

# STATE of INDIANA

INDIANA UTILITY REGULATORY COMMISSION  
101 WEST WASHINGTON STREET, SUITE 1500 EAST  
INDIANAPOLIS, INDIANA 46204-3419



www.in.gov/iurc  
Office: (317) 232-2701  
Facsimile: (317) 232-6758

**PETITION OF DUKE ENERGY INDIANA, LLC )  
FOR APPROVAL OF A TARIFF RATE FOR THE )  
PROCUREMENT OF EXCESS DISTRIBUTED ) CAUSE NO. 45508  
GENERATION PURSUANT TO INDIANA CODE )  
8-1-40 ET SEQ. )**

You are hereby notified that on this date the Indiana Utility Regulatory Commission ("Commission") has caused the following entry to be made:

1. **Motion for Summary Judgment.** On September 21, 2021, the Indiana Office of Utility Consumer Counselor ("OUCC"), the Indiana Distributed Energy Alliance, Citizens Action Coalition of Indiana, Inc., ("CAC"), Environmental Law & Policy Center ("ELPC"), Solar United Neighbors ("SUN"), Vote Solar, and Solarize Indiana, Inc. (collectively, "Joint Movants") filed the *Joint Motion for Summary Judgment, Statement of Material Facts Not In Dispute, and Supporting Brief* ("Motion") in this Cause. Joint Movants claim the pending proposal by Duke Energy Indiana, LLC ("DEI") does not comply with Ind. Code ch. 8-1-40; therefore, DEI's proposal cannot be approved as a matter of law. Specifically, Joint Movants assert that because "there are no disputed facts regarding the content of DEI's proposed tariff or the meaning of the key terms and phrases used in the proposed tariff, summary judgment should be granted, and DEI's request should be dismissed as a matter of law." Motion at p. 8.

Joint Movants designate five items, Exhibit 1: Corrected Petitioner's Exhibit No. 1-B (RAF), "EXCESS DISTRIBUTED GENERATION" Exhibit 2: Petitioner's Exhibit No. 1, "Verified Testimony of Roger A. Flick II" Exhibit 3: DEI's responses to OUCC DRs 2A.4, 2A.5 (Revised), 2A.6, and 2A.7 (including any other DEI DR responses incorporated by reference in the designated DEI responses) Exhibit 4: (Confidential) DEI's Confidential Attachment OUCC 2A.5-A Exhibit 5: Final Order, Cause No. 45378 (Ind. Util Reg. Comm'n, Apr. 7, 2021) in support of the Motion.

On October 1, 2021, DEI filed *Petitioner's Response to Joint Movants' Motion for Summary Judgment* ("Response"). DEI's Response included the Affidavit of Roger A. Flick II, which included several alleged genuine issues of material facts. Further, DEI argues that even if there were not issues of material fact, Joint Movants are not entitled to judgment as a matter of law. DEI argues that its proposal is consistent with the law and with the Commission's decision in Cause No. 45378.

On October 14, 2021, Joint Movants filed Joint Movants' Reply to DEI's Response to Motion for Summary Judgment. In their Reply, Joint Movants request a hearing on their Motion for Summary Judgment.<sup>1</sup>

On October 25, 2021, Joint Movants filed their *Opposed Joint Motion to Continue Evidentiary Hearing Pending Hearing and Order on Joint Motion for Summary Judgment* ("Motion to Continue Hearing").

The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Indiana-Kentucky Elec. v. Comm'r, Ind. Dept. of Enviro. Mgmt*, 820 N.E.2d 771, 776 (Ind. App. 2005). Ind. Trial Rule 56(C) addresses the process and standard for summary judgment, providing in relevant part, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Presiding Officers initially note that summary judgment is not typical practice in Commission proceedings. Under 170 IAC § 1-1.1-26(a), the Commission may be guided by the Indiana Rules of Trial Procedure to the extent consistent with agency-specific rules; therefore, the provisions of T.R. 56 are properly applied in appropriate cases, and the Commission has previously entertained and ruled upon summary judgment motions. *See, e.g., In Re Complaint of U.S. Steel Group*, Cause No. 43204, 2007 Ind. PUC LEXIS 154, \*6 (IURC May 9, 2007). In *Northern Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012 (Ind. 2009), the Indiana Supreme Court affirmed a grant of summary judgment by the Commission, noting the case involved a contract the Commission had approved as part of a regulatory settlement. But, the case at hand does not concern a contract or agreement upon which there are no material issues of fact. In this proceeding, the Commission is being asked to apply Ind. Code ch. 8-1-40 and determine, among other issues, whether excess distributed generation is being correctly calculated under Ind. Code § 8-1-40-5.

Joint Movants contend that their Motion is limited to a single but dispositive issue, whether the netting proposed by DEI to calculate "excess distributed generation" is consistent with Ind. Code Chapter 8-1-40. As noted by DEI in its Response, "[w]hile all parties may agree as to the 'content' of Duke's proposed tariff, the parties disagree about how that tariff should be implemented, in several ways." The issues in this proceeding are more extensive than what constitutes excess distributed generation. Thus, the Presiding Officers find the Commission should have the benefit of a full evidentiary hearing upon the issues and are not persuaded Joint Movants 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. Therefore, the Presiding Officers DENY the Motion and decline to enter summary judgment for Joint Movants. Further, we DENY the Motion to Continue the Hearing.

---

<sup>1</sup> The Commission is not bound by the Indiana Rules of Trial Procedure. However, it is worth noting that Ind. Trial Rule 56(C) requires a Motion for a hearing on summary judgment to be made no later than 10 days after the response was filed, or due. In this case, DEI filed their Response to the Motion on October 1, 2021. Joint Movants requested a hearing on the Motion on October 14, 2021, which is more than 10 days after DEI filed its Response.

2. **Motion to Strike.** On October 12, 2021, DEI filed *Petitioner's Objections to and Motion to Strike Portions of the Prefiled Testimony of Benjamin D. Inskip, Chris Rohaly, Barry S. Kastner, Darrell T. Boggess, and Michael A. Mullett* ("Motion to Strike"). DEI argues that portions of Indiana Distributed Energy Alliance ("IndianaDG") and Solarize Indiana, Inc.'s ("SI") testimonies are not relevant to this proceeding and should be stricken. DEI argues that "evidence concerning issues outside of those related specifically to whether Duke Energy Indiana's proposed EDG rate comports with the formula set out in the DG Statute is irrelevant and inadmissible." On October 21, 2021, IndianaDG and SI filed their responses to DEI's Motion to Strike.

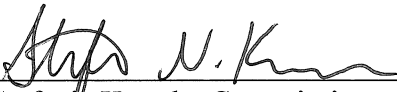
The Presiding Officers, having reviewed the Motion to Strike, DENY it. The Commission may be guided by the Indiana Rules of Evidence, but such rules are not strictly applied in Commission proceedings. As such, we are capable of giving the testimony identified in DEI's Motion to Strike the appropriate weight.

3. **Motion to Supplement Prefiled Testimony.** On October 14, 2021, SI filed its request for leave to supplement the testimony of its witness Barry S. Kastner ("Motion to Supplement"). SI seeks leave to present the results of a recently completed analysis of the comparative bill impacts of a legacy residential net metering customer under various alternative tariff scenarios.

On October 19, 2021, DEI filed its Response to SI's Motion to Supplement. DEI requests the Presiding Officer's deny SI's Motion to Supplement. On October 25, 2021, SI filed its Reply.

SI has been on notice since the Commission's March 25, 2021 Docket Entry establishing the procedural schedule in this proceeding that its case-in-chief was to be filed on September 9, 2021. On September 8, 2021, the OUCC filed its Unopposed Motion to Amend the Procedural Schedule. On September 14, 2021, the Presiding Officers extended Intervenor's filing deadline to September 20, 2021 and DEI's Rebuttal filing deadline to October 11, 2021. Now, after DEI has already filed rebuttal, SI seeks leave to supplement their case-in-chief testimony. The Presiding Officers, having reviewed the Motion to Supplement, DENY it.

**IT IS SO ORDERED.**

  
Stefanie Krevda, Commissioner

  
David L. Ober, Commissioner

  
David E. Veleta, Senior Administrative Law Judge

Date: 10/28/21