STATEMENT OF THE ISSUE

Whether the Indiana Utility Regulatory Commission's ("Commission") conclusion that Vectren's EDG Rider complied with the Distributed Generation Statute, Ind. Code § 8-1-40-5, was reasonable, where Vectren's Advanced Meter Infrastructure meters instantaneously net (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, and where the EDG Rider is consistent with the General Assembly's express intent to sunset net metering in favor of an excess distributed generation rate.

STATEMENT OF THE CASE

In 2017, the Indiana General Assembly enacted Senate Enrolled Act 309, Pub. L. No. 264-2017, § 6, 2017 Ind. Acts 3739, 3743–51 (codified at Ind. Code § 8-1-40-1 *et seq*.) (the "Distributed Generation Statute"). This Statute eliminated the net metering billing mechanism previously used by electricity suppliers pursuant to the Commission's Net Metering Rule (170 I.A.C. 4-4.2-1 *et seq*.) and replaced it with an excess distributed generation rate. Ind. Code § 8-1-40-10. The Distributed Generation Statute specifies that: "[n]ot later than March 1, 2021, an electricity supplier *shall* file with the commission a petition requesting a rate for the procurement of excess distributed generation by the electricity supplier." Ind. Code § 8-1-40-16 (emphasis added). Section 10 of the Distributed Generation Statute further provides:

> Before July 1, 2022, if an electricity supplier reasonably anticipates, at any point in a calendar year, that the aggregate amount of net metering facility nameplate capacity under the electricity supplier's net metering

> tariff will equal at least one and one-half percent (1.5%) of the most recent summer peak load of the electricity supplier, *the electricity supplier shall, in accordance with section 16 [of the Distributed Generation Statute], petition the commission for approval of a rate for the procurement of excess distributed generation*.

Ind. Code § 8-1-40-10 (emphasis added).

On May 8, 2020, as required by the Distributed Generation Statute, Southern Indiana Gas & Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc. ("Vectren") filed a Verified Petition with the Commission seeking approval of tariff rate Rider EDG ("Rider EDG") for procurement of excess distributed generation, along with supporting testimony and exhibits filed on May 11, 2020. (*See* App. Vol. 2 at 6.) As of that date, the amount of net metering capacity for residential and nonresidential customers had been exceeded when considering pending applications and current operating customers. (Ex. Vol. 1 at 89-90.)

The Indiana Office of Utility Consumer Counselor ("OUCC"), the statutory representative of the public under Ind. Code § 8-1-1.1-4.1, certain consumer representatives, as well as groups whose members are in the business of selling and installing distributed generation in Vectren's service territory (collectively, the "Appellants"), participated in the Commission proceedings.[1] (*See* App. Vol. 2 at 6.) Appellants filed testimony opposing multiple aspects of proposed Rider EDG, one of which was whether Vectren's Advanced Meter Infrastructure meters instantaneously

[1] *Cf.*, OUCC Brief at 6, which describes the Appellants as "consumer advocate and environmental group intervenors." In fact, the intervenors and Appellants include companies in the business of selling solar panels, such as Morton Solar and Johnson Melloh Solutions, Inc. (*See* App. Vol. 2 at 18.) Another solar company, Performance Services, Inc., was an intervenor below, but is not participating in this appeal. (*See generally id.*; Appellate Dkt.)

calculated the amount of excess distributed generation being delivered by customers to Vectren's distribution system, as required by Ind. Code § 8-1-40-5 . (*See id.* at 8-9.) Vectren filed rebuttal testimony on September 11, 2020. (*See id.* at 11.)

On September 17, 2020, Appellants and Performance Services, Inc. filed a Motion for Summary Judgment, arguing that Vectren's Rider EDG did not calculate the amount of excess distributed generation in accordance with Ind. Code § 8-1-40-5 and, therefore, it could not be approved as a matter of law. (*See id.* at 62-76.) On September 22, 2020, Vectren filed a Response to the Motion for Summary Judgment, opposing the Motion and cross-moving for summary judgment on the same issue, based on a separately filed Designation of Evidence. (*See id.* at 77.)

On October 15, 2020, the Presiding Officers issued a Docket Entry denying the cross-motions for summary judgment, finding "the Commission should have the benefit of a full evidentiary hearing upon the issues [as they were] not persuaded Joint Movants (or Vectren) have shown there are no genuine issues as to any material fact and they are now entitled to the requested judgment as a matter of law." (*Id.* at 99.) The Presiding Officers further found "the designated prefiled testimony evidences such a dispute and/or genuine issues with respect to how [Vectren's] meter works in effectuating th[e] language [of Ind. Code § 8-1-40-5] and determining excess distributed generation." (*Id.* at 100.) They also noted that the testimony of Appellants' own witnesses conflicted with the position Appellants took in their Motion for Summary Judgment. (*See id.* at 99) (stating "the testimony some Joint Movants prefiled appears inconsistent with claims made in the Motion."). On October 23, 2020,

Appellants filed a joint appeal to the full Commission, which was taken under advisement following Vectren's response and Appellants' reply. (*See id.* at 101-138.)

On November 17, 2020, the Commission held a public evidentiary hearing. (*Id.* at 20.) The prefiled evidence of the parties was admitted into evidence, and Vectren's witnesses were cross-examined. (*Id.* at 21.) The Commission took the matter under advisement, and on April 7, 2021, issued an Order approving Rider EDG, subject to Vectren making certain specified changes not at issue in this appeal (hereinafter the "Order"). (*See id.* at 45-46.) The Order also affirmed the Presiding Officers' denial of the cross-motions for summary judgment. (*Id.* at 49-52.) The OUCC timely filed its Notice of Appeal of the Order on May 6, 2021, which was joined by the other Appellants. (*See* Appellate Dkt.)

STATEMENT OF FACTS

The OUCC's Statement of Facts presents facts supporting Appellants' argument, but fails "to present the facts supporting the [Commission]'s judgment." *Cf. Gabriel v. Windsor, Inc.*, 843 N.E.2d 29, 49 (Ind. Ct. App. 2006). Vectren is providing a Statement of Facts that includes facts the Commission specifically relied upon in its Order, because the OUCC did not do so.

I. Electric customers have had the option to install distributed generation for years under favorable terms provided by Commission Rule.

In 2004, the Commission adopted 170 I.A.C. 4-4.2-1 *et seq*. (the "Net Metering Rule") to encourage Indiana electric customers to install distributed generation

resources (like rooftop solar panels) to meet their energy needs.[2] The Net Metering Rule allowed customers of investor-owned electric utilities to offset all or part of their electricity needs with distributed generation facilities at their premises. 170 I.A.C. 4-4.2-1 *et seq*. Under the Net Metering Rule, the amount of electricity delivered to the customer by an electric utility and the amount of electricity delivered to the utility by the customer were "netted" over the billing period, and the customer's bill was credited for electricity delivered to the utility at the applicable retail rate. *See* 170 I.A.C. 4-4.2-7.[3]

The Net Metering Rule was generous to customers who installed distributed generation resources because they essentially were paid the full retail rate for all

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[2] *Cf*., OUCC Br. at 8, which states, "[h]istorically, households had only one option for electricity—homes and businesses relied on their local electric utility for 100 percent of their electricity needs. Today, that is changing."

[3] The Net Metering Rule provided:

> 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, in accordance with normal metering practices. If the kilowatt hours (kWh) delivered by the investor-owned electric utility to the net metering customer exceed the kWh delivered by the net metering customer to the investor-owned electric utility during the billing period, the net metering customer shall be billed for the kWh difference at the rate applicable to the net metering customer if it was not a net metering customer. If the kWh generated by the net metering customer and delivered to the investor-owned electric utility exceed the kWh supplied by the investor-owned electric utility to the net metering customer during the billing period, the net metering customer shall be credited in the next billing cycle for the kWh difference.

170 I.A.C. 4-4.2-7(2).

electricity produced by their resource. Electricity produced by the customer on one day during the "billing period" could be used to offset the customer's needs on another day during the same "billing period." *Id.* For purposes of the hearing, and to illustrate the differences in the billing regimes under the Net Metering Statute and the Distributed Generated Statute, Vectren analyzed the bills of five net metering customers, selected by the Appellants, over a twelve-month period. (Ex. Vol. 1 at 56-58.) Three of the five customers were actually billed for *zero* consumption for most of the months of the year. (*Id.*) When this occurred, Vectren's non-distributed generation customers paid for the electricity consumed by the net metering customers. (App. Vol. 2 at 53.)

In contrast, the energy placed on a utility's system by customer-owned distributed generation resources is not necessarily needed by the utility or its retail customers, because it is not predictable enough to be factored into a utility's expected generation output or load requirement calculations. (Ex. Vol. 1 at 95.) Accordingly, excess electricity produced by distributed generation customers does not reduce the electric utility's power plant operations or purchased energy costs, but the utility still must accept it at a moment's notice and ultimately, it is paid for by non-distributed generation customers. (Ex. Vol. 1 at 96.) Indeed, distributed generation customers impose costs on other customers when their excess distributed generation results in transmission congestion, which increases the "costs for any needed energy imports" that must be procured by their electricity supplier. (*Id.*)

II. The General Assembly phased out the Net Metering Rule and replaced it with the Distributed Generation Statute.

In 2017, the Indiana General Assembly enacted the Distributed Generation Statute to phase out and replace the Net Metering Rule.[4] The Distributed Generation Statute provides that after June 30, 2022, "an electricity supplier *may not make a net metering tariff available to customers*," and "the terms and conditions of a net metering tariff offered by an electricity supplier before July 1, 2022, *expire and are unenforceable*." Ind. Code § 8-1-40-11(b) (emphasis added). Before July 1, 2022, electricity suppliers that reasonably anticipate reaching a specified statutory cap on net metering during the upcoming calendar year must file a petition for an excess distributed generation rate to replace their net metering tariff. *See* Ind. Code § 8-1-40-10.

The Distributed Generation Statute calls for net metering tariffs to be succeeded with a rate under which the electricity supplier would compensate new owners of distributed generation resources for "excess distributed generation." Ind. Code § 8-1-40-11. "Excess distributed generation" is defined as: "the difference between: (1) the electricity that is supplied by an electricity supplier to a customer that produces distributed generation; and (2) the electricity that is supplied back to the electricity supplier by the customer." Ind. Code § 8-1-40-5. The "billing period" language included in the Net Metering Rule that required the amounts of electricity

[4] Senate Enrolled Act 309, Pub. L. No. 264-2017, § 6, 2017 Ind. Acts 3739, 3743–51 (codified at Ind. Code § 8-1-40-1 *et seq.*).

to be "netted" was excluded from Ind. Code § 8-1-40-5. Now, the rate an electricity supplier must pay to purchase excess distributed generation is derived based on the rate the utility would have purchased the same energy at wholesale, plus a 25% adder. *See* Ind. Code § 8-1-40-17. An electricity supplier's customers must pay for this excess distributed generation through the fuel adjustment clause – whether needed or not. *See* Ind. Code § 8-1-40-15.

Customers already receiving service under the Net Metering Rule are "grandfathered" into the more generous net metering rate structure. *See* Ind. Code § 8-1-40-13(b). Successors in interest to grandfathered customers also can continue to receive service under the net metering rate until July 1, 2032. *See* Ind. Code § 8-1-40-13(c).

III. Vectren requested approval of an excess distributed generation tariff.

On May 8, 2020, Vectren filed a petition with the Commission requesting approval of Rider EDG. (*See* App. Vol. 2 at 6.) Vectren's evidence indicated that as of that date, the amount of its net metering participation had exceeded the cap set forth in Ind. Code § 8-1-40-10. (*See id.* at 23.) In accordance with the grandfathering provisions of the Distributed Generation Statute, Vectren indicated it would "not transfer a customer from Rider NM to Rider EDG." (*See id.* at 24.)

Vectren proposed to determine the amount of excess distributed generation by instantaneously measuring the flow of energy via Advanced Metering Infrastructure meters (which are often referred to as "smart meters"). (Ex. Vol. 1 at 18.) The electricity Vectren supplied to the customer in excess of their production would be

recorded on the meter as "inflow," and the net of the electricity supplied back to Vectren by the customer, and the electricity supplied by Vectren to the customer, is captured as "outflow." (Ex. Vol. 1 at 18; *see also* App. Vol. 2 at 50.) 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. (*Id.*) The total inflow and total outflow charges and credits are netted together to create a monthly bill. (*Id.*)

IV. Appellants challenged multiple components of Rider EDG, including Vectren's proposal to instantaneously net the components of excess distributed generation set forth in Ind. Code § 8-1-40-5.

Appellants challenged multiple components of Vectren's proposed Rider EDG. Relevant to this appeal is Appellants' challenge to Vectren's proposal to instantaneously net the components of excess distributed generation set forth in Ind. Code § 8-1-40-5. Specifically, OUCC witness Anthony Alvarez disputed that the "outflow" amount registered on the smart meters actually represents the difference between electricity supplied to the customer by the electricity supplier and electricity supplied to the electricity supplier by the customer. (Ex. Vol. 2 at 4.)

Other of the Appellants' witnesses, however, actually *conceded* that outflow as registered on Vectren's meters reflected the difference between electricity supplied to the customer by the electricity supplier and electricity supplied to the electricity supplier by the customer. The OUCC's Brief fails to mention this contradictory testimony, all of which supports the Commission's Order. Appellants' witness

Douglas Jester[5] testified: "If the amount of power supplied from the distributed generation is greater than the amount required by the customer's loads, *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) (emphasis added). In other words, Mr. Jester conceded that "excess distributed generation" as defined in Ind. Code § 8-1-40-5 is the "outflow" registered on Vectren's smart meter.

Likewise, Solarize Indiana, Inc. ("Solarize") witness Jay W. Picking recognized that Vectren's smart meters net excess distributed generation, stating:

> In my opinion, the current net metering framework has allowed a reasonable ROI to be achieved by residential homeowners installing solar. However, the proposed EDG tariff utilizing such a low compensation rate *and smart meters for netting excess generation* will reduce that ROI.

(Ex. Vol. 3 at 164) (emphasis added). Solarize witness Webb also recognized that instantaneous netting reflects the netting of energy received and the energy delivered by the customer.[6]

V. Vectren presented substantial evidence that its smart meters instantaneously net the two components of excess distributed generation set forth in Ind. Code § 8-1-40-5.

In response to the conflicting testimony of Appellants' witnesses, Vectren provided additional evidence to clarify that "[t]he net of the electricity supplied by

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[5] Witness Jester testified on behalf of Citizens Action Coalition of Indiana, Inc. ("CAC"), Environmental Law and Policy Center ("ELPC"), Solar United Neighbors ("SUN"), and Vote Solar.

[6] *See* Ex. Vol. 3 at 183 ("The complexity of instantaneous netting of energy received and delivered by the customer, measured only by the utility, creates risk for customers that neither Vectren nor SI are equipped to address to customers' satisfaction.").

Vectren South to the customer and the electricity that is supplied back to Vectren South is specifically captured as 'Outflow' on the customer's meter." (Ex. Vol. 1 at 48.) Vectren witness Mathew A. Rice testified that the smart meter registers as "outflow" the net of both components of "excess distributed generation" in accordance with Ind. Code § 8-1-40-5. (*Id.*) He explained that OUCC witness Alvarez was wrong in claiming that "outflow," as measured on the meter, does not account for both components of Ind. Code § 8-1-40-5, as follows:

> Q Is OUCC Witness Alvarez correct that "Vectren failed to define the term 'excess distributed generation' as it is defined in IC 8-1-40-5 in its proposed Rider EDG"?
>
> A No. Pursuant to IC § 8-1-40-5, "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." Mr. Alvarez misunderstands how Vectren South determines EDG as defined in the statute. The net of the electricity supplied by Vectren South to the customer and the electricity that is supplied back to Vectren South is specifically captured as "Outflow" on the customer's meter. In other words, the meter registers as "Outflow" the net of both components of "excess distributed generation" as set forth in IC § 8-1-40-5, not just a single component as OUCC Witness Alvarez believes.
>
> The meter records, as Inflow, the requirements from the customer not satisfied by the [distributed generation] resource. . . . To be clear: (i) what Vectren South referred to as "what the distributed generation resource produced" was intended to refer to "the electricity that is supplied back to the electricity supplier by the customer" (IC § 8-1-40-5(2)); and (ii) what Vectren South referred to as "what the customer used behind the meter" was intended to refer to "the electricity that is supplied by an electricity supplier to a customer" (IC § 8-1-40-5(1)). The "difference" as specified in IC § 8-1-40-5 is the Outflow measurement on the meter.

(Ex. Vol. 1 at 48.)

VI. The totality of Mr. Rice's testimony demonstrated that Vectren's smart meters instantaneously net 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.

On cross-examination, Vectren witness Mathew Rice was questioned at length about Vectren's smart meters. In its Brief, the OUCC repeatedly quotes the following portion of Mr. Rice's testimony:

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

(Tr. Vol. 2 at 28-29.) However, the OUCC fails to include the portion of Mr. Rice's testimony that follows, which alters the OUCC's characterization of Mr. Rice's testimony considerably:

> Q Okay, so when we talked about times when the inflow rate is higher than the outflow rate, do you agree with me that the shorter that netting time period, the larger the customer bill impact?

> A What we're reflecting in the [excess distributed generation] rate is instantaneous netting, so when the customer is drawing energy off the system because the [distributed generation] resource is not producing more than the consumption at the time, that's an inflow, and when the production exceeds the consumption, there's an outflow. *The balance of the energy usage and production is done behind the meter*.
>
> * * *
>
> Instantaneous netting, . . . is the – there's a balance between -- When the customer is utilizing more energy than what's being produced, there's an [in]flow.[7] 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.

(Tr. Vol. 2 at 61-63) (emphasis added).

VII. After weighing the evidence, the Commission approved Vectren's Rider EDG and discredited the OUCC's witness regarding his characterization of Vectren's smart meters.

The Commission issued its Order on April 7, 2021, which authorized Vectren to use instantaneous netting to determine the amount of a customer's excess distributed generation. In doing so, the Commission determined that: "[b]ased on the substantial evidence of record, the Commission finds that Vectren South's meters register at any given moment in time 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 and that instantaneous netting is permissible under [Ind. Code § 8-1-40-5]." (App. Vol. 2 at 52.)

[7] The witness inadvertently used the term outflow twice.

The Commission specifically found the testimony of OUCC witness Alvarez to be unpersuasive and, in fact, "incorrect," stating Appellants' "position relies upon the testimony of OUCC witness Alvarez who . . . *we find is incorrect in asserting that the outflow [Vectren]'s meter captures only recognizes Section 5(2).*" (*Id.* at 49) (emphasis added). Contrary to Mr. Alvarez's testimony, the Commission found that "mechanically, [Vectren]'s evidence shows that in measuring outflow, Vectren South's meter instantaneously nets both components of [excess distributed generation] under Section 5 at the meter to arrive at [excess distributed generation]." (*Id.*) The Commission further stated that the "[excess distributed generation] the meter measures *is* the difference between these components, not merely one component." (*Id.*) (emphasis added). The Commission explained:

> [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 [excess distributed generation].
>
> Notwithstanding the foregoing, the OUCC and some Intervenors claim outflow, as registered on the meter, is not actually the difference between electricity supplied to the customer by the electricity supplier and electricity supplied to the electricity supplier by the customer because electricity only flows one way. We find, however, that because it can only flow one way, to become outflow, both components of Section 5 are netted at the meter to arrive at [excess distributed generation]. Solarize witness Picking recognized that Petitioner's smart meters net excess generation, Solarize Exhibit 1 at p. 5, lines 24-25, with Solarize witness Webb also recognizing the complexity of instantaneous netting reflects the netting of energy received and energy delivered by the customer that is measured by the utility. Solarize Exhibit 2 at p. 13, lines 8-10.

> Having reviewed the evidence, as discussed above, the Commission finds that the electricity that flows through the meter and registers as outflow is the [excess distributed generation] produced by a [distributed generation] customer for purposes of Section 5. This excess electricity registered as outflow on the meter is the electricity Vectren South must accept from the [distributed generation] customer, regardless of whether that excess electricity is then needed or not needed to meet Vectren South's overall system needs. The amount of electricity Vectren South must accept from the customer is the amount of electricity that is supplied back to [Vectren] by the customer in excess of the amount Vectren South supplied to the customer at the same moment – i.e., the difference between the two components of Section 5 occurring at that instant and time.

(*Id.* at 51.)

The Commission also found the OUCC's position, if adopted, would double deduct one component of the excess distributed generation equation, stating: "Mr. Alvarez's position otherwise arrives at the difference between Section 5(1) and 5(2) at the wrong time, effectively deducting inflow a second time and not recognizing the meter itself is measuring the difference in the process, instantaneously netting the two components of [excess distributed generation] at the meter, to arrive at [excess distributed generation]." (*Id.* at 50.). The Commission found 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." (*Id.*)

The Commission concluded that if Mr. Alvarez's view were adopted, "it would result in over valuing [excess distributed generation] beyond what the statute directs." (*Id.* at 51.) Essentially, it would "be a continuation of net metering under which Rider EDG customers could continue to bank their [excess distributed

generation] on the utility's system at no charge until needed at some time later in the month, thereby also continuing to provide Rider EDG customers the retail rate allowed under net metering for 'banked' excess generation throughout the month." (*Id.*) The Commission noted that it did 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." (*Id.*)

This appeal followed. Additional facts will be supplied as necessary.

SUMMARY OF ARGUMENT

In enacting the Distributed Generation Statute, the General Assembly could not have been clearer in its intent to sunset net metering in favor of an excess distributed generation rate. The OUCC's entire argument on appeal asks this Court to disregard not only this clear legislative intent, but also the substantive findings and expertise of the Commission as to the capabilities and effect of Vectren's smart meters, and instead, adopt a statutory interpretation that forces electric suppliers to engage in net metering yet again. This argument contravenes both law and logic and cannot have been the result the General Assembly intended.

In an attempt to convince this Court its review of the Commission's Order should be *de novo*, the OUCC argues the Commission somehow committed an error of law in interpreting the statutory definition of "excess distributed generation" when concluding Vectren's EDG Rider complied with the Distributed Generation Statute.

This could not be further from the case. In reality, the Court's review of the Order should be deferential to the Commission's expertise and its interpretation of the facts.

Indiana Code § 8-1-40-5 defines "excess distributed generation" as "the difference between: (1) the electricity that is supplied by an electricity supplier to a customer that produces distributed generation; and (2) the electricity that is supplied back to the electricity supplier by the customer." At its core, this appeal is about the OUCC's disagreement with the Commission's factual finding that the evidence demonstrated Vectren's smart meters instantaneously net both components of Section 5. This factual determination about the mechanical operation of Vectren's smart meters, which served as the basis for the Commission's approval of Vectren's EDG Rider, is reasonable, supported by substantial evidence, and should be affirmed.

The OUCC ignores the majority of the substantial evidence supporting the Commission's Order, instead relying almost solely upon the testimony of its witness Alvarez and on a single line of questioning from Vectren witness Rice's cross-examination. But the Commission specifically found that Mr. Alvarez's testimony as to the mechanical capabilities of Vectren's smart meters was "incorrect," and Mr. Rice's testimony – when viewed in its entirety – establishes that the meters register as outflow the net of both components of excess distributed generation in accordance with Section 5. This evidence, especially when coupled with Appellants' own witnesses who acknowledged that "excess distributed generation," as defined in Section 5, is the "Outflow" registered on Vectren's smart meters, demonstrates the question at issue in this appeal is a factual one, entitled to deferential review.

The Commission considered the evidence presented, using its technical expertise, and determined that because Vectren's smart meters are capable of instantaneously netting the requirements of Section 5, Rider EDG complied with the Distributed Generation Statute and should be approved. Essentially, 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.

Moreover, instantaneous netting is consistent with the language and intent of the Distributed Generation Statute. The OUCC's position – that the Distributed Generation Statute somehow requires Vectren to net the difference between the electricity Vectren is supplying to the customer and the electricity the customer is supplying to Vectren over a monthly billing period – is neither supported by the plain language of Ind. Code § 8-1-40-5 nor logic. Why would the General Assembly incorporate the net billing period interval from the Net Metering Rule that the Distributed Generation Statute was enacted to replace? If the General Assembly wanted to require electricity suppliers to continue to use a monthly netting period, it could have done so. It did not.

The Commission considered – and rejected – the OUCC's proposed interpretation, and in doing so, cited several provisions of the Distributed Generation Statute which evidence a legislative intent to transition away from net metering. This

Court should decline the OUCC's request to read words into the Statute that do not exist, and that would contravene this clear legislative intent.

For all of these reasons, the Commission's Order approving Vectren's Rider EDG should be affirmed.

ARGUMENT

I. Standard of Review

A. Appellate review of Commission Orders

The General Assembly created the Commission "'primarily as a fact-finding body with the technical expertise to administer the regulatory scheme devised by the legislature.'" *Mullett v. Duke Energy Ind., LLC*, 103 N.E.3d 661, 664 (Ind. Ct. App. 2018), *reh'g denied, trans. denied* (quoting *Ind. Gas Co. v. Ind. Fin. Auth.*, 999 N.E.2d 63, 65 (Ind. 2013)). This Court has previously noted that "[b]ecause the complicated process of ratemaking is a legislative rather than judicial function, it is more properly left to the experienced and expert opinion present in the Commission." *Citizens Action Coal. of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 76 N.E.3d 144, 151 (Ind. Ct. App. 2017) (cleaned up). An order from the Commission "is presumed valid unless the contrary is clearly apparent." *Id.*

Appellate review of the Commission's Order is guided by Ind. Code § 8-1-3-1, which provides in relevant part:

> An assignment of errors that the decision, ruling, or order of the commission is contrary to law shall be sufficient to present both the sufficiency of the facts found to sustain the decision, ruling, or order, and the sufficiency of the evidence to sustain the finding of facts upon which it was rendered.

NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co. ("NIPSCO"), 125 N.E.3d 617, 623 (Ind. 2019) (citing *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp. ("U.S. Steel")*, 907 N.E.2d 1012, 1015 (Ind. 2009)). When presented with an appeal under this section, the reviewing court "appl[ies] three levels of review: one for factual findings; another for mixed questions of law and fact; and a third for questions of law." *Id.* at 623-24 (cleaned up).

As to the first, the Court will "not try the facts de novo," but will "defer to the agency's findings if they are supported by substantial evidence." *Moriarity v. Ind. Dep't of Nat'l Res.*, 113 N.E.3d 614, 619 (Ind. 2019) (cleaned up). In doing so, the Court "recognize[s] an agency has expertise in its field and the public relies on its authority to govern in that area." *Id.* (cleaned up). This Court recently elaborated on this level of review:

> An appeal of the Commission's decision amounts to a two-tiered review by the appellate court. On the first level, it requires a review of whether there is substantial evidence in light of the whole record to support the Commission's findings of basic fact. Such determinations of basic fact are reviewed under a substantial evidence standard, meaning the order will stand unless no substantial evidence supports it.
>
> During its substantial evidence review, the appellate court neither reweighs the evidence nor assesses the credibility of witnesses and considers only the evidence most favorable to the Commission's findings. The Commission's order is conclusive and binding unless (1) the evidence on which the Commission based its findings was devoid of probative value; (2) the quantum of legitimate evidence was so proportionately meager as to lead to the conviction that the finding does not rest upon a rational basis; (3) the result of the hearing before the Commission was substantially influenced by improper considerations; (4) there was no substantial evidence supporting the findings of the Commission; (5) the order of the Commission is fraudulent, unreasonable, or arbitrary. This list of exceptions is not exclusive. At the second level, the order must contain specific findings on all the factual determinations material to its ultimate conclusions. We review the Commission's conclusions of ultimate facts for reasonableness, the

> deference of which is based on the amount of expertise exercised by the agency.

IPL Indus. Group, et al. v. Indianapolis Power & Light Co., 159 N.E.3d 617, 622-23 (Ind. Ct. App. 2020) (cleaned up).

For the second level, appeals involving claims of insufficient findings to sustain the ultimate conclusions contained in the order, the Court will "review the Commission's conclusions for reasonableness, deferring to the Commission 'based on the amount of expertise exercised by [it].'" *NIPSCO*, 125 N.E.3d at 624 (quoting *U.S. Steel*, 907 N.E.2d at 1016). In doing so, the Court will "give more deference to orders on subjects within the Commission's expertise and less deference to orders dealing with matters outside its expertise," and "may examine the logic of inferences drawn and any rule of law that may drive the result" in either situation. *Id.*

As to the third level, the Court will "ordinarily review legal questions addressed by an agency de novo." *Moriarity*, 113 N.E.3d at 619. However, "[a]n interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself." *Id.* (quotations omitted).

Deference to an agency's reasonable interpretation of such a statute is required even if a different reading, proposed by the party challenging the agency's view, may also be reasonable. "When a court is faced with two reasonable interpretations of a statute, one of which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency." *Shaffer v. State*, 795 N.E.2d 1072, 1076 (Ind. Ct. App. 2003); *see also Sullivan v. Day*, 681 N.E.2d 713, 716 (Ind. 1997)

(when agency and challengers both "offered plausible interpretations" of statute and regulation, trial court "erred in not deferring to [agency]'s interpretation," as it was "charged with interpreting the statute and regulation in the first instance"); *Chrysler Grp. LLC v. Rev. Bd. of Ind. Dep't of Workforce Dev.*, 960 N.E.2d 118, 124 (Ind. 2012) ("[W]e defer to the agency's reasonable interpretation of such a statute even over an equally reasonable interpretation by another party."). Thus, as the Supreme Court explained in *Moriarity,* "if the agency's interpretation is reasonable, we stop our analysis and need not move forward with any other proposed interpretation." 113 N.E.3d at 619 (quotation marks and citation omitted).

B. The Commission's Order is entitled to deferential review.

The OUCC incorrectly claims the issue presented on appeal is subject to *de novo* review because this "case presents a question of law." (OUCC Br. at 21, 32.) To the contrary, the OUCC's argument challenges the Commission's interpretation of facts – in particular, the Commission's conclusion regarding the mechanical capability of Vectren's smart meters. At its core, this appeal is not about statutory interpretation; but rather, it is about the OUCC's disagreement with the Commission's finding that "*mechanically, [Vectren]'s evidence shows* that in measuring outflow, [Vectren's] meter instantaneously nets both components of [excess distributed generation] under Section 5 at the meter to arrive at [excess distributed generation]." (App. Vol. 2 at 49) (emphasis added). The Commission's findings about the mechanical operations occurring within Vectren's smart meters is

a factual determination, which is supported by substantial evidence, and should be affirmed.

II. The Commission's conclusion that Vectren's EDG Rider complied with the Distributed Generation Statute was reasonable and supported by substantial record evidence.

A. Appellants want the Court to substitute its judgment as to technical factual matters for that of the Commission.

The OUCC's Brief repeatedly cites evidence it contends is favorable to Appellants' position, omits evidence favorable to the Commission's Order, and asks the Court to reach a different conclusion than the Commission did as to the mechanics of Vectren's smart meters and whether they instantaneously calculate the difference between the two components of excess distributed generation set forth in Ind. Code § 8-1-40-5. Essentially, the OUCC wants this Court to reject the factual findings made by the Commission and side with OUCC witness Alvarez, who testified: "Vectren failed to conform with the definition of the term 'excess distributed generation,' as IC 8-1-40-5 prescribes, because the 'outflow' measured, by its meter only recognizes IC 8-1-40-5(2), . . . which is only one of the two Distributed Generation Statute components used to determine [excess distributed generation]." (Ex. Vol. 2 at 11.) Indeed, the OUCC repeats Mr. Alvarez's testimony before the Commission in its Brief in nearly identical terms:

> Rider EDG does not calculate the "difference between" the two statutory components of Excess Distributed Generation. Instead, it calculates [excess distributed generation] billing credits based solely on Outflow, which represents only half of the statutory equation — the electricity that the [distributed generation] customer "supplies back" to Vectren.

(OUCC Br. at 26.)

The problem with the OUCC's argument is that the Commission found Mr. Alvarez's testimony as to Vectren's meters to be *"incorrect" as matter of fact*, based on the evidence presented. Specifically, the Commission held: "[t]he OUCC and Intervenors' position relies upon the testimony of OUCC witness Alvarez who, as will be discussed more fully below, *we find is incorrect in asserting that the outflow [Vectren]'s meter captures only recognizes Section 5(2).*" (App. Vol. 2 at 49) (emphasis added). Contrary to the OUCC's claims below and in its Brief, the Commission concluded: "mechanically, [Vectren]'s evidence shows that in measuring outflow, Vectren South's meter instantaneously nets both components of EDG under Section 5 at the meter to arrive at EDG." (*Id.*) In other words, the Commission found that "[t]he EDG the meter measures is the difference between [the two Distributed Generation Statute] components, not merely one component." (*Id.*)

The Commission did not "disregard the statutory text" of Ind. Code § 8-1-40-5 or find it permissible for Vectren to use "only half of the statutory equation" to determine excess distributed generation, as the OUCC suggests in its Brief, in an effort to cast the Commission's decision as one based purely on law. (OUCC Br. at 26, 32.) Rather, the Commission reviewed the evidence and concluded that "mechanically," Vectren's smart meters "register at any given moment in time 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," which is consistent with the statutory text of Ind. Code § 8-1-40-5. (*See* App. Vol. 2 at 52.)

The OUCC wrongly states that "[t]he Commission approved Rider EDG even though the tariff, *by its own terms*, calculates EDG billing credits based solely on customer Outflow." (OUCC Br. at 18) (emphasis added). Rather, the "terms" of Rider EDG expressly incorporate Ind. Code § 8-1-40-5. Rider EDG, as approved by the Commission, defines "Excess Distributed Generation" precisely as it is defined in Ind. Code § 8-1-40-5: "in accordance with IC 8-1-40-5, 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." (Ex. Vol. 1 at 77.) "Outflow" is defined in Rider EDG as "the separate meter channel measurement of energy *delivered by Customer to Company as Excess Distributed Generation*." (*Id*.) (emphasis added). The marginal price of power, plus the statutory 25% premium (i.e., $0.03183), is applied to "all Outflow," i.e., "Excess Distributed Generation" as defined in Ind. Code § 8-1-40-5. (Ex. Vol. 1 at 78.)

The OUCC's "Statement of Facts" incorrectly claims the language in Rider EDG, which precisely matches the language of Ind. Code § 8-1-40-5, is merely "cosmetic." (OUCC Br. at 15.) However, Rider EDG was drafted to match the mechanics of the smart meter. As stated by Vectren witness Rice, "[t]he net of the electricity supplied by Vectren South to the customer and the electricity that is supplied back to Vectren South is specifically captured as 'Outflow' on the customer's

meter." (Ex. Vol. 1 at 48.) Rider EDG accurately describes this calculation occurring within the meter.[8]

The OUCC's argument comes down to a disagreement with the Commission about the mechanics of Vectren's smart meter. Nothing more. The Commission is a "fact-finding body with the technical expertise to administer the regulatory scheme devised by the legislature." *United Rural Elec. Membership Corp. v. Ind. & Mich. Elec. Co.,* 549 N.E.2d 1019, 1021 (Ind. 1990). Accordingly, courts avoid substituting their "judgment on complex evidentiary issues and policy determinations best left to an agency with technical expertise." *Hamilton Southeastern Util. v. Ind. Util. Reg. Comm'n*, 115 N.E.3d 512, 514 (Ind. Ct. App. 2018) (citing *North. Ind. Pub. Serv. Co. v. LaPorte*, 791 N.E.2d 271, 278 (Ind. Ct. App. 2003)). In reviewing questions of fact, courts will "give more deference to orders on subjects within the Commission's

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[8] Rider EDG also was drafted to respond to complaints from the OUCC that the definition of "excess distributed generation" in Ind. Code § 8-1-40-5 was not used in the originally filed version:

> Q OUCC witness Alvarez contends Vectren failed to incorporate the definition of EDG into the tariff, rendering it incomplete, incorrect and unacceptable. How do you respond?
>
> A The Company included definitions of the components utilized as billing determinants in the calculation of the charges for a Rider EDG customer. To ensure there is no confusion on the definitions utilized for Outflow, consistent with my testimony here, the Company has prepared a redline version of the Rider EDG Tariff, included as Petitioner's Exhibit No. 3, Attachment MAR-R1, which now includes the definition as presented in IC § 8-1-40-5.

(Ex. Vol. 1 at 72-73.)

expertise and less deference to orders dealing with matters outside its expertise. . . ." *NIPSCO,* 125 N.E.3d at 624 (citing *U.S. Steel,* 907 N.E.2d at 1016).

Notwithstanding the OUCC's disagreement on the subject, the Commission's conclusion regarding the mechanics of Vectren's smart meters is a matter within the Commission's technical expertise. The Commission has engineers on staff to assist its review of technical evidence and has presided over multiple cases involving smart meters.[9] As further discussed below, the Commission's conclusion here regarding the mechanics of the smart meters is supported by substantial evidence – including evidence from some of Appellants' own witnesses who conceded that the smart meters instantaneously net both components of excess distributed generation set forth in Ind. Code § 8-1-40-5 – is entitled to deference, and should not be disturbed on appeal.

[9] *See, e.g.*, *In re Indianapolis Power & Light Co.*, 2020 WL 6566748, Cause No. 45264 S1 (IURC Nov. 4, 2020) (approving Settlement Agreement involving the expansion of Petitioner's Advanced Metering Infrastructure system with related regulatory and recovery directives in special subdocket created for considering appropriate opt-out tariff); *In re Ind. Mich. Power Co.*, 2020 WL 1656243, Cause No. 45235 (IURC Mar. 11, 2020) (authorizing I&M to proceed with deploying Advanced Metering Infrastructure meters with proposed depreciation rates in rate base); *In re Duke Energy Ind., LLC*, 2018 WL 3067825, Cause No. 44963 (IURC June 13, 2018) (approving advanced meter opt-out tariff and authorizing associated recovery and deferment of related AMI costs); *In re S. Ind. Gas and Elec. Co.*, 2017 WL 4232049, Cause No. 44910 (IURC Sept. 20, 2017) (approving transmission, distribution, and storage system improvement charge ("TDSIC") Plan, which included cost recovery and ratemaking treatment associated with Advanced Metering Infrastructure projects and investment).

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B. The Commission's determination that Vectren's smart meter instantaneously nets both components of Ind. Code § 8-1-40-5 is supported by substantial evidence.

In reviewing a Commission order to determine whether it is supported by substantial evidence, an "appellate court neither reweighs the evidence nor assesses the credibility of witnesses and considers only the evidence most favorable to the Commission's findings." *IPL Indus. Group*, 159 N.E.3d at 622 (cleaned up). Here, Vectren presented substantial evidence regarding the mechanical operation of its smart meter, and the Commission appropriately credited that evidence and found it to be persuasive. (*See* App. Vol. 2 at 49-53.) The OUCC's Brief does not even acknowledge this evidence, let alone provide any basis for rejecting the Commission's ultimate findings.

In addition to parroting arguments made in the rejected Alvarez testimony, the OUCC repeatedly cites the same excerpt from the cross-examination of Vectren witness Rice and contends he "confirmed, unequivocally," that the word "Outflow," as used in Rider EDG, "represents electricity that is supplied back to Vectren by the customer." (OUCC Br. at 27) (emphasis omitted). But Mr. Rice in no way confirmed, "unequivocally" or otherwise, that Outflow as registered on a smart meter measures only one component of excess distributed generation. To the contrary, Mr. Rice actually explained that Vectren's meters register as outflow the net of both components of EDG in accordance with Section 5, stating:

> Q Both Mr. Alvarez and Solarize witness Kastner claim that Vectren South is not netting the kWh amount and monetizing the difference, but instead is summing Inflows multiplied by the

> retail rate and Outflows multiplied by the EDG rate and then calculating the difference. Is that accurate?
>
> A No. The Outflow is the net, in kWh, of the 'electricity that is supplied back to the electricity supplier by the customer' and the 'electricity that is supplied by an electricity supplier to a customer.' This net amount is what Rider EDG is applied to in accordance with IC § 8-1-40-5.

(App. Vol. 2 at 50) (citation omitted). Mr. Rice devoted a substantial portion of his rebuttal testimony to explaining how the meter instantaneously nets the electricity supplied by Vectren to the customer with the electricity supplied by the customer to Vectren. For instance, Mr. Rice also testified:

> Q Is the proposed EDG Rate applied to the correct EDG amount?
>
> A Absolutely. As indicated above, Mr. Alvarez's testimony that Vectren South is not applying the EDG rate to the correct EDG amount is based on a misunderstanding of the measurement occurring in the meter. Specifically, the "difference" is already captured in the Outflow measurement. There is no question that the EDG Rate is applied to the EDG as defined in IC § 8-1-40-5, which is recorded by the Outflow channel on the meter, for the billing period.

(Ex. Vol. 1 at 50-51.)

Yet the OUCC cites a single exchange out of Mr. Rice's cross-examination and repeats it *ad nauseum*, failing to note the testimony that follows (and failing to note the multiple other Appellant witnesses that support Vectren's characterization of its meters' capabilities and the Commission's Order). Following the exchange from the transcript that the OUCC repeatedly references, Mr. Rice stated:

> Q Okay, so when we talked about times when the inflow rate is higher than the outflow rate, do you agree with me that the shorter that netting time period, the larger the customer bill impact?

> A What we're reflecting in the EDG rate is instantaneous netting, so when the customer is drawing energy off the system because the DG resource is not producing more than the consumption at the time, that's an inflow, and when the production exceeds the consumption, there's an outflow. The balance of the energy usage and production is done behind the meter.
>
> * * *
>
> Q I'm talking – again, I'm talking about the time period, sir, the time period in which that netting occurs from a bill perspective.
>
> If you're doing it instantaneously and the inflow and outflow rates have a large differential, that has a much bigger customer bill impact, doesn't it, than if the customer can bank that inflow and outflow; right?
>
> A As shown in my testimony before, if you're asking about the difference between net metering and EDG, there is a difference. . . .
>
> Instantaneous netting, as I'm trying to illustrate, is the – there's a balance between -- When the customer is utilizing more energy than what's being produced, there's an [in]flow.[10] 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.

(Tr. Vol. 2 at 61-63.) In addition to Mr. Rice, Vectren's Director of System Operations, Jason Williams, testified regarding the workings of the Advanced Metering Infrastructure Meters. (Ex. Vol. 4 at 129-136.)

Some of Appellants' own witnesses even admitted "excess distributed generation," as defined in Ind. Code § 8-1-40-5, is the "Outflow" registered on Vectren's meter. Douglas Jester, a Partner with 5 Lakes Energy, LLC, testified: "If

[10] The witness inadvertently said outflow twice.

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) (emphasis added).[11] Like Mr. Jester, Solarize witness Jay W. Picking recognized that Vectren's smart meters net excess distributed generation, stating:

> In my opinion, the current net metering framework has allowed a reasonable ROI to be achieved by residential homeowners installing solar. However, the proposed EDG tariff utilizing such a low compensation rate *and smart meters for netting excess generation* will reduce that ROI.

(Ex. Vol. 3 at 164) (emphasis added). As the Commission noted, Solarize witness Webb also recognized that instantaneous netting reflects the netting of energy received and the energy delivered by the customer. (App. Vol. 2 at 51.)

Finally, the OUCC repeatedly claims "Outflow," as registered on Vectren's smart meter, measures only "half of the statutory equation." (OUCC Br. at 17, 20, 26, 27, 28 and 29.) As explained above, the OUCC's repeated contention is inconsistent with Vectren's evidence and indeed, the testimony of some of Appellants' own witnesses. Moreover, the Commission's Order explains how the meter mechanically

[11] In one of its post-hearing briefs, the OUCC argued Mr. Jester did not intend to "refer to 'excess distributed generation' in the context of Ind. Code § 8-1-40-5." (App. Vol. 2 at 131.) However, Mr. Jester was offered as an expert witness and his testimony was prefiled with the Commission. If Mr. Jester's intent was not correctly reflected in his prefiled testimony, he could have changed or clarified his testimony by filing a Notice of Corrections at any time before or during the hearing. Moreover, as noted above and in the Commission's Order, two of Appellants' other experts likewise recognized that the smart meters instantaneously net excess distributed generation. (App. Vol. 2 at 51.)

measures and nets both components of the excess distributed generation. The Commission found:

> [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. . . .
>
> [B]ecause [electricity] can only flow one way, to become outflow, both components of Section 5 are netted at the meter to arrive at EDG. . . .

(App. Vol. 2 at 51.)

The OUCC's Brief does not acknowledge the Commission's findings, let alone claim any fault in the Commission's understanding of how Vectren's meter operates. Quite simply, it cannot reconcile these findings with its arguments on appeal. Electricity flowing through Vectren's smart meter and registered as "Outflow" *is* "excess distributed generation."

The Commission concluded that Vectren's EDG Rider complied with the Distributed Generation Statute, in large part because it found that "[b]ased on the substantial evidence of record, . . . Vectren South's meters register at any given moment in time 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 and that instantaneous netting is permissible under Section 5 . . . ." (App. Vol. 2 at 52.) This was a question of fact, supported by substantial evidence, and thus, entitled to

deferential review on appeal. The Court should reject the OUCC's attempt to reframe the Commission's finding as a question of law and affirm the Commission's Order.

III. Instantaneous netting is consistent with the language and intent of the Distributed Generation Statute.

A. The Distributed Generation Statute does not specify any particular netting period that must be used, and there is no basis for reading one into the Statute.

The OUCC alternatively argues that the Distributed Generation Stature requires Vectren to net the two components of excess distributed generation set forth in Ind. Code § 8-1-40-5 over a monthly billing period, as was required under the Commission's Net Metering Rule. (*See* OUCC Br. at 30.) The OUCC offers no support for this position aside from the axiom that it is "'just as important to recognize what the statute does not say as it is to recognize what it' does say." *Id*. (quoting *State v. Dugan*, 793 N.E.2d 1034, 1036 (Ind. 2003)). The Distributed Generation Statute, however, does not specify the use of monthly netting period – or any netting period at all.

Unlike the Net Metering Rule, the Distributed Generation Statute omits the requirement that the difference between the electricity that is supplied by an electricity supplier to a customer, and the electricity supplied back to the electricity supplier by the customer, be netted or banked over the entire "billing period." *Cf*. Ind. Code § 8-1-40-5 and 170 I.A.C. 4-4.2-1(i). Contrary to the claims made in its Brief, the OUCC's position is not supported by the "plain language of I.C. § 8-1-40-5." (OUCC Br. at 27.) The OUCC is effectively asking the Court to read into the Distributed

Generation Statute an intent by the General Assembly to incorporate the "billing period" netting interval used in the Net Metering Rule.

The Commission appropriately declined to read words into the Distributed Generation Statute that are not found therein. *Perry-Worth Concerned Citizens v. Bd. of Comm'rs of Boone Cty.*, 723 N.E.2d 457, 459 (Ind. Ct. App. 2000), *trans. denied*. ("[A] court may not read into a statute that which is not the expressed intent of the legislature.") The Commission reasoned:

> [T]he Distributed Generation Statutes do not require the monthly or billing period netting which Intervenors' witnesses propose, and the timing of their proposed netting fails to recognize that the outflow measurement on the meter already is net of the amount of electricity supplied by Vectren South to meet the customer's load at the instant the outflow occurs.

(App. Vol. 2 at 50) (citation omitted).

The significance of the lack of a netting period was recognized by Appellants and their "counsel." William D. Kenworthy, Regulatory Director, Midwest for Vote Solar testified:

> I am not a lawyer but have been advised by counsel that Ind. Code § 8-1-40 *et. seq.* (the "DG Statute") does not require the Company to propose an instantaneous billing methodology. . . . I have been advised by counsel that the concept of some netting period is implied by the use of the word "difference," *and that the netting period is not specified in the statute*.

(Ex. Vol. 3 at 39) (emphasis added). Mr. Kenworthy even prepared a comparison of the instantaneous netting approach to hourly and monthly net billing. (*Id.* at 48.) During the evidentiary hearing, counsel for one of the intervening solar panel

companies likewise acknowledged that the timing of the netting period is not prescribed by statute:

> Q So if the timing of the netting is not prescribed by statute, wouldn't you agree with me that it's within the Commission's discretion to determine what netting interval they think is appropriate?
>
> A We're making the case right now for what we feel the statute says; the Commission will make a ruling on that.

(Tr. Vol. 2 at 64.) The OUCC itself has acknowledged the Commission has discretion to approve a netting period, different from a monthly billing period. (*See* App. Vol. 2 at 136.)[12]

If the General Assembly wanted to require electricity suppliers to continue to use a monthly netting period and allow distributed generation customers to "bank" their outflows, it could have done so, by incorporating the same "billing period" language in Ind. Code § 8-1-40-5 that is included in 170 I.A.C. 4-4.2-7. The General Assembly did not do so.

Not only is the OUCC's request that the Court read words into Ind. Code § 8-1-40-5 improper, but it contravenes the express intent of the General Assembly in enacting the Distributed Generation Statute, which was to end net metering on June

[12] The OUCC argued: "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). 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.

30, 2022, and limit the amount of distributed generation a utility must accept – and the utility's other customers must purchase.[13] In rejecting the OUCC's proposed interpretation, the Commission cited several provisions of the Distributed Generation Statute which evidence a legislative intent to eliminate the subsidy to distributed generation customers that was previously provided under the Net Metering Rule.[14] For instance, the Commission cited Ind. Code § 8-1-40-19, which it notes "provides . . . a means to eliminate any subsidy if the EDG tariff does not do so." (App. Vol. 2 at 54.) The Commission also noted that the General Assembly "capped the amount of net metering capacity on electricity suppliers' systems but placing no comparable cap on EDG." (*Id.* at 51.)

The Commission reasonably concluded that "the Distributed Generation Statutes are intended to be a transition away from the net metering construct for new [distributed generation] customers, with the primary value of [distributed generation] creation in the retail rate context being its offsetting of demand behind

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[13] *See* Ind. Code § 8-1-40-11(b), which provides: "[e]xcept as provided in sections 13 and 14 of this chapter, *after June 30, 2022: (1) an electricity supplier may not make a net metering tariff available to customers* . . . ." (emphasis added).

[14] It is well settled that the legislative intent as ascertained from an Act as a whole prevails over the strict literal meaning of any word or term used therein. *State v. George*, 273 Ind. 26, 401 N.E.2d 680 (1980); *Combs v. Cook*, 238 Ind. 392, 151 N.E.2d 144 (1958). When a court is called upon to construe words in a single section of a statute, it must construe them with due regard for all other sections of the act and with due regard for the intent of the legislature in order that the spirit and purpose of the statute be carried out. *Ind. State Highway Comm'n v. White*, 259 Ind. 690, 291 N.E.2d 550 (1973).

the meter. . . ." (App. Vol. 2 at 52.) This decision is supported by substantial record evidence and the language of the Distributed Generation Statute itself. Here, the General Assembly crafted statutory language to do precisely what it intended to do: transition away from net metering. This Court should decline the OUCC's request to read words into the Distributed Generation Statute that do not exist, and that would contravene this clear legislative intent.

B. The OUCC's proposed use of a monthly netting period would wholly undermine the General Assembly's intent in adopting the Distributed Generation Statute.

The OUCC's proposed interpretation of the Distributed Generation Statute, i.e., to continue to use a monthly netting period, undermines the General Assembly's intent and effectively renders the Distributed Generation Statute a nullity – a result the General Assembly cannot have intended. *See Gray v. D & G, Inc.,* 938 N.E.2d 256, 259 (Ind. Ct. App. 2010) ("In construing a statutory provision, we will assume that the legislature did not enact a useless provision."). Netting the two elements set forth in Ind. Code § 8-1-40-5 on a monthly basis, rather than instantaneously, results in an artificially low monthly bill for distributed generation customers, which differs only slightly – if at all – from what the customers would pay under the Net Metering Rule. This is because monthly netting falsely treats prior period outflows (which already are net of inflows at that moment) as having been "banked" for the distributed customer's future use – just as was the case under the Net Metering Rule.

To illustrate this result for the Commission, Vectren analyzed five distributed generation customer bills, using data gathered over the past twelve months. In the case of three of the five distributed generation customers, the analysis showed the

customer would be billed for *zero* consumption for most months of the year under a monthly netting paradigm, even though energy was provided by Vectren to those distributed generation customers and consumed throughout the year. (Ex. Vol. 1 at 56-58.) Another customer was billed for *no usage* during the entire twelve-month period. (*Id*. at 57.) A third customer was billed for only approximately half of their actual usage. (*Id*. at 58.) These customers would be billed for far less than their actual usage during these months, regardless of whether they were under Rider EDG or Rider Net Metering. In other words, if the OUCC had its way, the General Assembly's adoption of the Distributed Generation Statute would have little or no effect. The Commission considered this evidence (which the OUCC omitted from its Brief) when rejecting the OUCC's proposed interpretation of the Statute, advanced below and in this appeal. As the Commission summarized:

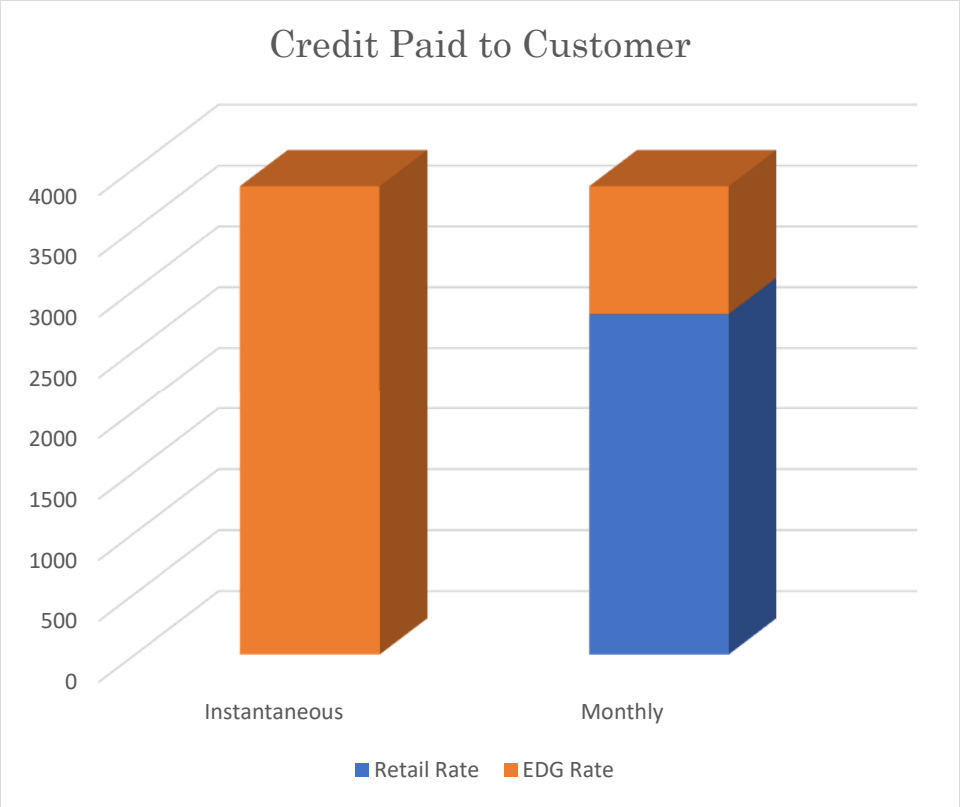
> [I]f the OUCC and Intervenors' view were adopted, the Commission finds it would result in over valuing EDG beyond what the statute directs. The result would, essentially, be a continuation of net metering under which Rider EDG customers could continue to bank their EDG on the utility's system at no charge until needed at some time later in the month, thereby also continuing to provide Rider EDG customers the retail rate allowed under net metering for "banked" excess generation throughout the month. Only at the end of the monthly netting period would excess energy returned to the grid by the distributed generator be valued at the EDG rate.

(App. Vol. 2 at 51.)

Said another way, instantaneous netting results in the electric supplier crediting the customer at the excess distributed generation rate for all electricity delivered to the Company's system – as opposed to the retail rate. *This is a change from the Net Metering Rule.* On the other hand, using a monthly netting period – the

result the OUCC advocates for – results in a distributed generation customer still being credited at the retail rate for a large portion of the electricity that is delivered to the electricity supplier' system.

By way of example only, in the case of the previously mentioned customer that would pay nothing for consumption under a monthly netting construct, the customer's distributed generation resource delivered approximately 3,850 kWh to Vectren over a 12-month period. (App. Vol. 2 at 187: customer "C3".) Using instantaneous netting through Vectren's smart meter, the customer would be compensated at the excess distributed generation rate for all 3,850 kWh that was delivered to Vectren's system – but would still have to pay for the electricity they consumed. On the other hand, using a monthly netting period, the customer would be compensated at the retail rate for approximately 2,800 kWh of the deliveries to Vectren's system and at the excess distributed generation rate for just 1,050 kWh. (*Id.*) In other words, most of the electricity delivered to Vectren's system by this customer would still be valued at the retail rate – as opposed to the new excess distributed generation rate as illustrated in the table below:



(Table populated with data from App. Vol. 2 at 187: customer "C3".) The result is that the customer would pay no volumetric charge for the electricity it consumed over the course of the year. (*Id.*)

The General Assembly made a policy decision to end net metering and the subsidy provided by Indiana electric customers to customers installing distributed generation resources. The Distributed Generation Statute recognizes that customer-owned distributed generation had reached a level of saturation that did not require further subsidization. *See* Ind. Code § 8-1-40-10 (establishing a cap on the amount of net metering). Moreover, the monthly netting construct is no longer necessary for distributed generation customers to offset future electricity needs with electricity generated and "banked" from previous times in the month. The Commission

recognized that if a distributed generation customer "wants to continue the monthly netting paradigm and use the electricity they produce over the course of a month to offset their consumption later in the month, they have the option to do so by installing additional behind the meter equipment such as a battery." (App. Vol. 2 at 54.)

Quite simply, the General Assembly could not have intended for distributed generation customers to continue being compensated at the retail rate for any of the electricity produced by their distributed generation resources – let alone most of it. As the Commission aptly noted, "[w]e do 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." (App. Vol. 2 at 51.) For this additional reason, the OUCC's challenge to the Commission's Order should be rejected.

C. Instantaneous netting results in just and reasonable rates.

Without any explanation, the OUCC claims in its Summary of Argument[15] the "Commission's interpretation of 'excess distributed generation' conflicts with the core role of the Commission, to ensure the establishment of just and reasonable rates," and results in "rates that are not 'just and reasonable.'" (OUCC Br. at 20.) To the contrary, monthly netting – the result advocated for by the OUCC – would result in unfair and unreasonable rates, as non-distributed generation customers would be required to subsidize distributed generation customers every month.

[15] This argument appears only in the OUCC's Summary of Argument, but is not expanded upon or otherwise mentioned anywhere else in the Brief.

In reaching its conclusion that instantaneous netting results in just and reasonable rates, the Commission cited, among other examples, the Vectren customer (discussed on page 44 above) that would be billed for "zero consumption eleven of twelve months," even though the "customer used energy Petitioner supplied throughout the year." (App. Vol. 2 at 52.) The Commission concluded charging such customers for zero consumption is not just and reasonable because they do not "operate on Vectren South's system at zero cost, and the energy [they] consumed over the year was not purchased or produced by Vectren South at no cost." (*Id*.) The Commission further found subsidization of these customers by non-distributed generation customers is not just and reasonable, explaining: "[w]e cannot conclude it is just and reasonable for Petitioner's other customers to subsidize the [investment] payback periods of [distributed generation] customers by the continuation of monthly netting as opposed to instantaneous netting." (*Id*. at 53.)

Instantaneous netting, on the other hand, results in a Rider EDG customer paying for the energy they are supplied by the electricity supplier, no more and no less, at the electricity suppliers' Commission-approved rate. Likewise, instantaneous netting compensates the distributed generation customer for the amount of energy they produce in excess of the amount supplied by the electricity supplier at the excess distributed generation rate established by the General Assembly, which includes a 25% adder over the wholesale cost of energy. As such, the OUCC's claim that the Order results in rates that are not just and reasonable should be rejected.

CONCLUSION

For the foregoing reasons, the Commission's Order should be affirmed.

Respectfully submitted,

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WORD COUNT CERTIFICATE

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

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CERTIFICATE OF SERVICE

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