BEFORE THE

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE INDIANA UTILITY REGULATORY COMMISSION'S INVESTIGATION INTO THE PUBLIC UTILITY STATUS OF DISTRIBUTED ENERGY RESOURCE AGGREGATORS.	**)**	**CAUSE NO. 46043**

INDIEC'S PROPOSED ORDER

The Indiana Industrial Energy Consumers, Inc. ("INDIEC"), by counsel, files its Proposed Order of the Commission.

Respectfully submitted,

LEWIS & KAPPES, P.C.

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ORDER OF THE COMMISSION

On April 17, 2024, the Indiana Utility Regulatory Commission ("Commission") issued an order commencing an investigation for the sole, limited purpose of considering whether distributed energy resource ("DER") aggregators are "public utilities" under Indiana law.

In accordance with Ind. Code § 8-1-2-51, the Commission designated Ren Norman, Senior Utility Analyst in the Research, Policy, and Planning Division, as Commission testimonial staff to conduct this investigation, with representation by the Commission's Office of General Counsel. The Indiana Office of Utility Consumer Counselor ("OUCC") was included as a party to participate in this proceeding pursuant to Ind. Code § 8-1-1-5 and Ind. Code ch. 8-1-1.1. Notice of the investigation was provided to Indiana's jurisdictional rate-regulated electric utilities. We also stated that notice should be provided to all known potential DER aggregators and to all entities that have participated in the Commission's roundtable meetings concerning the implementation of Order 2222.

Petitions to intervene were filed by Southern Indiana Gas and Electric Company d/b/a CenterPoint Energy Indiana South ("CEI South"), Indiana Michigan Power Company, Inc. ("I&M"), Indianapolis Power & Light Company d/b/a AES Indiana ("AESI"), Duke Energy Indiana, LLC ("Duke"), Northern Indiana Public Service Company LLC ("NIPSCO"), Wabash Valley Power Association, Inc. d/b/a Wabash Valley Power Alliance ("Wabash Valley"), Hoosier Energy Rural Electric Cooperative, Inc. ("Hoosier Energy"), the Citizens Action Coalition of Indiana, Inc. ("CAC"), Advanced Energy United, Inc. ("United"), Northeastern Rural Electric Membership Cooperative ("Northeastern"), Tipmont REMC ("Tipmont"), and the Indiana Industrial Energy Consumers, Inc. ("INDIEC").[1] Each of these petitions were subsequently granted by the Commission. No individual DER aggregator moved to intervene.

The Commission held a prehearing conference and preliminary hearing on May 22, 2024, at 1:30 p.m., in Room 222 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana. On May 29, 2024 the Commission issued a Prehearing Conference Order, establishing a procedural schedule for this Cause. A Technical Conference was held on June 11, 2024 at 1:30 P.M. in Room 222 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana.

[1] The individual names of INDIEC's members are listed in Appendix A to INDIEC's Petition to Intervene.

On July 15, 2024, the Commission's designated Testimonial Staff ("Staff") submitted an initial brief regarding the public utility status of DER aggregators and prefiled testimony addressing the same. A group of interveners collectively referred to as the Indiana Investor-Owned Electric Utilities ("IOUs")[2] submitted comments on the issue, which were subsequently joined by Wabash Valley, Hoosier Energy, Tipmont, and Northeastern.[3] In their respective filings, Staff and the Utilities[4] asserted that DER aggregators are "public utilities" under Indiana law, and therefore are subject to Commission jurisdiction. In contrast, United submitted a legal brief and prefiled testimony asserting that DER aggregators are not "public utilities" as defined under Indiana Code § 8-1-2-1(a).

On August 5, 2024, various parties filed or joined in the filing of responsive briefs. One such party, INDIEC, submitted a responsive brief asserting that DER aggregators are not "public utilities" under Indiana law. In addition, United submitted its Rebuttal Testimony, which included the testimony of John D. Albers, Director of Regulatory for Illinois, Michigan, and Indiana at United.

On August 19, 2024, Northeastern filed a motion to strike certain portions of INDIEC's responsive brief or, in the alternative, for leave to file supplemental comments in response.[5] On August 20, 2024, INDIEC filed its Response in Opposition to the Motion. On August 22, 2024, Northeastern and the IOUs filed a Joint Response to INDIEC's Opposition to the Motion. During the evidentiary hearing, the Presiding Officers denied the Motion to Strike.

The Commission noticed this matter for an evidentiary hearing at 9:30 a.m. on August 27, 2024 in Hearing Room 222 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana.

Based upon the applicable law and evidence presented, the Commission now finds:

1. <u>Commission Jurisdiction and Notice</u>. The Commission initiated this proceeding pursuant to Ind. Code § 8-1-2-58. We will address our jurisdiction, and our authority to issue the declaratory relief regarding Distributed Energy aggregators, in our Findings. Pursuant to the provisions of Ind. Code §8-1-2-58, we provided notice to all "Indiana's jurisdictional rate-regulated electric utilities", the OUCC, participants in the IURC's roundtable meetings concerning the implementation of Order 2222, and "all know potential DER aggregators."

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[2] The group of interveners collectively referred to as the Indiana Investor-Owned Electric Utilities consists of the following: CEI South, I&M, AESI, Duke, and NIPSCO.

[3] In addition to joining in the comments filed by the IOUs, Northeastern also submitted its own Initial Brief.

[4] Given the parallels between the IOUs filing and the separate brief submitted by Northeastern, who, along with the other REMC entities, also joined in the IOU's filing, the IOUs and the REMC entities will be referred to collectively as the "Utilities."

[5] The IOUs joined in the Motion to Strike or, in the Alternative, Motion for Leave to File Supplemental Comments filed by Northeastern.

2. Characteristics of the Parties. Five of the intervening parties –CEI South, I&M, AESI, Duke, and NIPSCO – are investor-owned public utilities, as defined in Ind. Code § 8-1-2-1(a), that render retail electric public utility service in Indiana. Additionally, these parties own, operate, and manage, and control, among other things, utility plant and equipment within Indiana that is used for the production, transmission, delivery, and furnishing of electric public utility service.

INDIEC is a 501(c)(6) organization made up of over 20 member companies who are large, energy-intensive users of electricity in Indiana. INDIEC has members who are customers of each of the five electric public utilities in the state, as well as members served by other providers including REMCs and municipal electric utilities. Further, a number of INDIEC members participate in demand response programs and/or own and operate self-generation facilities, or are actively considering the installation of such units.

United is a District of Columbia corporation that is registered with the Indiana Secretary of State. United is a national trade association that represents more than 100 companies and organizations with operations related to the advanced energy industry.

CAC is an Indiana non-profit corporation made up of approximately 40,000 members. Many of the CAC's members individuals and families who are residential retail utility customers.

Northeastern and Tipmont are non-profit rural electric membership cooperatives ("REMCs") organized and existing pursuant to the laws of the State of Indiana. Northeastern and Tipmont supply power to thousands of households and business in their respective service territories.

Wabash Valley is a mutual benefit non-profit organization existing pursuant to the Indiana Non-Profit Corporation Act, as amended. Wabash Valley's members include rural electric membership corporations located generally in the northern part of the State of Indiana.

Hoosier Energy is a rural electric cooperative corporation organized and existing pursuant to the laws of the State of Indiana. Hoosier Energy is a general district corporation as described in I.C. § 8-1-13-23 and has seventeen local district corporation members in Indiana and one electric cooperative member in Illinois.

The OUCC is the state agency representing ratepayer interests in cases before state and federal utility regulatory commissions.

3. Purpose of Investigation. On September 17, 2020 the Federal Energy Regulatory Commission ("FERC") issued Order 2222 ("Order 2222"), revising its rules and requiring regional transmission organizations ("RTOs") to allow participation of distributed energy resources ("DERs") in the wholesale electricity markets through DER aggregators and aggregations. FERC's rule revision is intended to enable DERs to participate alongside traditional resources in RTO wholesale electricity markets through aggregation. DER aggregators will serve as the

aggregation's wholesale market participant, allowing several types of DERs to aggregate in order to satisfy minimum size and performance requirements that each individual DER might not be able to meet on its own.

In 2022, Ind. Code ch. 8-1-40.1 was enacted, explicitly providing the Commission with rulemaking authority to implement Order 2222 and allowing the Commission to develop or amend rules as may be necessary to ensure appropriate participation of the DER aggregators in the wholesale markets as envisioned by Order 2222. On April 17, 2024, the Commission opened this investigation for the sole, and express, purpose of allowing the Commission to consider the public utility status of DER aggregators.

4. Summary of Evidence and Parties Positions.

Only two of the parties have offered evidence in this case: the Commission's designated Testimonial Staff ("Staff") and United.

A. Initial Testimony and/or Briefs.

1. Testimonial Staff. Staff Witness Ren Norman and Staff's initial brief, asserts that all DER Aggregators participating in wholesale market transactions and conducting business in Indiana are "public utilities" under Indiana law, and therefore are subject to Commission jurisdiction. *Staff Initial Brief at 10*; *Staff Ex. 1 at 18*.

In support of this view, Staff notes that to be a public utility in Indiana, an entity must both: (1) own, operate, manage, or control plant or equipment within the state for the production, transmission, delivery, or furnishing of power under Ind. Code 8-1-2-1(a); and (2) do so directly or indirectly to an indefinite public under Ind. Code 8-1-2-1(g)(2). *Staff Initial Brief at 9.* Staff asserts that through contractual arrangements with its customers/clients, who are the owners of the DER assets in aggregation, DER Aggregators will operate, manage, and control the DER owners' equipment and coordinate the market participation of their clients' assets. Staff further claims that the energy and other market products that DER Aggregators sell on the wholesale electricity markets are clearly for the benefit of, and will be available to, an indefinite and undifferentiated public, be it directly or indirectly. *Staff Initial Brief at 10*. Staff asserts that, due to the nature of these activities, a DER Aggregator meets the definition of a public utility under Indiana law. *Id.*

2. United. United Witness John D. Albers (Director of Regulatory Policy) and United's initial brief assert that DER Aggregators, regardless of their business model, should not be defined as public utilities under Indiana Law. *United Initial Brief at 1-2*; *United Ex. 1 at 6-7*.

In support of this view, United states that DER Aggregators do not carry out a business impressed with a public purpose; their operations, agreements, and purpose, are private. United further states that while DER Aggregators occasionally manage or control a DER, they do so only at the request, via contract, of the end user and thus, this degree of control does not render DER Aggregators public utilities. *United Initial Brief at 4*. In regards to aggregation contracts for ancillary stored power from batteries primarily used to serve their owner's load, United stated that

such resources are not indivisible from the utilities' operations and should not place DER Aggregators within the scope of a public utility under Indiana law. *United Initial Brief at 7*.

United further states that the potential for certain DER Aggregators to direct the export of power from behind the meter batteries does not render those DER Aggregators public utilities under IC 8-1-2-1(a). *United Initial Brief at 5*. United explains that unlike public utilities, who are responsibility for generating and delivering power to their customers, the DER Aggregator does not take ownership of any power. Rather, ownership remains with the battery owner until the power enters the grid and the utilities retain control of their entire production, collection, and distribution systems. DER Aggregators simply provide a service to DER owners and utilities.

3. Utilities. The Utilities, in the briefs of the Investor-Owned Utilities and Northeastern, assert that DER Aggregators are sufficiently affected with a public interest to be treated as public utilities because they sell energy indirectly to the public, hold themselves out as ready and willing to conduct public business, and a bad actor could potentially discriminate in serving customers. *Comments of IOUs at 1*. *See also Northeastern Initial Brief at 3*.

In support of this view, the Utilities claim that while DER Aggregators are different from traditional public utilities that may own a plant that produces energy or power lines that distribute that energy to consumers, DER Aggregators "manage" and "control" DERs and thus, fall within the plain meaning of public utility under Ind. Code section 8-1-2-1(a). *Comments of IOUs at 3*. The Utilities further state that DER Aggregators indirectly sell energy to the undifferentiated public in that they may make wholesale sales of electricity to other utility companies that would in turn sell indiscriminately to consumers. *Comments of IOUs at 5-6*. Moreover, the Utilities claim that DER Aggregators do not limit their services to defined privileged groups but rather, hold themselves out as ready and willing to conduct public business. *Comments of IOUs at 6*.

B. Response Testimony and/or Briefs.

1. Testimonial Staff. Staff responded to United's Initial Brief through a Responsive Brief. Staff asserts that having acknowledged that DER Aggregators operate, manage, and control plant and equipment for the provision of power to utilities, via the markets, and thus ultimately to end-use customers, United cannot also insist that because operational control over those assets may be "occasional," or that because DER Aggregators do not directly sell or distribute electricity to the public, that these inactions somehow detract from the DER Aggregators public utility status. *Staff Response Brief at 5*.

2. United. United states that DER Aggregators that rely entirely on demand response are not public utilities because they are acting, by way of contract, in response to a call for demand flexibility on behalf of the DER owner and managing equipment only as a contractor for the DER owner. *United Response Brief at 2-3; United Ex. 2 at 6*. United further states that to focus on the management of equipment within the state in determining whether DER Aggregators are public utilities falls short because demand response does not produce, transmit, deliver, or furnish power, as required by IC 8-1-2-1(a). *United Response Brief at 3*. United also notes that

federal precedent is persuasive in determining that demand response aggregation at the wholesale level does not make an aggregator subject to state regulation. *United Response Brief at 4*.

United also responds to an argument posited in Witness Norman's direct testimony on behalf of Staff, in which he states that demand response provides otherwise unavailable power and scarce resources to an undifferentiated public and thus furnishes power to others. United states that if this argument were accepted as true, it would render all energy users who reduce demand subject to the public utility label.

3. Utilities. The Utilities also responded to United's Initial Brief and Direct Testimony with additional briefing. In response to United's claim that aggregators do not sufficiently operate, manage, or control DERs to be public utilities, the Utilities claim that DER Aggregators more than "occasionally" operate, manage, and control DERs. Moreover, Utilities note that Section 8-1-2-1 of Indiana Code does not contain a de minimus exception and thus, DER Aggregators fall within the plain meaning of 8-1-2-1 regardless of the extent to which they operate, manage, or control DERs. *Utilities Response Comments at 2*.

The Utilities also respond to United's claim that DER Aggregators are not sufficiently impressed with a public purpose to be public utilities because their operations, agreements, and purpose are private. The Utilities state that in arguing that the private agreements that exist between DER Aggregators, customers, and utility companies preclude a finding that DER Aggregators are public utilities, United implies that only those companies that offer tariffed services can be public utilities, which contradicts established precedent. *Utilities Response Comments at 6*. The Utilities also note that most existing public utilities utilize bilateral contracts with private customers yet these arrangements are subject to regulation by the Commission.

Lastly, the Utilities respond to United's claim that DER Aggregators do not satisfy the IC 8-1-2-1 requirement that companies serve the public "directly or indirectly." *Utilities Response Comments at 8*. The Utilities state that DER Aggregators serve the public directly through their operation, management, and control of DERs owned by residential and commercial customers. The Utilities further state that Aggregators' "one step removed" furnishing of power to consumers is indirect furnishing of power sufficient to satisfy IC 8-1-2-1.

4. INDIEC. INDIEC, in its responsive brief, points out that the Commission's investigation here is in the nature of a declaratory judgment action and thus, falls beyond the Commission's scope of authority. *INDIEC Responsive Brief at 4-5*.

INDIEC further states that in their initial briefs, the parties mistakenly focused solely on whether DER Aggregators are providing services "directly or indirectly to the public," rather than also considering whether any service that is being rendered is, in fact, public in nature. *INDIEC Responsive Brief at 6-7*. INDIEC asserts that DER Aggregators cannot, as a class, be found to be public utilities because the DERs being aggregated are privately owned, limited access to the DERs is given to DER Aggregators only by private contract, and the DER Aggregator is performing a delegated function that the DER owner could itself provide without becoming a public utility.

INDIEC Responsive Brief at 8-9. INDIEC further emphasizes that if the IURC were to determine the public utility status of DER Aggregators, it should only be done on a case-by-case basis. *INDIEC Responsive Brief at 10*.

INDIEC also asserts that imposing state regulation on DER Aggregators as public utilities would conflict with federal jurisdiction already being exercised by FERC. *INDIEC Responsive Brief at 9*. INDIEC explained that FERC recognized a role for state regulatory authorities only with respect to interconnections with utility systems and related dealings with state-regulated utilities, as those functions are incident to the Commission's existing jurisdiction over retail utilities in Indiana. This role, however, does not extend to asserting jurisdiction over the FERC-authorized participation of DER Aggregators in the FERC-regulated wholesale market.

Lastly, INDIEC notes that the underlying purpose of FERC Order 2222 is to facilitate the entry of DER Aggregators into wholesale markets so as to allow the capabilities of DERs to be efficiently utilized. INDIEC states that state regulation of DER Aggregators as "public utilities" would frustrate that purpose by erecting barriers to entry and adding layers of regulatory inefficiency. *INDIEC Responsive Brief at 14*.

5. Commission Discussion and Findings

We initiated this proceeding with the express purpose of allowing "the Commission consider the public utility status of DER aggregators." *April 17, 2024 Order Initiating Investigation at Ordering ¶2*. In stating that we found it "appropriate to initiate this investigation to review and consider the public utility status of a DER aggregator," we further stated that "[s]uch determination will govern how and who the Commission regulates in any wholesale market participation rule to be developed." *Id. at 1 & n. 1*.

In support of our authority to initiate this proceeding, we cited Indiana Code 8-1-2-58, which authorizes us to investigate "any matters relating to any public utility." We also cited *Hidden Valley Lake Property Owners Assoc. v. HVL Utilities*, 408 N.E.2d 622, 629 (Ind. Ct. App. 1980), for the proposition that we have "the authority to determine whether a person or entity is a public utility under Indiana law" and, therefore, possess jurisdiction in this matter. *April 17, 2024 Order Initiating Investigation at 1-2*. In light of INDIEC's submission questioning our jurisdiction to make determinations with respect to the status of DER aggregators as public utilities, we look afresh at this conclusion.[6]

[6] In response to arguments that INDIEC could not raise the Commission's lack of authority or jurisdiction to initiate this proceeding at the responsive submission stage, we must respectfully disagree. It is settled law that the lack of subject matter jurisdiction may be raised at any time in a proceeding, even on appeal, as it cannot be waived. *See Town Council v. Parker*, 726 N.E.2d 1217, 1223 n.8 (Ind. 2000). Not only that, but any order issued without subject matter jurisdiction is considered void ab initio, having "no effect whatsoever." *See In re Adoption of L.T.*, 9 N.E.3d 172, 175 (Ind. Ct. App. 2014). If we failed to review our authority to act, then, we would establish a potentially ineffective order, and any rule derived from that invalid order would be subject to adverse scrutiny.

Subject matter jurisdiction is "the power to hear and determine cases of the general class to which any particular proceeding belongs." *K.S. v. State*, 849 N.E.2d 538, 540 (Ind. 2006). As with a trial court, this Commission must possess subject matter jurisdiction in order to issue a valid judgment in any case. *See, e.g., DSG Lake, LLC v. Petalas*, 156 N.E.2d 677, 688 (Ind. Ct. App. 2020). Our jurisdiction is defined by statute. As courts have said, "the IURC derives its power solely from the legislature; if the power to act has not been conferred by statute, it does not exist." *S.E. Ind. Nat. Gas v. Ingram*, 617 N.E.2d 943, 947 (Ind. Ct. App. 1993). The necessary statutory basis for our jurisdiction is further reflected in the appellate decisions stating that "any doubt about the existence of [our] authority must be resolved against a finding of authority." *Id., citing United Rural Electric v. Ind. & Michigan Electric Co.*, 549 N.E.2d 1019, 1021 (Ind. 1990).

While we may have the power to investigate issues related to public utilities pursuant to Indiana Code §8-1-2-58, and while we may possess certain inherent authority necessary to effectuate the statutory scheme, it has been established that we do not have the power to issue declaratory judgments. Indeed, regardless of any authority we do possess, Indiana's courts have consistently made it expressly clear that we lack the ability to "enter judgments which determine the parties' rights, status, or legal relationship, even when the subject matter of the determination appears to fall within the IURC's broad grant of authority." 617 N.E.2d at 948. *See also, Netflix, Inc. v. City of Fishers*, 212 N.E.3d 188, 193 (Ind. Ct. App. 2023) ("The courts of this state have already concluded that the IURC does not possess the power to make declaratory rulings in the manner contemplated by the Declaratory Judgment Act."); *U.S. Steel v. NIPSCO*, 482 N.E.2d 501, 506 (Ind. Ct. App.), *reh. denied*, 486 N.E.2d 1082 (1985) ("There is nothing in the [Commission's] enabling acts which authorizes it to issue declaratory relief. Thus, the [Commission] is without jurisdiction or authority to issue declaratory rulings."); *Kentucky-Indiana Municipal Power Assn v. Public Service Co.*, 181 Ind. App. 639, 645, 393 N.E.2d 776, 780 (1979) (affirming Commission's dismissal of petition which "involved a determination of their rights, status, and legal relations under various statutes")

We initiated this proceeding with the stated purpose of evaluating the status of DER aggregators as public utilities under Indiana law. Our determination of whether a party is, or is not, a public utility, however, carries with it substantial legal consequences as it amounts to an assertion of regulatory authority over that entity, except to the extent we decline to exercise such authority pursuant to Indiana Code ch. 8-1-2.5. Indeed, in initiating this proceeding, we recognized that our conclusions with respect to the status of DER aggregators as public utilities "will govern how and who the Commission regulates in any wholesale market participation rule. . . ." Our determination of whether DER aggregators, as a class of entities, are, or are not, public utilities then, fits squarely within the authority granted exclusively to the state's trial courts by the Declaratory Judgment Act, Ind. Code ch. 34-14-1. Therefore, we must conclude we lack jurisdiction to make a determination of the public utility status of an entire class of entities in this proceeding.

The Court of Appeal's decision in *Hidden Valley Lake Property Owners*, is not contrary to the proposition that an investigative determination of that sort is beyond our power. Rather, in *Hidden Valley*, the case was brought before the Commission by the subsidiary of a property

developer which was then alleged to be, itself, acting as a public utility. 408 N.E.2d at 625. The Court of Appeals held that only "when requested under appropriate circumstances" do we have authority to determine if a party before us is a public utility.

That holding, however, is not the same as a statutory grant of power to determine the public utility status of any entity at any time. In fact, that exact proposition was rejected by the Court of Appeals in *U.S. Steel v. NIPSCO,* 486 N.E.2d 1082, 1086-87 (Ind. Ct. App. 1985), *on rehearing*. In that case, the Court explained that it is only after the Commission's power is properly invoked that we can "hear evidence and then resolve [a dispute as to an entity's status as a public utility] as one of several factual issues in the matter before it." *Id*. at 1086. Indeed, in cases such as those involving BP Products, U.S. Steel and even matters involving entities such as wholesale generators, the question of a party's status as a public utility was an issue in a case properly before us, which needed to be resolved to adequately resolve the matter presented. *See NIPSCO, U.S. Steel and ArcelorMittal, Consolidated Cause Nos. 43363 & 43369 (May 11, 2010) (among other claims an allegation by NIPSCO that U.S. Steel was acting as a public utility by selling electricity to ArcelorMittal, thereby violating NIPSCO's exclusive electric service territory) vacated in part by U.S. Steel v. Northern Indiana Public Service Co.*, 951 N.E.2d 542 (Ind. App. 2011), *trans. denied*, 963 N.E.2d 1119 (Ind. 2012), *BP Products, Cause No.* 43525 (May 13, 2009*) at 1-2 (describing relief requested by BP seeking finding that the company was not a public utility, or, alternatively, a declination of jurisdiction pursuant to I.C. 8-1-2.5-5) reversed in part and remanded by BP Products v. OUCC*, 947 N.E.2d 471 (Ind. Ct. App.) *modified on rehearing*, 964 N.E.2d 234 (2011). Here, on the other hand, we initiated this proceeding *sua sponte*, to determine the status of an entire class of entities, none of whom were brought before us, or even appeared in this case.

We further note that neither FERC Order 2222, nor Indiana Code §8-1-40.1, require us to make a finding of the public utility status of DER aggregators in order to manage their participation in the wholesale market. Rather, FERC Order 2222 leaves to state regulators the role of coordinating DER aggregator participation. This role includes the development of interconnection rules, rules and means of conflict resolution regarding issues such as data sharing, and overseeing the distribution utility's relationship with DER aggregators. *FERC Order 2222 at ¶61*. None of those functions requires a finding of the public utility status of DER aggregators, and all can clearly be addressed through our existing authority over Indiana's existing utilities. For example, we can clearly set appropriate standards for interconnection rules, and hold the state's public utilities accountable if their rules are unreasonable or their practices unfair, without determining if a complaining a DER aggregator is, or is not, a public utility. Similarly, our authority over retail utilities is sufficient to support rules for data sharing, or to establish a complaint process for problems between aggregators and public utilities. Likewise, we can reasonably assume that the State's trial courts will be capable of addressing the contractual obligations of aggregators and DER owners who voluntarily contract with them, or resolve disputes in situations where aggregators allegedly employ unfair business practices. In short, the role assigned to us by FERC Order 2222 does not depend on our regulation of DER aggregators as public utilities.

Nor does our rulemaking authority under Indiana Code 8-1-40.1, require a finding of public utility status, either explicitly or implicitly. Indeed, the statute makes no reference to the phrase "public utility" and it grants us authority only to implement rules "necessary to implement" FERC Order 2222. As discussed above, nothing in FERC Order 2222 requires that our regulatory role is dependent on DER aggregators being found to be "public utilities" under Indiana law.

In sum, while we possess authority to determine the status of a party in a case before us when necessary to resolve that case, we do not have the subject matter jurisdiction to issue declaratory judgments of the scope, and under the circumstances, proposed here. Nothing under Indiana statute obligates us to determine whether DER aggregators are public utilities for purposes of rulemaking, and our ability to implement FERC Order 2222 is not dependent upon such a finding. In keeping with the long history of decisions by Indiana courts that any doubts about our jurisdiction must be resolved against the assertion of authority, we must conclude we do not have jurisdiction to declare the status of DER aggregators as public utilities in this proceeding.

Even if that were not the case, we cannot make a finding that DER aggregators as a class are public utilities, or that this is the appropriate means to reach a conclusion on that issue.

The question of public utility status begins with Indiana Code §8-1-2-1, which provides that a public utility must "own, operate, manage, or control any plant or equipment within the state for the . . . production, transmission, delivery, or furnishing of heat, light, water, or power [either directly or indirectly to the public]." However, as Indiana courts have recognized:

> It is an essential requirement that a business must in some way be impressed with a public interest before it may become a public utility. Accordingly, whether the operator of a given business or enterprise is a public utility depends on whether or not the service rendered by it is of a public character and of public consequence and concern, which is a question necessarily dependent on the facts of the particular case.

See U.S. Steel., 482 N.E.2d at 506 (*quoting Foltz v. City of Indianapolis*, 234 Ind. 656, 675, 130 N.E.2d 650, 659 (1955), and 73 C.J.S, Public Utilities §2, p. 991).

In *Foltz*, the Court further explained the difference between *public* entities subject to regulation and *private* entities:

> The early test of a public calling or business was a "holding out" to the public in a particular trade. This was based upon a fundamental concept that business was of two classes: public and private. Thus, we have the term "common" carrier, or "common" innkeeper or "common" smithy as distinguished from one who engaged in the act only casually or on special agreement or contract.

Foltz, 234 Ind. at 667-668, 130 N.E.2d at 655.

When analyzing the "public character and consequence" of specific arrangements, Indiana courts are very careful to recognize this distinction, holding that simply because an entity is providing a utility service to another does not necessarily render that entity a "public utility" under Indiana law. *See, e.g., U.S. Steel v. Northern Indiana Public Service Co.*, 951 N.E.2d 542 (Ind. App. 2011), *trans. denied*, 963 N.E.2d 1119 (Ind. 2012); *BP Products v. OUCC*, 947 N.E.2d 471 (Ind. Ct. App.) *modified on rehearing*, 964 N.E.2d 234 (2011). Rather, the courts in these cases analyzed the particular nature of the specific arrangement to determine whether, or not, the entity was providing "public utility" service or simply engaged in a private arrangement.

Undeniably, the DERs being aggregated are privately owned and devoted to the private use of consumers. Those owners, by private contract, are delegating limited access to DER aggregators for the limited purpose of providing a system benefit collectively which the DERs individually could not provide on their own. As explained in United Ex. 1 at p.7, that access applies only during called events, and otherwise the DER owner retains full operational control. If, however, the provision of such private resources by an aggregator is a public utility service, then we cannot see a line separating individual DER owners providing its own resource from being considered public utilities. Indeed, this line of thinking implies that a homeowner who voluntarily turns down a water heater a few degrees, or willingly puts on a sweater rather than turn up the heat on the coldest day of the year, is offering public utility service. That perspective cannot be sustained.

Moreover, we find nothing in the record which indicates that the arrangements between a hypothetical DER aggregator and a DER owner, or owners, will be anything other than a private contract. Rather, the testimony of Mr. Albers indicates that multiple private business models exist to provide aggregation services, *United Ex. 1 at 6*, a fact collaborated by Staff and the utilities. *See Staff Ex. 1 at 18-20*. Indeed, Staff acknowledges that there may be potential business models not yet developed. *Id. at 18*. The theory advanced by Staff and the Utilities appears to be a conclusory assumption that because a DER Aggregator can remotely control the property of another party, or inject energy into the grid, then it must, therefore, be impressed with the public interest. *See* Staff Ex. 1 at 15,19; Utilities Brief at 3-4. That assumption, however, does not account for the context where DERs are privately owned consumer resources, limited access is available only by private contract, and the Aggregator is performing a delegated function that the DER owner could itself provide without becoming a public utility.

We are concerned with taking an absolutist, and categorical, approach in light of the differences between existing DER aggregation models and the host of potential models. Indiana law recognizes that public utility status is dependent on the particular facts presented, requiring a fact-specific analysis that is not present here. *See Foltz*, 234 Ind. at 675, 130 N.E.2d at 659; *U.S. Steel*, 951 N.E.2d at 553; *BP Products*, 947 N.E.2d at 478; *U.S. Steel*, 482 N.E.2d at 506. That concern is only heightened when no actual aggregator participated in this case, and most testimony supporting a finding of public utility status relies on third-party sources rather than direct, personal knowledge. Accordingly, it would be inappropriate to determine on this record that any, much less all, DER aggregators are public utilities. This is especially true since none were shown to be operating in Indiana, and a categorical determination today which encompasses a hypothetical construct tomorrow could have drastic and unforeseen consequences.

In addition, an assertion of regulatory control over all DER aggregators would potentially conflict with existing law in at least some respects. For example, electric vehicles and their charging equipment are addressed by statute with specificity at Ind. Code §8-1-2-1.3. Under that statute, an entity which owns or operates EV charging equipment for sale or use by the public is specifically "not a public utility." *Id.* §1.3(d). In addition, the private provision of electric energy for EV charging does not render the owner or operator a "public utility" and does not render such provision of electricity "a public utility service." *Id.* §1.3(e). Despite those explicit legislative determinations, the positions put forward by Staff and the Utilities would have the Commission nevertheless find the aggregation of such DERs does constitute a public utility service.

Similarly, the proposition that any export of energy to the grid constitutes a public utility service subject to regulation under Indiana law is clearly an overstatement. In particular, Qualifying Facilities (QFs) such as cogeneration and small power production units are authorized by both federal and Indiana law to sell excess power onto the grid. *See 16* U.S.C. §824a-3(a)*;* Ind. Code §§8-1-2.4-4(a), -6(a). Such entities, however, do not become subject to regulation as public utilities. *See* 170 Ind. Admin. Code §4-4.1-3 ("Qualifying facilities shall be exempt from revenue requirement and associated regulation under IC 8-1-2 as administered by the Indiana utility regulatory commission," except for terms of transactions between QFs and public utilities); 16 U.S.C. §824a-3(e)(1)*;* 18 C.F.R. §292.602(c). *See also Whiting Clean Energy,* Cause No. 45071 (Feb. 20, 2019) at 13 ("WCE will be subject to regulatory treatment as a QF but is no longer a 'public utility' for purposes of Indiana law."). At least some DERs might be certified as QFs by FERC, and those facilities will not be subject to public utility regulation under Indiana law; yet a categorical declaration of aggregators as public utilities would subject them to a form of regulation which is not consistent with state or federal law.

There is no bright line that transactions in the wholesale market automatically makes an entity a public utility under Indiana law. Indeed, the indirect relation of the aggregator to both the physical equipment and any energy sold, purely for resale, does not support public utility status under Indiana law. *See United States Gypsum, Inc. v. Indiana Gas Co.,* 735 N.E.2d 790, 795-96 (Ind. 2000) (finding joint venture performing gas supply functions for regulated utilities was not itself a public utility; "ProLiance performs services for the Utilities, not for the Utilities' retail customers"); *id.* at 796 n.4 (finding "little statutory support" for the proposition that "the definition of 'public utility' includes an entity that indirectly furnishes gas to the public"). Furthermore, MISO and PJM have operational control over transmission assets in Indiana and administer wholesale markets, but the impact of those functions on retail service in the State does not subject them to regulation as public utilities under Indiana law.

It is, then, unnecessary, and premature, to categorically assert that all, any, or no DER aggregator is, or will ever be, a "public utility" under Indiana law. As a matter of law, public utility status is a fact-sensitive issue dependent on the specifics of a given case. Therefore, the categorical declaration sought by Staff and the Utilities is inappropriate and is rejected.

Because we have concluded that we lack the jurisdiction and authority to issue a declaratory judgment as to the public utility status of DER aggregators as a class, that it is not

necessary to do so under FERC Order 2222 or for purposes of making rules pursuant to Indiana Code ch. 8-1-40.1, and because doing so would be contrary to established Indiana case law, this investigation is closed without any finding as to the public utility status of Aggregators as a class. We will proceed with the rulemaking contemplated by Ind. Code §8-1-40.1-4 with the benefit of the views and positions presented by the parties in this matter and further solicited in the rulemaking process.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION THAT:

1. This Investigation is closed without determination as to the public utility status under Indiana law of DEG aggregators.

2. Rulemaking as required by Ind. Code ch. 8-1-40.1 will proceed in order to implement FERC Order 2222.

3. This Order shall be effective on or after the date of its approval.