

*In the*  
*Indiana Court of Appeals*

No. 23A-EX-00881

LONE OAK SOLAR ENERGY LLC,

Appellant (Petitioner below),

v.

INDIANA UTILITY REGULATORY  
COMMISSION, INDIANA OFFICE OF  
UTILITY CONSUMER COUNSELOR,  
and MADISON COUNTY BOARD OF  
ZONING APPEALS and MADISON  
COUNTY BOARD OF COMMISSION-  
ERS,

Appellees (Administrative Agency,  
Statutory Party and Respondents  
below).

Appeal from the Indiana Utility Regu-  
latory Commission

Cause No. 45793

The Hon. Jim Huston, Chairman  
The Hon. Sarah Freeman,  
The Hon. Stefanie Krevda,  
The Hon. David Veleta,  
The Hon. David Ziegner,  
Commissioners  
The Hon. Ann Pagonis, Administrative  
Law Judge

**APPELLANT’S VERIFIED RESPONSE TO  
MADISON COUNTY’S MOTION TO DISMISS APPEAL**

Appellant, Lone Oak Solar Energy LLC (“Lone Oak”), by counsel, pursuant to Appellate Rule 34(C), respectfully requests that the Court deny the “Motion to Dismiss Appeal, or in the Alternative, Response of Non-Opposition to Motion to Stay” (“Motion to Dismiss”) filed by Appellees, Madison County Board of Zoning Appeals and Madison County Board of Commissioners (collectively, the “County”), and in support states:

1. The County argues that Lone Oak has acquiesced to the Indiana Utility Regulatory Commission’s (“IURC” or “Commission”) Order, or somehow waived its right to appeal the IURC’s order in this Cause No. 45793 (“Lone Oak I”), by filing a second case with the IURC in Cause No. 45883 (“Lone Oak II”).

2. The County is simply wrong. As set forth in Lone Oak's Petition in Cause No. 45793 ("Lone Oak I"), the Commission has primary (and mandatory) jurisdiction over this matter under Indiana Code § 8-1-2-101(a)(1).<sup>1</sup>

3. The Commission, and this Court, are on nearly an identical path here as in *Duke Energy Ind., LLC v. Town of Avon, Ind.*, 82 N.E.3d 319, 321-324 (Ind. Ct. App. 2017). In that case, Duke Energy Indiana challenged the Town of Avon's Ordinance under Indiana Code § 8-1-2-101 that shifted the responsibility for relocation expenses associated with Duke's facilities and required Duke to pay for that relocation in the public right-of-way, so that the Town could make road improvements and build a municipal trail.

4. This Court reversed and remanded the IURC's dismissal of its Complaint against Avon, and held that::

We hold that [Ind. Code § 8-1-2-101(a)(1)] and [Ind. Code § 8-1-2-115] unambiguously establish exclusive jurisdiction in the IURC to hear Duke's complaint on the validity of the Ordinance. Section 115 explicitly says that it "shall be [the IURC's] duty" to "enforce . . . all . . . laws[] relating to public utilities." I.C. § 8-1-2-115. Section 115 further expressly directs the IURC to "inquire into *any* . . . violation" of a local ordinance by a public utility. *Id.* (emphasis added). And Section 101 specifically contemplates disputes between towns and utilities regarding access to rights-of-way or other access to public property by a utility. I.C. § 8-1-2-101(a)(1). Accordingly, Indiana law directs that the subject matter of the dispute between Avon and Duke be decided by the IURC . . . [as] the Ordinance directly affects a public utility, and if the IURC did *not* have exclusive jurisdiction to consider the operation, effect, and enforceability of such ordinances then Indiana's public utilities would be forced to engage in a multitude of disputes over local ordinances throughout the State with no clear guidance either to the utilities or the municipalities. Section 101(a)(1) and Section 115 place the resolution of all such disputes with the IURC.

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<sup>1</sup> Indiana Code § 8-1-2-101(a)(1) states that “. . . the commission **shall** set a hearing, as provided in sections 54 to 67 of this chapter, and if it shall find such ordinance or other determination to be unreasonable, such ordinance or other determination shall be void.” (emphasis added).

82 N.E.3d at 325 (paragraph structure altered).

5. Admittedly, the filing of Lone Oak II should not have been necessary given the Commission's mandatory duties under Sections 101 and 115, and the Commission's ability to *sua sponte* reassert its jurisdiction under Ind. Code § 8-1-2.5-7. Nevertheless, the Commission's dismissal order in Lone Oak I was a clear invitation to file another case requesting that the Commission reassert jurisdiction under Indiana Code § 8-1-2.5-7, as well as an opportunity for the Commission to avoid heading down the same erroneous path as it did in *Duke v. Avon*. If the Commission reasserts its jurisdiction in Lone Oak I, it will be able to make a determination of these issues on the merits of Lone Oak's claim that the County's solar ordinance is unreasonable and unjustly discriminatory. The interests of judicial economy and respect for the administrative agency here weigh strongly in favor of maintaining this Court's current stay of this appeal, pending the IURC's resolution of the Lone Oak II case requesting reassertion of IURC jurisdiction. Staying the appeal, and maintaining the status quo, will not impose any risk of prejudice to any party.

6. The County's assertion that this appeal is moot is equally misplaced, regardless of the outcome of this Lone Oak II case. The Lone Oak I dismissal order stands for the incorrect legal proposition that – if the Commission has declined its jurisdiction under Ind. Code § 8-1-2.5-5 (the “Alternative Regulatory Statute”) to require a Certificate of Public Convenience and Necessity for an electric generation project pursuant to Ind. Code § 8-1-8.5-2 – then the Commission somehow lacks jurisdiction to hear a utility's Complaint that a local ordinance is improper under Section 101. In *Duke v. Avon*, this

Court agreed with Duke's argument that ". . . if the IURC did *not* have exclusive jurisdiction to consider the operation, effect, and enforceability of local ordinances then Indiana's public utilities would be forced to engage in a multitude of disputes over local ordinances throughout the State with no clear guidance either to the utilities or the municipalities. 82 N.E.3d at 325. The Alternative Regulatory Statute must be read *in pari materia* with Section 101; one does not cancel out the other. Otherwise, Section 101 is without effect. *See Ohio Valley Plastics, Inc. v. National City Bank*, 687 N.E.2d 260, 263 (Ind. Ct. App. 1997) ("Statutes relating to the same general subject matter are *in pari materia* and should be construed together so as to produce a harmonious statutory scheme."). In the event the Commission denies the request to reassert jurisdiction in Lone Oak II, this is an issue from the first case that Lone Oak would definitely want to brief to this Court on appeal.

7. Lone Oak is also required to exhaust its administrative remedies before proceeding to trial court. *See Northern Ind. Pub. Serv. Co. v. Dozier*, 674 N.E.2d 977, 982 (Ind. Ct. App. 1996) (holding that plaintiff was required to bring issue to the IURC even though trial court had jurisdiction over preliminary injunction). In the absence of a request that the Commission reassert jurisdiction, a ruling on the merits could have been further delayed by an argument that it had not sufficiently exhausted its administrative remedies.

8. Finally, the County disappointingly asserts that Lone Oak's counsel "crosses the line into lack of candor" in its Motion to Stay by allegedly (i) "falsely asserting 'Lone Oak and the County filed a Joint Motion to Stay' the judicial review proceeding with the Grant County Circuit Court," and also allegedly (ii) "falsely suggesting that 'the

County agreed that...the IURC has jurisdiction over certain county ordinances.’” (Motion to Dismiss p. 3 ¶7) (original emphasis) (quoting Motion to Stay p. 3, ¶ 8).

9. The County is now represented in this appeal by the law firm of Kroger, Gardis and Regas, LLP (“KGR”) that filed the Motion to Dismiss before this Court. According to KGR, “The Grant County Stay Motion was not styled as a ‘joint’ motion, nor did the County ever ‘join’ in it or otherwise agree the IURC had jurisdiction over this matter.” (Motion to Dismiss p. 3 ¶8.)

10. But KGR did not represent the County when the Grant County Stay Motion was previously filed in 2022, and KGR attorneys do not claim to have personal knowledge of discussions that Lone Oak’s counsel at Bose McKinney & Evans LLP had with the County Attorney, Jeffrey Graham, regarding that agreed Motion to Stay. True and accurate copies of the emails between Bose and Mr. Graham dated November 11, 2022 and November 13, 2022 are attached hereto as “**Exhibit 1**.”

11. As reflected in those emails, Lone Oak’s attorney referred to and forwarded a draft of what was titled an “Agreed Motion,” and Mr. Graham indicated his consent (“Looks good, Alan”) to the filing after his review. The Grant County Stay Motion also specifically references *Duke v. Avon, supra*, and states that the “Commission has jurisdiction over certain ordinances pursuant to Ind. Code 8-1-2-101.” (¶2 of **Ex. A** to KGR’s Motion to Dismiss.)

12. Perhaps there was a misunderstanding of the County’s position with regard to the Grant County Stay Motion, all that was stated in that motion, and Mr. Graham’s

response that “I’m fine with it, ‘as is’” (Ex. 1 hereto) – but those are not valid reasons to aggressively accuse Lone Oak of lying to this Court.

WHEREFORE, for these reasons, and because the County has indicated that it, alternatively, does not oppose the stay, Lone Oak respectfully requests that the Court deny the Motion to Dismiss, and decline to lift its stay of this appeal.

Respectfully submitted,

**/s/ Kristina Kern Wheeler**

Bryan H. Babb, No. 21535-49

Nikki Gray Shoultz, No. 16509-41

Kristina Kern Wheeler, No. 20947-49A

Alan S. Townsend, No. 16887-49

BOSE MCKINNEY & EVANS LLP

111 Monument Circle, Suite 2700

Indianapolis, IN 46204

(317) 684-5100 | FAX: (317) 223-0172

[bbabb@boselaw.com](mailto:bbabb@boselaw.com)

[nshoultz@boselaw.com](mailto:nshoultz@boselaw.com)

[kwheeler@boselaw.com](mailto:kwheeler@boselaw.com)

[atownsend@boselaw.com](mailto:atownsend@boselaw.com)

### **VERIFICATION**

Pursuant to Appellate Rule 34(F), I affirm under the penalty for perjury that the foregoing representations are true of my own personal knowledge, information and belief.

**/s/ Kristina Kern Wheeler**

Kristina Kern Wheeler

Pursuant to Appellate Rule 34(F), I affirm under the penalty for perjury that attached at **Exhibit 1** are true and accurate copies of the emails between myself and Mr. Graham dated November 11, 2022 and November 13, 2022.

/s/ Alan S. Townsend

Alan S. Townsend

### **CERTIFICATE OF SERVICE**

I certify that on May 25, 2023, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on the same day the foregoing document was served upon the following person(s) via IEFS:

T. Jason Haas Deputy Consumer Counselor Ind. Office of Utility Consumer Counselor <a href="mailto:THaas@oucc.IN.gov">THaas@oucc.IN.gov</a> <a href="mailto:info-mgt@oucc.IN.gov">info-mgt@oucc.IN.gov</a>	General Counsel IURC <a href="mailto:bheline@urc.in.gov">bheline@urc.in.gov</a>
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Beth Heline General Counsel IURC <a href="mailto:bheline@urc.in.gov">bheline@urc.in.gov</a>	The Honorable Theodore J. Rokita Ind. Attorney General's Office <a href="mailto:efile@atg.in.gov">efile@atg.in.gov</a>
--	--

Lynda Ruble, Chief Court Reporter Amy Tokash, Court Reporter Indiana IURC <a href="mailto:lruble@urc.IN.gov">lruble@urc.IN.gov</a> <a href="mailto:atokash@urc.IN.gov">atokash@urc.IN.gov</a>	Kevin D. Koons Adam R. Doerr Kroger, Gardis & Regas, LLP <a href="mailto:kkoons@kgrlaw.com">kkoons@kgrlaw.com</a> <a href="mailto:adoerr@kgrlaw.com">adoerr@kgrlaw.com</a>
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Jason M. Kuchmay <a href="mailto:jmk@smfklaw.com">jmk@smfklaw.com</a>	Jeffrey K. Graham Graham, Farrer & Wilson, PC <a href="mailto:jgraham@gfwlawyers.com">jgraham@gfwlawyers.com</a>
--	--

4582646.dt4

s/ Kristina Kern Wheeler  
Kristina Kern Wheeler

**Townsend, Alan**

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**From:** Townsend, Alan  
**Sent:** Friday, November 11, 2022 11:57 AM  
**To:** jgraham@gfwlawyers.com  
**Subject:** Lone Oak  
**Attachments:** Invenergy\_Lone Oak - Petitioner's Agreed Motion to Stay.DOCX

Hi Jeff:

I've attached a draft of Petitioner's Agreed Motion to Stay and a proposed Order.

Let me know if this works for you and, if so, I'll get it filed.

Thanks, Alan

**Alan S. Townsend**  
**Bose McKinney & Evans LLP**  
111 Monument Circle | Suite 2700 | Indianapolis, Indiana 46204  
atownsend@boselaw.com | P 317-684-5225 | F 317-223-0225

*Assistant Contact | Dana Y. Cowell | dcowell@boselaw.com | P 317-684-5241 | F 317-223-0241*

*Bose McKinney & Evans LLP is a member of Mackrell International, a network of independent law firms from more than sixty countries and thirty states.*



STATE OF INDIANA	)	IN THE GRANT CIRCUIT COURT
	) SS:	
COUNTY OF GRANT	)	CAUSE NO. 27C01-2207-PL-000052
LONE OAK SOLAR ENERGY LLC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
BOARD OF ZONING APPEALS OF	)	
MADISON COUNTY,	)	
	)	
Respondent.	)	

**PETITIONER'S AGREED MOTION TO STAY**

The Petitioner, Lone Oak Solar Energy LLC ("Lone Oak"), by counsel, respectfully requests that the Court enter an order staying this lawsuit and, in support thereof, states as follows:

1. Lone Oak initiated this lawsuit on July 28, 2022 by filing a Verified Petition for Judicial Review.
2. Since filing the Verified Petition for Judicial Review, Lone Oak has filed a Verified Complaint before the Indiana Utility Regulatory Commission, docketed as Cause No. 45793. The Verified Complaint, once adjudicated, may resolve some or all of the issues set forth in the Verified Petition for Judicial Review because the Indiana Utility Regulatory Commission has jurisdiction over certain ordinances pursuant to Ind. Code § 8-1-2-101. Duke Energy Ind., LLC v. Town of Avon, 82 N.E.3d 319, 325 (Ind. Ct. App. 2017).
3. Under the circumstances, and in order to promote judicial economy, Lone Oak respectfully requests that the Court enter an order staying this lawsuit during the pendency of the Verified Complaint before the Indiana Utility Regulatory Commission and any appeal thereof. Decision of the Indiana Utility Regulatory Commission are appealable to the Indiana Court of Appeals. Ind. Code § 8-1-3-1.

4. On November 10, 2022, the undersigned counsel spoke with Jeffrey K. Graham, counsel for the Board of Zoning Appeals of Madison County, about the relief requested in this Motion. In response, Mr. Graham, stated that the Board of Zoning Appeals of Madison County had no objection to the relief requested in this Motion.

WHEREFORE, the Petitioner, Lone Oak Solar Energy LLC, by counsel, respectfully requests that the Court enter an order (a) staying this lawsuit during the pendency of the Verified Complaint before the Indiana Utility Regulatory Commission and any appeal thereof, and (b) providing for all other appropriate relief.

Respectfully submitted,

/s/ Alan S. Townsend

Alan S. Townsend, #16887-49

Nikki G. Shoultz, #16509-41

Kristina Kern Wheeler, #20957-49A

BOSE MCKINNEY & EVANS LLP

111 Monument Circle, Suite 2700

Indianapolis, Indiana 46204

(317) 684-5000 (Phone)

(317) 684-5173 (Fax)

[atownsend@boselaw.com](mailto:atownsend@boselaw.com)

[nshoultz@boselaw.com](mailto:nshoultz@boselaw.com)

[kwheeler@boselaw.com](mailto:kwheeler@boselaw.com)

Attorneys for Petitioner,  
Lone Oak Solar Energy LLC

**CERTIFICATE OF SERVICE**

I hereby certify that on November 10, 2022, a copy of the foregoing *Petitioner's Agreed Motion to Stay* was served upon the following counsel via the Court's IEFS:

Jeffrey K. Graham – [jgraham@gfwlawyers.com](mailto:jgraham@gfwlawyers.com)

/s/ Alan S. Townsend

Alan S. Townsend

4468304\_1

STATE OF INDIANA	)	IN THE GRANT CIRCUIT COURT
	) SS:	
COUNTY OF GRANT	)	CAUSE NO. 27C01-2207-PL-000052
LONE OAK SOLAR ENERGY LLC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
BOARD OF ZONING APPEALS OF	)	
MADISON COUNTY,	)	
	)	
Respondent.	)	

**ORDER**

This matter came before the Court on an Agreed Motion to Stay filed by the Petitioner, Lone Oak Solar Energy LLC. The Court, having examined the Agreed Motion and being duly advised, now finds that the Agreed Motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that this lawsuit shall be and hereby is stayed pending the determination of the Verified Complaint filed by Lone Oak Solar Energy LLC before the Indiana Utility Regulatory Commission and any appeal thereof.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge, Grant Circuit Court

**Distribution:**

All Counsel of Record

## Townsend, Alan

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**From:** Jeff Graham <jgraham@inlawemail.com>  
**Sent:** Sunday, November 13, 2022 12:01 PM  
**To:** Townsend, Alan  
**Subject:** RE: Lone Oak

Looks good, Alan. I'm fine with it 'as is.'

Thank you,  
Jeff



**Jeffrey K. Graham**

*Attorney at Law*

**Graham, Farrer & Wilson, P.C.**

p: 765-552-9878

a: 1601 S. Anderson Street, Elwood, Indiana 46036

a: 200 E. State St, Pendleton, IN 46064

e: [jgraham@gfwlawyers.com](mailto:jgraham@gfwlawyers.com)

**From:** Townsend, Alan <atownsend@boselaw.com>  
**Sent:** Friday, November 11, 2022 11:57 AM  
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Thanks, Alan

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111 Monument Circle | Suite 2700 | Indianapolis, Indiana 46204  
[atownsend@boselaw.com](mailto:atownsend@boselaw.com) | P 317-684-5225 | F 317-223-0225

*Assistant Contact* | Dana Y. Cowell | [dcowell@boselaw.com](mailto:dcowell@boselaw.com) | P 317-684-5241 | F 317-223-0241

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