STATE OF INDIANA

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**

ADVANCED ENERGY UNITED'S SUBMITTAL OF PROPOSED ORDER

Intervenor, Advanced Energy United, Inc., by counsel, herewith submits its proposed order in this proceeding.

Dated this 27th day of September 2024.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was electronically delivered this 27th day of September 2024, to the following:

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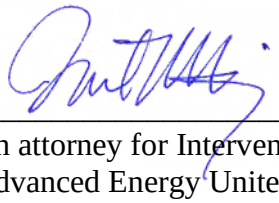

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PROPOSED ORDER OF THE COMMISSION

Presiding Officers:
James F. Huston, Chairman
Loraine L. Seyfried, Chief Administrative Law Judge

On April 17, 2024, the Indiana Utility Regulatory Commission ("Commission") issued an Order initiating this investigation ("Initiating Order") into whether aggregators of distributed energy resources ("DER") are public utilities. The Commission opened this proceeding under the general authority granted under Indiana Code § 8-1-2-58 as an initial step in determining how to implement Ind. Code § 8-1-40.1-4. Section 8-1-40.1-4 directs the Commission to "adopt rules that the commission determines to be necessary to implement Federal Energy Regulatory Commission Order No. 2222 concerning distributed energy resources and distributed energy resource aggregators."

The following entities filed petitions to intervene: Southern Indiana Gas and Electric Company d/b/a CenterPoint Energy Indiana South, Indiana Michigan Power Company, Inc., Indianapolis Power & Light Company d/b/a AES Indiana, Duke Energy Indiana, LLC, Northern Indiana Public Service Company LLC, Wabash Valley Power Association, Inc. d/b/a Wabash Valley Power Alliance, Hoosier Energy Rural Electric Cooperative, Inc., Northeastern Rural Electric Membership Cooperative, Tipmont REMC (collectively, "the Utilities"), the Citizens Action Coalition of Indiana, Inc., Advanced Energy United ("United"), and the Indiana Industrial Energy Consumers, Inc. ("INDIEC").[1] The Commission granted each petition to intervene.

The Commission held a prehearing conference and preliminary hearing on May 22, 2024, at 1:30 PM in Room 222 of the PNC Center, 101 W. Washington Street, Indianapolis, Indiana. On May 29, 2024, the Commission notified the parties via an order that a technical conference would be held to allow questions and discussion among the parties, Presiding Officers, and Commission Staff ("Staff") concerning the public utility status of DER aggregators. The Technical Conference occurred on June 11, 2024, at 11:30 a.m., virtually via Webex.

Pursuant to the adopted schedule, on July 15, 2024, various parties filed briefs or comments addressing the sole question at issue. Only United and Staff offered witness testimony.

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

Subsequently, several parties filed response briefs or comments on August 5, 2024. United was the only party to offer responsive testimony. The evidentiary hearing occurred on August 27, 2024, at 9:30 am, although all parties waived cross-examination.

Based upon the applicable law and the evidence in the record, the Commission finds as follows:

1. Notice and Jurisdiction. The Commission is authorized under Ind. Code § 8-1-2-58 to summarily initiate an investigation into all matters relating to any public utility. If the Commission becomes satisfied that sufficient grounds exist to warrant a hearing pertinent to the matters investigated, Ind. Code § 8-1-2-59 requires the public utility involved be furnished a statement notifying it of the matters under investigation. In addition to the foregoing statutory provisions, the Indiana Court of Appeals has specifically found that inherent in this grant of power is the implicit power and authority to "do that which is necessary to effectuate the regulatory scheme."[2] The Commission also has the authority to determine whether a person or entity is a public utility under Indiana law.[3] Accordingly, the Commission has jurisdiction to conduct this investigation.

In accordance with the Initiating Order, the Commission provided notice to all of Indiana's jurisdictional rate-regulated electric utilities, the Indiana Office of Utility Consumer Counselor, participants in the Commission's roundtable meetings concerning the implementation of Federal Energy Regulatory Commission ("FERC") Order 2222, and all known potential DER aggregators.

2. Purpose of Investigation. On September 17, 2020, FERC issued Order 2222 revising its rules and requiring regional transmission organizations ("RTOs") to allow the participation of DERs in the wholesale electricity markets through DER aggregators and aggregations.[4,5] As noted in the Commission's Initiating Order, this rule revision is,

> intended to enable DERs to participate alongside traditional resources in RTO wholesale electricity markets through aggregations, with the DER aggregator serving 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.[6]

[2] *S. E. Ind. Nat. Gas v. Ingram*, 617 N.E.2d 943, 948 (Ind. Ct. App. 1993).
[3] *Hidden Valley Lake Property Owners Assoc. v. HVL Utilities, Inc.*, 408 N.E.2d 622, 629 (Ind. App. 1980).
[4] 172 FERC ¶ 61,247.
[5] 18 CFR 35.28, adding paragraphs (b)(10)-(11) and (g)(12)(i)-(iv).
[6] Initiating Order, at 1.

To this end, in 2022, the legislature adopted Ind. Code § 8-1-40.1-1 *et seq.*, explicitly providing this Commission with general rulemaking authority to implement FERC Order 2222 and, in conjunction therewith, amend its interconnection and net metering rules as may be necessary.[7] Thus, the Commission may develop a rule or rules to ensure appropriate participation of DER aggregators in the wholesale markets as envisioned by Order 2222. Ind. Code § 8-1-40.1, however, does not define a "public utility" or address the public utility status of a DER aggregator. The Commission therefore initiated this proceeding as the first step in determining how to implement Order 2222.

3. Summary of the Parties' Primary Recommendations. United, through testimony of John D. Albers, Regulatory Policy Director, recommended the following:

- The Commission should not classify DER aggregators as public utilities under Ind. Code § 8-1-2-1.
- Any rules governing DER aggregators should be adopted under the authority granted in Ind. Code § 8-1-40.1-4.

Staff, through the testimony of Ren Norman, Senior Utility Analyst, recommended the following:

- The Commission should classify and regulate DER aggregators, regardless of the DERs they aggregate, as public utilities under Ind. Code § 8-1-2-1.
- The Commission should study the need to amend Indiana's current demand response wholesale construct. Specifically, how it will interact with FERC's new regulatory paradigm and "determine whether it will be necessary or prudent to supersede [its Demand Response ('DR')] Order and align state/federal programs and processes through future rulemakings."

The Utilities, through their comments and briefs, recommended that the Commission find that all DER aggregators are public utilities under Indiana law.

INDIEC, through its responsive brief, recommended that the Commission close this investigation without determining the public utility status of DER aggregators and initiate the rulemaking required by Ind. Code ch. 8-1-40.1.

4. Summary of the Evidence. Only two participants, United and Staff, offered evidence concerning whether DER aggregators are public utilities.

A. Initial Testimony.

United. United argues that DER aggregators should not be categorized as public utilities. In support of this view, United explains that unlike public utilities, which are regulated monopolies, DER aggregators operate in competitive marketplaces, where transactions are premised on private

[7] Ind. Code §§ 8-1-40.1-4 and -5.

voluntary agreements. Given the nature of these agreements, it cannot be said that DER aggregators sell power or offer to sell power to the public regardless of their business model. Rather, United argues, they collect and bring together DERs that are then used or dispatched when called upon by utilities or independent system operators/regional transmission organizations. Specifically, the "electric energy supply relationship remains between the DER owner and the utility; the DER aggregator is simply a service provider that works with both the DER owner and utility." Thus, DER aggregators are service providers that aggregate "identified resources and sell the option to manage their use to support energy, capacity, and ancillary services markets in the same manner as supply-side resources." These resources "are then dispatched 'onto' the grid, not sold to individual consumers or ratepayers." under predetermined terms.[8] To illustrate this point, United detailed and provided examples for several types of DER aggregators, none of which would fit the definition of a public utility in Indiana because all of them provide a resource that simply reduces demand on the grid. Finally, United outlined several states that are at various stages of regulating DER aggregators, but none are classifying them as public utilities.

Staff. Staff asserts that DER aggregators, regardless of the type of DER, should be classified as public utilities because they operate, manage, and control aggregations of DERs in the engagement of wholesale power system markets, thus making them marketplace participants. In support this classification, Staff argues that DER aggregators sell "injected" power into the marketplace and therefore serve the general public. For demand-response aggregators, Staff argues that "reducing end-user load, demand response and other demand[-]side management resources provide otherwise unavailable power and scarce resources to an undifferentiated public."[9] Staff further notes that curtailment of power or load control are "understood to be furnishing power to others."[10] In supporting these arguments, Staff cites presentations from two DER aggregators, but only includes a presentation from Voltus—a DER aggregator—in its testimony as an exhibit. In terms of public policy reasons, Staff also explains this classification will provide for efficient, legally defensible, transparent, and expedient regulation and rulemaking at the Commission. It would also make complaint resolution process more accessible for consumers and more straight forward. Additionally, being under the Commission's jurisdiction will "create an environment where DER aggregators compete fairly, leading to better[,] and more choices for consumers."[11] Staff also notes that DER aggregators may be able to petition to opt out of this classification if it were to be enforced under Ind. Code ch. 8-1-2.5.

B. Responsive Testimony

[8] United's Exhibit 1, at 7.
[9] Indiana Utility Regulatory Commission Research, Policy, and Planning Division Staff's Exhibit 1 at 20.
[10] *Id.* at 20.
[11] *Id* at 24-25.

United. United reiterates and counters several other parties' arguments by again, asserting that "DER aggregators do not 'fit neatly' within the Indiana definition of a 'public utility.'" In response to claims that DER aggregators sell power, United counters that DER aggregators "neither own DERs or in situations where a DER is capable of exporting energy, take title to any energy."[12] Rather, DER aggregators are a service provider, that at a minimum "aggregate" DERs in return for predetermined compensation. Then, the aggregator only dispatches those DERs pursuant to an agreement with each DER owner when "called upon by a utility or an ISO/RTO which may not occur depending on grid needs."

Also, United replies to Staff's arguments that DER aggregators are adding energy resources to the grid (1) through saving energy via demand reduction or demand-side management, or (2) "injecting" energy into the distribution system from distributed generation. United counters this first argument, by explaining that it would lead to an "unreasonable" result, as it would mean that any entity providing energy savings services or products could be deemed a public utility. This could include sellers and installers of heat pumps, high-efficiency water heaters, or insulation. United also cites relevant FERC and United States Supreme Court precedents that support their claims that demand response and other load reductions are a wholesale market activity and not a sale of energy. In responding to the "injected" energy arguments, United again details that DER aggregators do not sell power as discussed above. To further support this claim, United cites FERC precedent that says that if there is no net sale of power over a billing period there is no sale for resale, and that making the determination that any entity that injects power onto the grid a public utility could lead to unreasonable results beyond the legislative intent of Indiana law.[13]

In response to Staff's claim that DER aggregators "'manage,' 'operate,' and 'control' equipment, namely DERs, for 'delivery' and 'furnishing' electric power," United reiterates that DER aggregators "do not directly deliver or furnish power but rather facilitate the DER owner's ability to do so." Here, if the Commission classifies DER aggregators as public utilities, it would lead to an unreasonable result outside the intent of the statute. This is especially true because some DER owners can override the aggregator through the option to not participate in events when there is a call for load flexibility.

United also explains that aggregators are not "sufficiently 'affected' with a public interest" to be public utilities because they "do not carry out business impressed with a public purpose. Instead, DER aggregators' operations, agreements, and purpose all relate to private business transactions with eligible customers in a competitive market.

With regard to Staff's references to the slide presentations of Voltus and CPower, United pointed out that Voltus' presentation failed to discuss DER aggregators selling power, while CPower's explicitly said that they do not sell power.

In terms of public policy arguments, United asserts that the Commission can ensure non-discrimination, safety, and data privacy while at the same time ensuring grid stability without classifying DER aggregators as public utilities. Instead, United offers that DER aggregators can be regulated under Ind. Code § 8-1-40.1-4, rules promulgated under it, and existing Commission

[12] United's Exhibit 2, at 3.
[13] *Id.* at 5.

rules, industry codes, and utility requirements. United also explains that DER aggregators do not compete with utilities but rather work with them as a necessary part of their business model. This is augmented by the fact that DER aggregators function in an open marketplace that prevents "cherry-picking" and discrimination.

Finally, United explains that if the Commission decided to classify DER aggregators as public utilities, it would have a chilling effect on the market because of the additional steps needed to reverse this determination. It would also create additional regulatory burdens on other devices and practices like solar arrays or sellers and installers of energy efficient appliances. To this end, United maintains that like other states, Indiana should not classify DER aggregators as public utilities.

5. Commission Discussion and Findings. As mentioned at the outset of this Order, the sole purpose of this investigation is to determine whether to classify DER aggregators, regardless of DERs they aggregate, as "public utilities." The Presiding Officer found that such a determination of how DER aggregators would be defined and possibly regulated would be better informed with testimony from interested parties. Only two parties provided testimony in this Cause, as summarized above, concerning those issues for Commission consideration.[14]

Staff contends that aggregators add energy to the grid and this energy is being sold to an undifferentiated public. According to Staff, this occurs when energy is injected onto the grid from distributed generation or batteries, or when aggregators reduce demand through demand-side management practices. Staff considers the avoided energy use in the latter situation to be the same as injecting energy onto the grid. On the other hand, United argues that demand reduction and demand-side management activities do not "inject" or add power. To support this claim, United explains that regulating anything that curtails power as a "public utility" can lead to unreasonable results, such as regulating sellers and installers of heat pumps, high-efficiency water heaters, or insulation. They also cite a FERC and United States Supreme Court decision that demand response and other load reductions are a wholesale market activity and not a sale of energy. In terms of "injecting" power via DERs, United argues that DER aggregators are a

> [S]ervice provider that facilitates a DER owner's ability to participate in the energy market. Aggregators do not generate or store power. The extent of their involvement with injecting power onto the grid is the assistance they provide to DER owners in response to signals from an ISO/RTO or a utility when an event is called.[15]

[14] The Utilities joined together in filing comments in this Cause, along with briefs, but declined to submit evidence into the record. The Commission notes the scant evidence upon which to base an order adopting the Utilities' position and the tenuous position that creates. *Northern Indiana Public Service Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1016 ("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… (4) there was not substantial evidence supporting the findings of the Commission…").

[15] United's Exhibit 2, at 4.

To bolster this argument, United again cites a FERC ruling that said, "… where there is no net sale of power over a billing period there is no sale for resale."[16]

This Commission finds that DER aggregators do not add power to the grid, nor sell it to an undifferentiated public. This is because DER aggregators are service providers in an open and competitive marketplace. DER aggregators are not selling or adding power in any way; instead, they are doing for the DER owner what the DER owner could do directly without being considered a public utility. If this Commission were to regulate aggregators as "public utilities," it would be a poor precedent and lead to regulation of numerous energy technologies clearly not within the legislature's intent, and by extension, the Commission's authority. The rulings from FERC and the Supreme Court indicate that other jurisdictions have thought through similar questions and have found that DER aggregators are not what Staff suggests. The extent to which aggregators need to be regulated can be accomplished under the clear authority granted under Ind. Code § 8-1-40.1-4. This more conservative and practical approach also serves Indiana by not discouraging DER deployment and aggregators from entering the Indiana energy markets. The Commission agrees that overly aggressive regulation can have a chilling effect on the market for advanced energy technologies and practices, especially when it is inconsistent with numerous jurisdictions within the United States.

In conclusion, the Commission finds that Indiana law and policies do not support the classification of DER aggregators as public utilities. In addition, the Commission finds that a "public utility" classification is unduly burdensome and will create unnecessary hurdles to the evolution and growth of advanced technologies and practices on Indiana's grid. Appropriate rules will therefore be adopted under Ind. Code § 8-1-40.1-4, rather than on the basis that DER aggregators are public utilities.

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

1. DER aggregators, regardless of the DERs they aggregate, are not public utilities.
2. Any rules governing DER aggregators should be adopted under the authority granted in Ind. Code § 8-1-40.1-4.
3. This Order shall be effective on and after the date of its approval.

[16] United's Exhibit 2, at 5 *citing* Declaratory Order, Docket No. EL09-31-000, 129 FERC ¶ 61,146 (Issued Nov. 19, 2009).

HUSTON, BENNETT, FREEMAN, VELETA, AND ZIEGNER CONCUR:

APPROVED:

I hereby certify that the above is a true and correct copy of the Order as approved.

_____
Dana Kosco
Secretary of the Commission