IN THE

Indiana Supreme Court

No. 21A-EX-821

Indiana Office of Utility Consumer Counselor, et al., Appellants, v. Southern Indiana Gas & Electric Co., and Indiana Utility Regulatory Commission, Appellees.	Appeal from the Indiana Utility Regulatory Commission No. 45378, Hon. James F. Huston, Chairman Hon. Sarah E. Freeman, Commissioner Hon. David L. Ober, Commissioner Hon. David E. Ziegner, Commissioner Hon. Carol Sparks Drake, Senior Administrative Law Judge

PETITION TO TRANSFER OF APPELLEE INDIANA UTILITY REGULATORY COMMISSION

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QUESTION PRESENTED ON TRANSFER

Indiana electricity customers increasingly generate some of their own electricity using solar panels, windmills, and other devices. But such devices work only under limited circumstances—when it is sunny or windy, for example. At other times, customers who use them must purchase electricity from their public utilities at retail prices. Yet customer-installed solar panels, windmills, and other devices sometimes generate more electricity than the customer can either use or store, such that the customer will want to be compensated for providing that excess electricity—dubbed "Excess Distributed Generation" or EDG—to their utility. Energy markets being highly regulated, the Indiana General Assembly has enacted statutes governing EDG compensation in a way that accounts for the cost of maintaining the overall electricity transmission system—a system that ensures universal access to safe and reliable electricity at just and reasonable rates. The legislature did this by establishing a compensation rate for EDG that is less than retail *and* by negating a previous Indiana Utility Regulatory Commission standard that offset a customer's EDG and retail electricity consumption only every month.

The question presented here is whether, consistent with Indiana Code chapter 8-1-40, the Indiana Utility Regulatory Commission acted within its legislatively delegated authority, when, using its technical expertise regarding electric utility meters, it approved a tariff that calculates EDG at fractional-second, rather than monthly, intervals.

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BACKGROUND AND PRIOR TREATMENT OF ISSUE ON TRANSFER

Most customers rely on utilities for all their electricity needs. With each on-flip of a switch—whether it be a light, an appliance, or machinery—electricity flows almost instantly from the utility, through the network of transformers and power lines called "the grid," to the customer's property in sufficient quantity to meet the demand. With each off-flip, the quantum of electricity needed to perform that function ceases to flow from the grid. A utility installs a meter on a customer's property to track electricity consumption; as electricity flows to a customer's property, it tracks usage in units of kilowatt-hours. A kilowatt-hour is a measure of volume, *i.e.*, the volume of electricity necessary to power a 1000-watt device for one hour. Every monthly billing cycle, the ordinary customer pays retail price for the number of kilowatt-hours used.

One key to understanding this case is that, for any given time unit—whether an hour, a minute, or a fraction of a second—the number of kilowatt-hours being transmitted and used can be greater or lesser, depending on the customer's demand. The nature of electricity is such that its volume can increase indefinitely without increasing transmission time. The nature of electricity is also such that it can flow only one direction on a wire at a time, though that direction (and volume) can change in fractions of a second, which modern digital meters can read and record.

When, as for most customers, the supply of electricity flows only from the utility to the customer, the number of kilowatt-hours transmitted and used at any given hour, minute, or fraction of a second is irrelevant. All that matters is the aggregation of kilowatt-hours used during a monthly billing period. But when the supply of electricity can go either direction—sometimes from the utility to the customer, but other

times from the customer to the utility—the time interval for measuring the direction and volume of electricity being distributed matters a great deal where the compensation value of the imported electricity is different from the exported electricity. In that circumstance, to capture the most precise value of what the customer is using versus what the customer is generating, the electricity must be measured—both as to direction and volume—at the most basic interval possible, *i.e.*, within a fraction of a second. That way, for valuation purposes, the electricity imports remain disaggregated from the electricity exports. The more time between measurements, the more exports and imports defy separate valuation.

In this case, the opposing sides disagree over the appropriate period contemplated by the legislature for measuring customers' electricity imports and exports. The Commission concluded that the law permits these measurements to be taken as frequently as possible, which, owing to the state of technology, means in a fraction of a second. The Indiana Court of Appeals and the OUCC,[1] on the other hand, say the law requires these measurements be taken every month. The gulf between the two yields such dramatically different outcomes for electricity valuation that the choice of one or the other must reflect a deliberate legislative policy decision. This Court needs to decide which policy the legislature chose.

[1] Numerous private organizations—Indiana Distributed Generation Alliance, Solarize Indiana, Inc., Citizens Action Coalition, Inc., Environmental Law & Policy Center, Vote Solar, and Solar United Neighbors—intervened. App. Vol. II at 16–18. The Court's recent decision in *Solarize Ind., Inc. v. So. Ind. Gas & Elec. Co.*, No. 21S-EX-236, 2022 WL 681297 (Ind. Mar. 8, 2022), calls into question the standing of these interveners.

I. Regulating Electricity Delivery to and Procurement from Energy-Producing Customers

In recent decades, solar panels, windmills, and other renewable-power devices have risen in popularity as a way for customers to generate their own electricity and thereby reduce their usage and cost of electricity from their utilities. As a device generates electricity, the customer's internal electrical system uses the amount necessary to meet present demand and exports any excess to the utility's distribution system. Such customers are dubbed "distributed generation" or "DG" customers.

Distributed generation devices, however, generate electricity only under limited circumstances—when it is sunny, or windy, for example. On the other hand, when they do generate electricity, these devices may generate more electricity than the DG customer can either use at that time or store. And, of course, during those hours when DG customers do not supply their own electricity, they need electricity from another source (*i.e.*, their electric utility). So, DG customers must remain connected to the grid both to ensure a constant and reliable source of electricity and to export any excess electricity they generate. The electricity that a DG customer exports to the grid is known as "Excess Distributed Generation," or "EDG."

EDG, of course, has value as a source of electricity for other utility customers—albeit a small source. The question for policymakers is whether and how to compensate DG customers for their EDG. Electricity, after all, is bought, sold, transmitted, and used in a highly regulated market; by design, the General Assembly keeps the price of electricity stable by permitting public utilities to operate limited geographic

monopolies where rates are regulated by the Commission. How EDG fits into that market, therefore, is also a subject of regulation.

When solar panels first became available to private customers to generate electricity for their own use, the Commission used its general rulemaking authority, Ind. Code § 8-1-1-3(g), to create a system that provided a one-for-one retail credit for all EDG kilowatt-hours exported to the grid. 170 Ind. Admin. Code 4-4.2. That is, each kilowatt-hour of electricity exported to the grid offset a kilowatt-hour of imported energy. If in each billing cycle a customer exported more than it imported, the customer could apply 1:1 retail credits to a future bill. 170 Ind. Admin. Code 4-4.2-7.

This regulatory system was called "net metering" because the kilowatt-hours of *imported* electricity were "netted" each month against the kilowatt-hours of *exported* electricity. "Netting" simply means the difference between the two quantities each month. A net export in a month yielded corresponding kilowatt-hour credits to carry forward; a net import in a month yielded a corresponding bill that charged the retail rate for each net kilowatt-hour used. 170 Ind. Admin. Code 4-4.2-6, -7.

Net metering proved advantageous to DG customers. A DG customer who exported 100 kilowatt-hours each month but also imported 100 kilowatt-hours that same month would break even and owe nothing to the utility. A good month might even yield 1:1 credits to apply in a future bad month. Either way, DG customers in effect received the same rate for their exported electricity as they were charged for imported electricity.

The costs this arrangement unfairly imposed on non-DG retail customers eventually became evident. The IURC approves public utilities' retail rates based on many factors, including the cost of building and maintaining distribution lines and other shared infrastructure. *See* App. Vol. II at 52–54; Ind. Code § 8-1-2-1 *et seq*. With each kilowatt-hour paid at retail rates, customers share the economic burden of supporting that critical infrastructure, which allows them to be connected to the grid and receive instant, reliable, and safe electricity. But by applying 1:1 retail-value credits for electricity exports to offset the retail value of electricity imports, DG customers avoided contributing to the cost of maintaining the entire electric system, even though they, too, continued to rely upon and benefit from that system. *See* App. Vol. II. at 53. The economic burden of maintaining the infrastructure thus shifted to a smaller set of paying retail customers, yielding, in effect, a subsidy of the DG "haves" by the DG "have-nots." As customer-owned solar-energy generation became more common, this subsidy arrangement became less equitable.

Accordingly, in 2017, the General Assembly overhauled the compensation structure for EDG. Instead of valuing each kilowatt-hour exported the same as each imported, the legislature capped the amount of net metering utilities may accept and directed utilities to compensate DG customers 125% of the *wholesale* price of electricity for each kilowatt-hour exported by a DG customer. Ind. Code §§ 8-1-40-15, -17, -18. This is a marked difference, as the retail price of electricity is roughly 250% of wholesale. In other words, the legislature created a system where DG customers are credited about half as much for their electricity *exports* as they pay for their electricity

imports, per kilowatt-hour. That way, DG customers pay some share of maintaining the broader electricity system.

The statutory scheme creates this system first by directing that "[a]n electricity supplier shall procure the excess distributed generation produced by a customer at a rate approved by the commission" (*i.e.* 125% wholesale price) and then by defining "excess distributed generation" as "the difference between" electricity imported by a customer and electricity exported by a customer. Ind. Code §§ 8-1-40-5, -15. The statute mirrors the net metering rule's requirement that the utility calculate the "difference" with one critical exception—the legislature chose to omit from the statute the net metering rule's express provision that the "difference" be measured "during the billing period" each month. 170 Ind. Admin. Code 4-4.2-7.

So, while "difference" implies subtraction, electricity flows in only one direction at a time, so no matter the interval at which a meter takes snapshot measurements of electricity direction and volume, if the meter measures electricity moving in one direction, the volume of electricity moving in the other direction—and thus one of the two integers in the subtraction equation—will always be zero. In short, utilities must "procure the excess distributed generation produced by a customer" at the proper rate; doing so requires snapshot measurements taken at fractional-second intervals, as provided under the Commission-approved tariff.

II. The Commission Approved Vectren's Proposed Tariff, but the Court of Appeals Rejected It

The General Assembly has charged the Commission with responsibility for ratemaking. *Hamilton Se. Utils., Inc. v. Ind. Util. Regulatory Comm'n*, 101 N.E.3d

229, 233 (Ind. 2018); *see also* Ind. Code § 8-1-2-1 *et seq*. The Commission serves "primarily as a fact-finding body with the technical expertise to administer the regulatory scheme devised by the legislature." *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1015 (Ind. 2009) (citations omitted). In addition, the General Assembly delegated to the Commission authority for approving tariffs, *i.e.*, schedules of utilities' rates and regulations. *See* Ind. Code §§ 8-1-2-38 (utilities required to file rate schedules), 8-1-2-39 (utilities required to file their regulations), 8-1-2-42(a) (changes must be approved by the Commission and new schedules be filed), 8-1-2-69 (Commission's investigation authority, including over utilities' regulations and practices).

This ratemaking and tariff-approval authority come into play in the DG Statute, which sunsets net metering tariffs, *see id.* § 8-1-40-11, and requires investor-owned electric utilities submit EDG tariffs for approval, *id.* § 8-1-40-16.

Southern Indiana Gas and Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc. (Vectren), now known as CenterPoint Energy Indiana, was the first electric utility in Indiana to file for approval of its EDG tariff. It filed a petition seeking IURC approval of a tariff rate for procuring EDG in which it would apply the statutory rate of 125% wholesale price to the EDG calculated over "instantaneous" measurement periods. App. Vol. II at 16, 49.

The Commission approved Vectren's EDG tariff because Vectren's testimony demonstrated that, consistent with Indiana Code section 8-1-40-5, its advanced metering infrastructure measured the "difference between" electricity flowing to and

from distributed generation customers in accordance with the statute in an "instantaneous" timeframe (also called "instantaneous netting"). App. Vol. II at 49; Ind. Code § 8-1-40-5. The Indiana Office of Utility Consumer Counselor (OUCC), joined by other intervenors, appealed the Commission's approval of Vectren's tariff, arguing that the instantaneous calculation of EDG does not constitute a "difference between" the electricity supplied by and to the customer and that the timeframe for the EDG calculation should be the monthly billing period, the same as in the net metering rule that the legislature had replaced.

The Court of Appeals ruled for the OUCC in an opinion it eventually published. It rejected the Commission's approval of the Vectren tariff as "unreasonable" because, in its view, Vectren's methodology "compare[s] competing forces meeting behind the meter" to "determine whether there is inflow or outflow," which "is not the inflow/outflow comparison prescribed by Indiana Code Section 8-1-40-5." Op. 10–11. It said that a customer's "production is not within the statutory definition until it is 'supplied back to the electricity supplier.'" Op. 14. It selected a monthly period over which to calculate EDG because it purported to "defer to the monthly billing period previously selected by our Legislature." Op. 15.

ARGUMENT

I. Transfer Is Warranted Because This Case Involves an Important Question of Law Affecting Millions of Utility Customers

The Indiana General Assembly enacted an entirely new statutory chapter to address EDG, Ind. Code ch. 8-1-40, under which net metering is both grandfathered

and sunsetted. The importance of properly interpreting and applying these statutes from the outset for all Indiana ratepayers warrants transfer.

Under Indiana Rule of Appellate Procedure 57(H)(4), this is a question of widespread public importance, as it goes beyond Vectren and its customers and will ultimately affect over 2,400,000 customers, all ratepayers of the five largest Indiana electric utilities. All five Indiana investor-owned utilities have filed petitions with the Commission for approval of EDG rates proposing similar fractional-second intervals for calculating EDG. The other four EDG tariff petitions are pending just one or two steps behind this case. The Commission approved EDG tariffs for Northern Indiana Public Service Company's (NIPSCO), IURC Cause No. 45505, Indiana Michigan Power Company, IURC Cause No. 45506, and the Indianapolis Power & Light Company d/b/a AES Indiana, IURC Cause No. 45504, and all three approvals are on appeal in the Court of Appeals. No. 22A-EX-0115; No. 22A-EX-00378; No. 22A-EX-00389. Duke Energy Indiana has proposed its EDG tariff and awaits a Commission order.

Moreover, the Court of Appeals' interpretation of the DG Statute affects *all* customers of these utilities, as EDG credits are recovered through retail electricity rates. EDG credits are incorporated in fuel adjustment proceedings under Indiana Code section 8-1-2-42 and, therefore, paid by ratepayers. Ind. Code § 8-1-40-15.

II. The Decision Below Departed from the Statute and Misunderstood the Factual Justification for Vectren's Tariff

1. Under the Commission's now-defunct net-metering rule, DG customers received a one-for-one retail credit for all EDG kilowatt-hours exported to the grid. That

is, each kilowatt-hour of electricity exported to the grid offset a kilowatt-hour of imported energy. If in each billing cycle a customer exported more than it imported, the customer could carry the 1:1 retail credits forward to apply to a future bill. *See* 170 Ind. Admin. Code 4-4.2-7. Net metering provided DG customers with an advantageous one-for-one compensation structure, but also enabled those customers to avoid sharing costs of maintaining critical infrastructure that they used. App. Vol. II at 53. Non-DG customers ended up subsidizing DG customers.

When the General Assembly overhauled the DG compensation system, it sunsetted net-metering and replaced it with a new EDG statutory scheme. Ind. Code ch. 8-1-40. Instead of valuing each exported kilowatt-hour the same as each imported, the legislature decided to value EDG at 125% of the *wholesale* price of electricity for each kilowatt-hour a DG customer exports. Ind. Code § 8-1-40-17. In other words, the legislature created a system where utilities credit DG customers a little more than the wholesale price at which the utilities may purchase electricity from other sources. That way, DG customers pay some share of the burden for maintaining the broader electricity system, and their EDG value is aligned with wholesale alternatives.

The statute accordingly provides that "[a]n electricity supplier shall procure the excess distributed generation produced by a customer at a rate approved by the commission" (*i.e.* 125% wholesale price), Ind. Code § 8-1-40-15, and then defines "excess distributed generation" as "the difference between" electricity imported by a consumer and electricity exported by a customer, Ind. Code § 8-1-40-5.

2. Vectren's proposal effectuates the statute's mandate. Electricity flows through the meter only one direction at a time but can change volume and direction at fractional-second intervals. At any given interval, (1) the meter may measure zero because the customer's DG resource is perfectly matching the customer's demand; (2) the meter may measure positive flow to the customer, who is drawing electricity from the utility because the customer's consumption is greater than its production; or (3) the meter may measure negative flow, *i.e.*, electricity coming from the customer, who is pushing electricity out because its production is greater than its consumption. At each interval of measurement, the EDG "difference" calculation occurs, with either one or both quantities at zero, yielding the quantity of EDG "procured" by the utility.

The interval of measurement—of each snapshot of electricity direction and volume—is critical to proper valuation. The statute imposes a rate of 125% wholesale on *all* EDG "procure[d]" by the utility. Ind. Code §§ 8-1-40-15, -17. Utilities "procure the excess distributed generation produced by a customer," *id.* at § 8-1-40-15, at the proper statutory rate only when they take the most precise measurements possible, which depends on the time interval in which the measurement occurs. If the measurement interval is too long, the calculation may not capture the actual quantity of EDG the customer exported because it will be netted out by any imported electricity drawn by the customer during that interval period; in that situation, the utility will not be complying with the statute because it will be offsetting imports and exports rather than isolating the customer's EDG exports and crediting them at 125% of the

wholesale rate. Vectren's meters measure flow and volume at fractional-second intervals, providing the most accurate reading possible under current technology.

3. The Court of Appeals made critical errors in its legal and factual analyses.

First, the court erred in its interpretation of the EDG statute and its imposition of its own period for calculating EDG. The General Assembly "clearly expressed its intent to end" the net metering tariff option. Op. 15. Achieving that objective means that the interval of measurement must be as short as possible to quantify each unit of EDG and apply the proper statutory rate. The longer the interval, the more 1:1 netting occurs between imports and exports, which defeats the legislature's policy choice to replace net metering rule.

The Court of Appeals stated that it would "defer to the monthly *billing* period previously selected by our Legislature." Op. 15 (emphasis added). It is not clear what the Court of Appeals was referring to. Monthly *netting* comes from the Commission's administrative rule on net metering, 170 Ind. Admin. Code 4-4.2, not legislative enactment. The DG statute provides that the credit for EDG is to be applied to the customer's monthly bill, Ind. Code § 8-1-40-18, but does not demonstrate any intent to impose a monthly interval for the EDG calculation. Indeed, a month-long interval directly contradicts both the legislature's decision to *omit* the monthly netting period previously included in the Commission's net-metering rule *and* the statute's requirement that *all* the EDG supplied to the utility from the customer should be credited at a rate of 125% of wholesale price. The longer monthly measurement interval that

the Court of Appeals ordered enables customers producing EDG to receive the equivalent of a one-for-one retail dollar offset for all EDG the customer supplied to Vectren against the electricity Vectren supplied over the course of the month. Under that model, the 125% wholesale rate credit imposed by Ind. Code § 8-1-40-17 would apply only to the extent total EDG exceeds electricity supplied by the utility that month. The legislature did not intend such a ready workaround of its effort to reduce the valuation of *all* EDG.

Second, when the Court of Appeals said that "the comparison of supply and electrical generation (some of which meets the DG customer's own needs and some of which is supplied to Vectren) is not the inflow/outflow comparison," Op. 12, it second-guessed the Commission's factual expertise and misunderstood the evidence underlying Vectren's proposal.

The Commission considered the competing evidence, including evidence that showed "mechanically" that "in measuring outflow, Vectren South's meter instantaneously nets" both the inflow and the outflow. App. Vol. II at 49. The Commission concluded that Vectren provided "substantial evidence . . . explaining that outflow" from its meter "accounts for both the electricity supplied by the customer to [Vectren] and the electricity Vectren South supplied to the DG customer" and specifically relied on the testimony of Matthew Rice. App. Vol. II at 50.

The Court of Appeals observed that "Rice explained that the meter registered as outflow the net of two components" but rejected his testimony because, in the court's view, "the components involved in his scenario are competing energies behind

the meter, and the dominant force is subject to one allocation." Op. 13. The Court of Appeals' understanding has no basis in the record or in how electricity operates. Electricity imports and exports are not "competing" in the meter with one of them crowned champion as "the dominant force." All that is happening is that when a DG customer's production exceeds need, its DG system pushes that electricity through the meter to grid. And when the DG customer's system generates insufficient electricity to meet demand, Vectren pushes electricity through the meter to the customer. But at any given interval, that electricity can move in only one direction at a time through the meter, with the capability of switching in a fraction of a second. Furthermore, in no instance is Vectren measuring EDG that has not been "supplied" by the customer because it has not passed through the meter. *Contra* Op. at 10–11, 13.

As this Court recently reiterated, "When it comes to technical expertise, the commission is entitled to great deference, and we will not substitute our judgment for its: 'So long as the experts act within the limits of the discretion given them by … statute, their decision is final.'" *Ind. Off. Util. Consumer Counselor v. Duke Energy Ind., LLC*, No. 21S-EX-432, 2022 WL 713351 at *5 (Ind. Mar. 10, 2022) (quoting *Pub. Serv. Comm'n v. City of Indianapolis*, 131 N.E.2d 308, 311 (Ind. 1956)). The Commission, as the administrative body responsible for setting retail electricity rates and approving utility tariffs, *see* Ind. Code § 8-1-2-38, has substantial expertise in the mechanical functions of meters. It has a staff of engineers who review metering technology and understand both the physical properties of electricity and how the working characteristics of meters functionally measure electricity usage. Indiana courts

do not have such expertise, nor has the General Assembly delegated to courts the responsibility for developing that expertise and using it to review tariffs submitted by investor-owned utilities.

Even so, the Court of Appeals substituted its (mis)understanding of what happens inside Vectren's bi-directional electricity meters for the Commission's studied assessment, born of training and experience. The methodology the Court of Appeals rejected is not the methodology the Commission approved for measuring EDG.

At the very least, insofar as the Court of Appeals made these determinations contrary to the findings of the Commission, it decided "mixed questions of law and fact"—if not pure questions of fact—without according deference to the Commission's expert determinations. *See N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1016 (Ind. 2009). Transfer is warranted to correct these errors on this important issue.

CONCLUSION

The Commission respectfully requests that the Court grant transfer and affirm the Commission's order.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this Petition contains no more than 4,200 words based upon Microsoft Word's software word count.

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 14, 2022, I electronically filed the foregoing document using the Indiana E-filing System ("IEFS"). I further certify that on March 14, 2022, the following persons were contemporaneously served with the foregoing document via IEFS:

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