

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF INDIANA MICHIGAN POWER)
COMPANY FOR APPROVAL OF A TARIFF)
RATE AND ACCOMPANYING TARIFF TERMS) CAUSE NO. 45506
AND CONDITIONS FOR THE PROCUREMENT)
OF EXCESS DISTRIBUTED GENERATION)
PURSUANT TO IND. CODE CH. 8-1-40.)

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

The Office of Utility Consumer Counselor (“OUCC”), Citizens Action Coalition of Indiana, Inc., Indiana Distributed Energy Alliance (“IndianaDG”), and Solar United Neighbors (collectively “Joint Parties”), by counsel, submit this brief in support of the proposed order filed by the OUCC recommending that the Indiana Utility Regulatory Commission (“Commission”) deny the proposal by Indiana Michigan Power Company (“Petitioner” or “I&M”) for an Excess Distributed Generation Rider (“Rider EDG”), 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 I&M’s proposal. If not, the Commission must reject I&M’s proposed tariff. As described further below, I&M’s interpretation of “excess distributed generation” (“EDG”) as defined in Ind. Code § 8-1-40-5 violates the plain, ordinary, and usual meaning of the language of the statute, and therefore I&M’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. The plain language of the statute states it is the difference between two values: the electricity that I&M supplies to a distributed generation (“DG”) customer and the electricity that the DG customer supplies back to I&M.

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).

III. I&M'S FAILURE TO FOLLOW IND. CODE CH. 8-1-40

A. I&M's Proposed Tariff Ignores the Statutory Definition of EDG.

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 *Allied Signal, Inc. v. Ott*, 785 N.E.2d 1068, 1079 (Ind.2003)). Thus, the Commission must avoid an interpretation of Ind. Code ch. 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).

In this case, I&M’s proposed tariff ignores the statutory definition in Ind. Code § 8-1-40-5 and uses measurements outside the statute to determine the amount of “excess distributed generation.” I&M’s tariff states, “[t]he meter register will record instances when the eligible onsite generation is producing more than what is being consumed at the premises (excess distributed generation)...”³ I&M uses this amount as the basis for determining the billing credit.⁴ Importantly, the components used for this determination, electricity generation and consumption by the DG customer, are **not** included in the statutory definition used to calculate EDG. Instead of calculating EDG as the “difference between” electricity supplied to a customer and the electricity supplied back to the utility, I&M’s tariff uses non-statutory components, a DG customer’s behind-the-meter generation and consumption, as the basis for applying the EDG rate to determine the credit.

This invalid interpretation and application of EDG is further confirmed in the testimony of I&M witness Cooper, who states:

³ Petitioner’s Ex. No. 3, Attachment KCC-1, p. 3 of 7.

⁴ *Id.*

This definition of “excess distributed generation”, along with other provisions of Ind. Code ch. 8-1-40, requires the utility to compensate a distributed generation (DG) customer for electricity produced by the customer and delivered to the grid, over and above any electricity produced by the customer and used for the customer’s own electricity requirements, at a certain rate (basically an average wholesale price plus 25%).⁵

In contrast to I&M’s testimony, 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. The definition of EDG does not mention a DG customer’s behind-the-meter generation or direct the utility to measure this amount. Likewise, the definition does not mention a DG customer’s electricity consumption or usage. I&M’s definition of EDG 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 by explicitly stating that EDG is solely the excess of on-site generation over consumption. But it did not. The legislature defined EDG as the difference between electricity that I&M “supplied” to a DG customer and the electricity that the DG customer “supplied back” to I&M. I&M does not “supply” the electricity that a DG customer produces and consumes behind the meter. By using customer’s generation and consumption, I&M is comparing (or “netting”) two non-statutory terms in direct conflict to the express language of the statute. I&M is not free to substitute the statutory components of EDG for a different set of non-statutory components (behind-the-meter DG production and consumption) that it prefers.

⁵ Petitioner’s Ex. No. 5, p. 2, l. 21 – p. 3, l. 3.

I&M incorrectly attempts to compare its definition of outflow with the statutory EDG definition. Electricity generated and consumed by the customer occurs solely on the customer's side of the meter, and more importantly, is not included in the definition of EDG, so it cannot be the "difference" between the two components listed in Ind. Code § 8-1-40-5. I&M's use of customer generation and consumption is therefore irrelevant to the Commission's consideration and should not be used as the basis for the EDG determination. Simply put, I&M's proposed methodology for calculating EDG is unlawful, and the Commission must reject it.

B. I&M Cannot Avoid the Statute's Plain Meaning by Characterizing Its Proposal as an "Instantaneous Measure."

I&M's attempt to characterize its proposal as an "instantaneous measure" does not satisfy the statute.⁶ I&M acknowledges that electricity can only flow in one direction on an instantaneous basis.⁷ On an instantaneous basis, there is only electricity delivered to the customer or electricity delivered from the customer back to the utility, not both. Because only one exists on an instantaneous basis, there is nothing from which to take the difference as required by Ind. Code § 8-1-40-5. While I&M witness Cooper provides a conclusory response that the difference is calculated at the meter during the instantaneous measure, he provides no underlying explanation to show that this statement is correct and makes no attempt to try to reconcile this statement with the acknowledgement that electricity only flows in one direction on an instantaneous basis.⁸ I&M's interpretation of the measurement of EDG only considers the second part of the statutory EDG definition ("the electricity that is supplied back to the electricity supplier by the customer"), rendering the first portion of the definition superfluous, as at no time is it measuring and taking

⁶ Petitioner's Ex. No. 5, p. 3, ll. 13-14.

⁷ Public's Exhibit No 2, I&M Response to OUCC Request 1-02(a).

⁸ Petitioner's Ex. No. 5, p. 3, ll. 13-14.

“the difference between” electricity supplied by the utility to the DG customer with this second component.

As the meter can only measure either inflow or outflow at any given instant, not energy flow in both directions, any measurement is not “net” of both components. Therefore, it is not physically possible to “instantaneously” net the two components of Ind. Code § 8-1-40-5. The Commission is not free to ignore the plain meaning of the statute that requires I&M to measure (i.e., “net”) the “difference between” electricity supplied to the DG customer and electricity supplied back to the utility.

It should be noted that in the Final Order approving Vectren’s EDG proposal in Cause No. 45378, the Commission discussed the concept of “opposing forces” to justify its decision that an instantaneous measurement calculates the “difference” as required by the statute.⁹ Despite I&M referencing this Final Order as support for its proposal, I&M did not reference “opposing forces” or provide any testimony to support this concept. Therefore, there is no evidentiary basis of this concept in this proceeding.

C. The Commission Should Utilize the “Billing Period” as the Period over Which to Take the “Difference” as Required by Ind. Code § 8-1-40-5.

IndianaDG witness Inskeep recommends that the Commission reject I&M’s proposed methodology and maintain netting over the billing period (“monthly netting”), i.e., maintain what the Commission currently has in place for net metering customers to determine the “difference” between the amount of electricity delivered to the customer and the amount of electricity delivered from the customer to the utility.¹⁰ The Joint Parties agree with this position. When the Legislature

⁹ IURC Cause No. 45378, Final Order at p. 36 (April 7, 2021) (on appeal).

¹⁰ 170 IAC 4-4.2-7(2).

enacted Ind. Code ch. 8-1-40, it used an almost identical definition of EDG as was in place in Commission rules for “net metering.”¹¹ The Legislature did not provide a time period in Ind. Code ch. 8-1-40 over which to take the difference but was presumably fully aware of the Commission’s rule that provides for the use of the monthly “billing period” for this. If the Legislature had intended to change the use of “billing period,” it had the opportunity to do so when the statute was enacted. Because there is no specific language in Ind. Code ch. 8-1-40 that requires a change in the netting period from the “billing period” currently in Commission rules, and the Commission has already determined that the “billing period” is appropriate in its rule, the Commission should rely on what is already in place to determine the “difference” for DG customers under I&M’s Rider EDG.

Furthermore, one of the main changes in the statute from the Commission’s “net metering” rule addresses the pricing of the difference between electricity delivered to the customer and electricity delivered back to the utility. Under the net metering rule, the energy difference is applied as a credit to the next monthly bill,¹² while in the EDG statute, the Legislature provides that the utility will procure the difference¹³ (now defined as “excess distributed generation”) and provides a rate for the difference.¹⁴ However, as described above, the Legislature specifically used almost identical language to define “excess distributed generation” as is used in the Commission rule for the definition of “net metering.” In addition to keeping almost the same language, the Legislature did not provide any change to the methodology to determine the difference for EDG that is different from the determination of the difference for net metering. The statute does not define

¹¹ 170 Ind. Admin. Code 4-4.2-1(i): “‘Net metering’ means measurement of the difference between the electricity that is supplied by the investor-owned electric utility to a net metering customer and the electricity that is supplied back to the investor-owned electric utility by a net metering customer.”

¹² 170 IAC 4-4.2-7(2).

¹³ I.C. § 8-1-40-15.

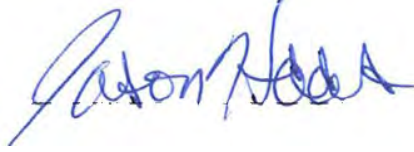
¹⁴ I.C. § 8-1-40-17.

only “the electricity that is supplied back to the electricity supplier by the customer” as EDG. Rather, one of the statutory changes is to the pricing of the difference, not a change in the methodology to determine the difference. If the legislature had intended to change the methodology to determine the “difference,” it had the opportunity to do so, but it did not make that change. Because the language to determine the “difference” is almost the same, the methodology to determine these amounts should also be the same, and the Commission should only apply the new pricing to the difference, as required in the statute.

IV. CONCLUSION

As explained above, I&M’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, I&M’s proposed tariff is unlawful and must be rejected. In the alternative, if the Commission decides to adopt an EDG rate for I&M, the Commission should require taking the difference under Ind. Code § 8-1-40-5 over the billing period, as is currently in Commission rules for net metering customers.

Respectfully submitted,



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

/s/ R. M. Glennon
Robert M. Glennon, Attorney No. 8321-49
3697 North County Road 500 East
Danville, Indiana 46122
(317) 694-4025
robertglennonlaw@gmail.com
Counsel for Indiana Distributed Energy Alliance

/s/ Jennifer A. Washburn
Jennifer A. Washburn, Attorney No. 30462-49
Citizens Action Coalition of Indiana, Inc.
1915 W. 18th Street, Suite C
Indianapolis, Indiana 46202
(317) 735-7764
jwashburn@citact.org
Counsel for CAC and SUN

CERTIFICATE OF SERVICE

This is to certify that a copy of the *OUCC'S AND THE JOINT PARTIES' BRIEFS IN SUPPORT OF PROPOSED ORDER* has been served upon the following parties of record in the captioned proceeding by electronic service on October 26, 2021.

Kay E. Pashos
Ice Miller
kay.pashos@icemiller.com

Tammara Avant
Indiana Michigan Power Co.
tavant@aep.com

CAC, SUN
Jennifer A. Washburn
Citizens Action Coalition
jwashburn@citact.org
Courtesy Copy to:
Reagan Kurtz
rkurtz@citact.org

Indiana Distributed Energy Alliance
Robert M. Glennon
Robert Glennon & Associates, PC
robertglennonlaw@gmail.com

Laura Arnold
Indiana Distributed Energy Alliance
laura.arnold@indianadg.net



T. Jason Haas
Attorney No. 34983-29
Deputy Consumer Counselor

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR
PNC Center
115 West Washington Street, Suite 1500 South
Indianapolis, IN 46204
infomgt@oucc.in.gov
thaas@oucc.in.gov
317.232.2494 – Telephone
317.232.3315 – Direct
317.232.5923 – Facsimile