

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF SOUTHERN INDIANA GAS AND)
ELECTRIC COMPANY D/B/A VECTREN)
ENERGY DELIVERY OF INDIANA, INC. FOR)
APPROVAL OF A TARIFF RATE FOR THE)
PROCUREMENT OF EXCESS DISTRIBUTED)
GENERATION PURSUANT TO IND. CODE § 8-)
1-40 ET SEQ.) **CAUSE NO. 45378**

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR’S AND THE JOINT
PARTIES’ BRIEF IN SUPPORT OF PROPOSED ORDER

The Indiana Office of Utility Consumer Counselor (“OUCC”), Citizens Action Coalition of Indiana, Inc., Environmental Law & Policy Center, Indiana Distributed Energy Alliance, Solar United Neighbors, Solarize Indiana, and Vote Solar, by counsel, submit this brief in support of its proposed order recommending that the Indiana Utility Regulatory Commission (“Commission”) deny the proposal by Southern Indiana Gas and Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc. (“Vectren”) for an Excess Distributed Generation (“EDG”) Tariff, as the proposal does not comply with the statutory requirements of Ind. Code ch. 8-1-40 *et seq.*

I. STATUTORY INTERPRETATION

This brief focuses on the interpretation of Ind. Code § 8-1-40-5. When interpreting a statute, the first step is to consider “whether the Legislature has spoken clearly and unambiguously on the point in question.”¹ If a statute is clear and unambiguous, the Commission and reviewing courts must “put aside various canons of statutory construction and simply ‘require that words and phrases be taken in their plain, ordinary, and usual sense.’” *Id.* When determining whether a statute

¹ *KS&E Sports v. Runnels*, 72 N.E.3d 892, 898–99 (Ind. 2017) (citing *Basileh v. Alghusain*, 912 N.E.2d 814, 821 (Ind. 2009)).

is clear, Indiana courts presume that “the legislature uses undefined terms in their common and ordinary meaning.”² Thus, in this case, the Commission’s primary job is to determine whether the “common and ordinary” interpretation of the words in Section 8-1-40-5 support Vectren’s proposal. If not, the Commission must reject Vectren’s proposed tariff. As described further below, Vectren’s interpretation of “excess distributed generation” as defined in Ind. Code § 8-1-40-5 violates the plain, ordinary, and usual meaning of the language of the statute, and therefore Vectren’s proposal cannot be approved.

II. STATUTORY DEFINITION OF EXCESS DISTRIBUTED GENERATION

Ind. Code § 8-1-40-5 provides the definition of “excess distributed generation,” which states:

As used in this chapter, “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.

The statutory definition of “excess distributed generation” is straightforward. It is the difference between two values: the electricity that Vectren supplies to a distributed generation (“DG”) customer and the electricity that the DG customer supplies back to Vectren. Stated as an equation,

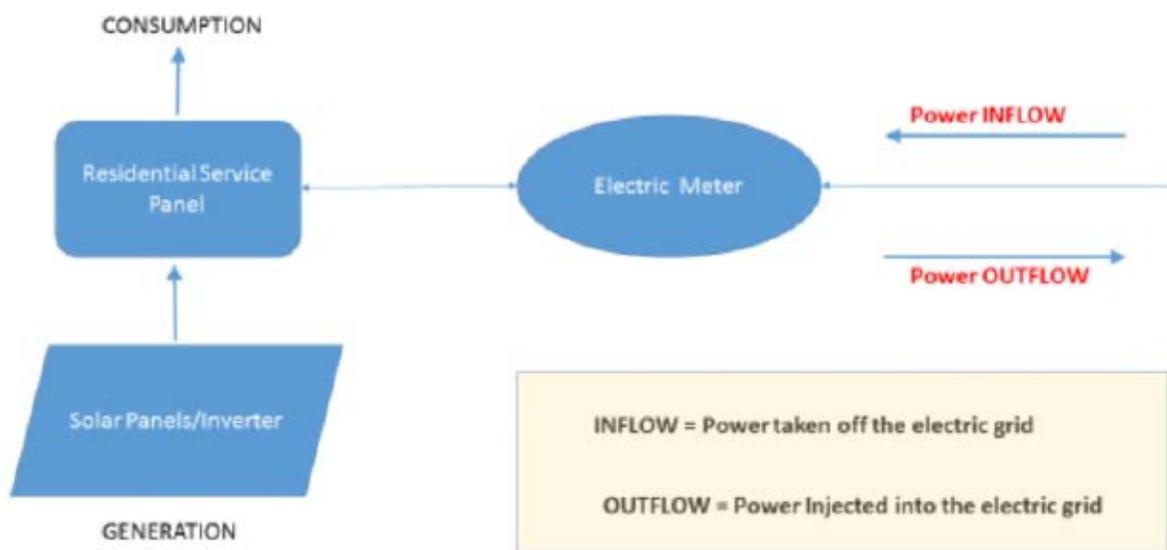
² *NIPSCO Indus. Grp. v. N. Indiana Pub. Serv. Co.*, 100 N.E.3d 234, 242 (Ind. 2018), modified on reh’g (Sept. 25, 2018). Additionally, “[t]he language of the statute itself is the best evidence of legislative intent, and we must give all words their plain and ordinary meaning unless otherwise indicated by statute.” *U.S. Steel Corp. v. N. Indiana Pub. Serv. Co.*, 951 N.E.2d 542, 552 (Ind. Ct. App. 2011)

the statute requires this calculation: *Excess Distributed Generation (EDG) = Outflow (electricity supplied by the customer to the utility) — Inflow (electricity supplied by the utility to the customer).*

In short, it is the *difference* between the two values that constitutes Excess Distributed Generation as defined by statute. This straightforward interpretation of Excess Distributed Generation is driven by the plain language of the statute, supported by the testimony of OUC and Joint Intervenor witnesses, and confirmed by Vectren’s witness Rice at the evidentiary hearing.

During the hearing, Mr. Rice was questioned about Vectren’s Figure 1 on page 8 of his pre-filed rebuttal testimony, Petitioner’s Exhibit No. 3. That figure is reproduced below:

What is INFLOW and OUTFLOW?



Mr. Rice’s responses confirmed, unequivocally, that the arrow labeled “Power INFLOW” is the electricity that Vectren supplies to a DG customer, and “Power OUTFLOW” is the electricity that the DG customer supplies back to Vectren:

- 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.³
-
- 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.⁴

The emphasized language from the exchange with Mr. Rice at the hearing precisely mirrors the two statutory components of EDG, as defined by Indiana Code § 8-1-40-5. Mr. Rice’s admission that “Inflow” is “electricity that is supplied by Vectren to a customer that produces distributed generation” and “Outflow” is “electricity that is supplied back to Vectren by the customer” conforms to the plain language definition of Excess Distributed Generation which requires Vectren to measure “the difference between” “Outflow” and “Inflow” when applying its EDG rate. As explained below, however, Vectren’s tariff does not follow the plain language of the statute.

III. VECTREN’S FAILURE TO FOLLOW IND. CODE CH. 8-1-40

A. By Defining EDG as Outflow, Vectren Ignores Half of the EDG Definition.

Instead of calculating EDG as the “difference between” Outflow (the power supplied by a customer to Vectren) and Inflow (the power supplied by Vectren to the customer), Vectren’s tariff defines outflow exclusively as EDG: “Outflow – (kWh) the separate meter channel measurement

³ Transcript, page A-24, line 23 – page A-25 line 3.

⁴ Transcript, page A-25, lines 19-23.

of energy delivered by Customer to Company as Excess Distributed Generation.”⁵ Vectren’s interpretation of EDG ignores the Inflow component (the power supplied by Vectren to the customer), which is half of the statutory equation. *See* Ind. Code § 8-1-40-5(1) (defining EDG as the difference between “the electricity that is supplied by an electricity supplier to a customer that produces distributed generation” and “the electricity that is supplied back to the electricity supplier by the customer”).

When interpreting a statute, Indiana courts “generally presume that all statutory language is used intentionally,” so that “[e]ach word should be given effect and meaning where possible.” *In re Howell*, 27 N.E.3d 723, 726 (Ind. 2015) (quoting *AlliedSignal, Inc. v. Ott*, 785 N.E.2d 1068, 1079 (Ind.2003)). Thus, the Commission must avoid an interpretation of Section 8-1-40 that would “render any part of the statute meaningless or superfluous.” *ESPN, Inc. v. Univ. of Notre Dame Police Dep’t*, 62 N.E.3d 1192, 1199 (Ind. 2016). If the legislature had intended to define EDG as Outflow, it could have done so easily. But it did not. The statute defines EDG as the “difference between” electricity supplied to customers (Inflow) and electricity supplied back to the utility (Outflow). Vectren’s interpretation of EDG ignores the Inflow component, rendering half of the statutory definition meaningless or “mere surplusage.” *ESPN, Inc.*, 62 N.E.3d at 1199 n.7 (citing “the surplusage canon” of statutory interpretation that requires courts to “avoid an interpretation that renders any part of the statute meaningless or superfluous”).⁶

⁵ Rice Direct, page 12, lines 23-25, “The total outflow amount for the billing period will be priced at the Rider EDG credit rate, as it represents excess distributed generation from the customer to the Company.” *See also* Rice Rebuttal, Attachment MAR-R1, page 1 of 6 (defining “Outflow” as “the separate meter channel measurement of energy delivered by Customer to Company as Excess Distributed Generation”).

⁶ Specifically, Vectren ignores this portion of the statutory definition of EDG definition:

Mr. Rice's rebuttal testimony claims that Vectren's measurement of "Outflow" somehow captures "the net of both components" of EDG:

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.⁷

But, Mr. Rice's cross-examination directly contradicts this testimony. As he admitted at the hearing, "Outflow" represents "electricity that is supplied back to Vectren by the customer," not the "net of the electricity supplied by Vectren South to the customer and the electricity that is supplied back to Vectren South."⁸ Mr. Rice agreed that Outflow occurs "when a DG customer's on-site electricity generation exceeds that customer's on-site electricity usage at any given moment in time."⁹ Mr. Rice's response on cross-examination clarifies that Outflow is determined exclusively by activities occurring on the *customer's* side of the meter and therefore *cannot* represent "the net of both components" of excess distributed generation as he stated on rebuttal.¹⁰

Vectren's attempt to characterize its proposal as a form of "instantaneous billing" or "instantaneous netting" is misleading and does not save Vectren's proposed tariff from the failure to meet the statutory definition of Excess Distributed Generation.¹¹ Mr. Rice's initial testimony explains that power only flows in one direction through the meter on an instantaneous basis:

(1) the electricity that is supplied by an electricity supplier to a customer that produces distributed generation

....

⁷ Petitioner's Exhibit No. 3, Rebuttal Testimony of Matthew A. Rice, page 6, lines 13-18.

⁸ Transcript, page A-25, lines 19-23.

⁹ Transcript, page A-25, line 24 to page A-26, line 2.

¹⁰ Rice Rebuttal, page 6, lines 13-18.

¹¹ Rice Rebuttal, pages 10-11.

“Because the meter can only register the instantaneous measurement of electricity in either direction, each unit of power can only be either inflow and outflow (or net zero in the case of perfect matching of generation to consumption).”¹² Mr. Rice further confirmed this at the hearing:

- Q:** And would you agree that it’s not possible for inflow and outflow to occur simultaneously across a DG customer’s meter?
- A:** When the net inflow is occurring, there is zero outflow, and when the net outflow is occurring, there is zero inflow.
- Q:** Okay. So, at any moment in time, the meter is registering either inflow or outflow or nothing; correct?
- A:** Correct.¹³

As the meter can only measure either inflow or outflow at any given instant, not energy flow in both directions, any outflow is not simultaneously “net” of both components. Therefore, notwithstanding Vectren’s description of its approach as “instantaneous netting,” it is not physically or conceptually possible to “instantaneously” net inflow against outflow. Ultimately, “instantaneous netting” is just another way to say “no netting.” While Vectren may prefer a “no netting” policy, the Commission is not free to ignore the plain language of the statute that requires Vectren to measure (i.e. “net”) the “difference between” inflow and outflow.

The Commission should, accordingly, give no weight to Mr. Rice’s contradictory position on rebuttal. Vectren’s decision to define EDG as the “total outflow amount for the billing period” (without regard to Inflow) cannot be squared with the plain language of the statute, which requires Vectren to measure EDG as “the difference between” electricity supplied to a customer (Inflow) and the electricity supplied back to Vectren (Outflow). Ind. Code § 8-1-40-5. Vectren’s tariff does

¹² Rice Direct, page 12, lines 14-17 (emphasis added).

¹³ Transcript, page A-26, lines 17-25.

not conform to the plain and ordinary meaning of Ind. Code § 8-1-40-5 and therefore must be rejected.

B. Vectren’s EDG Definition Substitutes Two Non-Statutory Components (DG Production and Consumption) for the Required Statutory Components (Inflow and Outflow).

When interpreting a statute, Indiana courts “presume the legislature uses undefined terms in their common and ordinary meaning.” *NIPSCO Indus. Grp.*, 100 N.E.3d at 242 (Ind. 2018) (citing words *In re S.H.*, 984 N.E.2d 630, 635 (Ind. 2013)). As a verb, “supply” means “to provide for” or “to make available for use.” Supply, MERRIAM–WEBSTER’S DICTIONARY (2020). The electricity that Vectren “provides” or “makes available” to DG customers is Inflow. The electricity that DG customers “provide” or “make available” to Vectren is Outflow. In order to properly conform with the plain language of the statute, Vectren must use a methodology that measures Inflow and Outflow, and then takes the “difference between” these amounts to determine EDG. Ind. Code § 8-1-40-5.

Instead of measuring the difference between Inflow and Outflow, Vectren substitutes two different, non-statutory terms to determine EDG: the difference between “what the distributed generation resource produced and what the customer used behind the meter.” In response to an OUCC discovery request, Vectren admits:

The measurement of outflow in the standard customer meter reflects the *difference between what the distributed generation resource produced and what the customer used behind the meter*, with the excess (“excess distributed generation”) flowing through the meter to Vectren South’s distribution system, and priced at the Rider EDG Marginal DG Price in accordance with IC 8-1-40-17.¹⁴

¹⁴ OUCC Exhibit No. 1, Attachment AAA-1, page 8, Vectren’s Response to OUCC DR 2-011 (emphasis added).

Vectren witness Rice similarly states:

[T]he existence of the DG resource behind the meter dictates that the customer's requirements and the DG resource production are *netted before passing through the meter*. The "Outflow" recorded on the meter then is the EDG. The "Inflow" recorded on the meter is the measurement of the requirements of the customer in excess of what is produced by the DG resource. [emphasis in original]¹⁵

Contrary to Vectren's proposal, Ind. Code § 8-1-40-5 clearly states that EDG is the difference between the amount of electricity supplied to the customer and the amount supplied back to the electric supplier. This exchange of energy occurs at the customer's meter and is measured as Inflow and Outflow. Vectren's definition of EDG instead pushes across the customer's meter and examines the individual customer's own production and consumption that is occurring on the customer's private property. If the legislature had intended to define EDG by comparing production and consumption on the customer's side of the meter, it would have said so. But it did not. The legislature defined EDG as the difference between electricity that Vectren "supplied" to a DG customer and the electricity that the DG customer "supplied back" to Vectren. Ind. Code § 8-1-40-5. Vectren, however, does not "supply" the electricity that a DG customer produces and consumes behind the meter. By comparing "the customer's requirements and the DG resource production," Vectren is therefore comparing (or "netting") two non-statutory terms.

Vectren is not free to substitute the statutory components of EDG (inflow and outflow) for a different set of non-statutory components (behind-the-meter DG production and consumption) that it prefers. Simply put, Vectren's proposed methodology for calculating EDG is unlawful and the Commission must reject it.

¹⁵ Rice Rebuttal, page 7, lines 20-25.

IV. CONCLUSION

As explained above, Vectren's proposed EDG tariff fails to properly apply Ind. Code § 8-1-40-5 by using components not stated in the statute and by failing to follow the plain, ordinary, and usual meaning of the statutory language. Therefore, Vectren's tariff is unlawful and must be rejected.

Respectfully submitted,

/s/ Jason Haas

T. Jason Haas, Atty. No. 34983-29
Indiana Office of Utility Consumer Counselor
115 West Washington Street, Suite 1500 South
Indianapolis, Indiana 46204
Phone: (317) 232-3315
thaas@oucc.in.gov
Attorney for OUCC

/s/ R. M. Glennon

Robert M. Glennon, Atty. No. 8321-49
Robert Glennon & Assoc., P.C.
3697 N. Co. Rd. 500 E.
Danville, IN 46122
Phone: (317) 852-2723
robertglennonlaw@gmail.com
Attorney for IndianaDG

/s/ Joseph P. Rompala

Joseph P. Rompala, Atty. No. 25078-49
LEWIS & KAPPES, P.C.
One American Square, Suite 2500
Indianapolis, Indiana 46282-0003
Phone: (317) 639-1210
Facsimile: (317) 639-4882
JRompala@Lewis-Kappes.com
Attorney for Solarize Indiana, Inc.

/s/ Jennifer A. Washburn

Jennifer A. Washburn, Atty. No. 30462-49
Citizens Action Coalition of Indiana, Inc.
1915 W. 18th Street, Suite C
Indianapolis, Indiana 46202
Phone: (317) 735-7764
Fax: (317) 290-3700
jwashburn@citact.org
Attorney for CAC, ELPC, SUN, and Vote Solar
(collectively, "Joint Intervenors")

/s/ Bradley Klein

Bradley Klein, Atty. No. 5381-95-TA
Environmental Law & Policy Center
35 E. Wacker Drive, suite 1600
Chicago, Illinois 60601
Phone: (312) 795-3746
bklein@elpc.org
Attorney for ELPC and Vote Solar

/s/ Russell L. Ellis

Russell L. Ellis, Atty. No. 29240-49
6144 Glebe Drive
Indianapolis, IN 46237
Russell_ellis@abcglobal.net
Attorney for Solarize Indiana, Inc.