

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

**VERIFIED PETITION OF NORTHERN INDIANA)
PUBLIC SERVICE COMPANY LLC FOR)
APPROVAL OF RIDER 889 – EXCESS)
DISTRIBUTED GENERATION RIDER FOR THE)
PROCUREMENT OF EXCESS DISTRIBUTED)
GENERATION PURSUANT TO IND. CODE CH.)
8-1-40)**

CAUSE NO. 45505

**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 (“Indiana DG”), and Solar United Neighbors (“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 the Northern Indiana Public Service Company LLC, (“Petitioner” or “NIPSCO”) 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

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)).

phrases be taken in their plain, ordinary, and usual sense.” *Id.* When determining whether a statute 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 NIPSCO’s proposal. If not, the Commission must reject NIPSCO’s proposed tariff. As described further below, NIPSCO’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 NIPSCO’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 NIPSCO supplies to a distributed generation (“DG”) customer and the electricity that the DG customer supplies back to NIPSCO.

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

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)

A. Definition of “Outflow” in the Proposed Tariff Ignores the Definition of EDG in the Statute.

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, NIPSCO’s interpretation of Ind. Code § 8-1-40-5 ignores the statutory definition in its tariff and uses measurements outside the statute to determine the energy amounts to which it applies the “Marginal DG Price.” While NIPSCO’s tariff defines “Excess Distributed Generation” using the correct statutory language, it then fails to apply this definition anywhere in the tariff to calculate the difference between the electricity supplied to the DG customer and the electricity the DG customer supplies back to the utility.³ Rather, the definition of “Outflow” in the tariff states: “The separate meter channel measurement of electricity being produced by Customer above the electricity being used by Customer.”⁴ NIPSCO then uses the “Outflow” amount as the basis for determining the billing credit.⁵ Importantly, the components used to determine “Outflow,” electricity production 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, NIPSCO’s tariff

³ Petitioner’s Exhibit No. 1, Direct Testimony of Kevin A. Kirkham, Attachment 2-A, Rider 889, Definitions, “Excess Distributed Generation” (May 10, 2021).

⁴ *Id.*, Definitions, “Outflow.”

⁵ See Rider 889 definition of “DG Billing Credit.”

uses non-statutory components, a DC customer's behind-the-meter production 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 NIPSCO's witnesses. NIPSCO Witness Sears states: "NIPSCO will measure EDG by recording the instantaneous net difference in the amount of energy produced by the customer-owned generation which exceeds the amount of energy that is being consumed at that point in time."⁶ NIPSCO Witness Kirkham confirms that "Outflow" is used to calculate the DG billing credit: "The resulting total kWh that is recorded by the outflow channel will be utilized at the end of monthly billing cycle as the amount of energy in kWh used in the calculation of the DG Billing Credit (as described below) applied to the customer's monthly utility bill."⁷

In contrast to NIPSCO'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 and is measured as "Inflow" and "Outflow." The definition of EDG does not mention a DG customer's behind-the-meter production or direct the utility to measure this amount. Likewise, the definition does not mention a DG customer's electricity consumption or usage. NIPSCO'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. But it did not. The legislature defined EDG as the difference between electricity that NIPSCO "supplied" to a DG customer and the electricity that the DG customer

⁶ Petitioner's Exhibit No. 2, Direct Testimony of Robert C. Sears, p. 11 line 17 to p. 12 line 2 (May 10, 2021).

⁷ Kirkham Direct, p. 11, lines 9-12.

“supplied back” to NIPSCO. Ind. Code § 8-1-40-5. NIPSCO does not “supply” the electricity that a DG customer produces and consumes behind the meter. By using customer generation and consumption, NIPSCO is comparing (or “netting”) two non-statutory terms in direct conflict to the express language of the statute. NIPSCO 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.

NIPSCO incorrectly attempts to compare its definition of outflow with the statutory EDG definition. “While NIPSCO defines Outflow as ‘[t]he separate meter channel measurement of electricity being produced by Customer above the electricity being used by Customer’ in the EDG Rider, this simply a simplified statement [sic] that uses the word ‘above’ to refer to the ‘net’ or ‘difference’ between the two components.”⁸ This statement is incorrect. 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. NIPSCO’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, NIPSCO’s proposed methodology for calculating EDG is unlawful, and the Commission must reject it.

B. NIPSCO Cannot Avoid the Statute’s Plain Meaning by Characterizing Its Proposal as “Instantaneous Netting.”

NIPSCO’s attempt to characterize its proposal as “instantaneous netting” does not satisfy the statute. NIPSCO acknowledges that electricity can only flow in one direction on an

⁸ Petitioner’s Exhibit 2-R, Rebuttal Testimony of Kevin A. Kirkham, p. 5, lines 14-18 (Aug. 9, 2021).

instantaneous basis.⁹ 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 NIPSCO Witness Sears provides a conclusory response that “Outflow” is the “net difference,” he provides no underlying explanation to show that this statement is correct and makes no attempt to try to reconcile this statement with the differing definition of “Outflow” in the proposed tariff which uses customer generation and consumption. NIPSCO’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 “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 outflow is not “net” of both components. Therefore, notwithstanding NIPSCO’s description of its approach as “instantaneous netting,” it is not physically possible to “instantaneously” net inflow against outflow. Ultimately, “instantaneous netting” is just another way to say “no netting.” While NIPSCO may prefer a “no netting” policy, the Commission is not free to ignore the plain meaning of the statute that requires NIPSCO to measure (i.e., “net”) the “difference between” inflow and outflow.

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.¹⁰ Despite

⁹ Public’s Exhibit No 2, NIPSCO Response to OUCC Request 1-001(a).

¹⁰ Cause no. 45378, Order at p. 36.

NIPSCO referencing this Final Order as support for its proposal, NIPSCO 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 recommend that the Commission reject NIPSCO’s proposed “no netting” methodology and maintain netting over the billing period (“monthly netting”) that the Commission currently has in place for net metering customer 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.¹¹ The OUCC agrees with this position. When the Legislature enacted Ind. Code ch. 8-1-40, it used an almost identical definition for EDG as was in place in Commission rules for “net metering” when the statute was enacted.¹² Additionally, 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 “billing period” to take the difference. 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 NIPSCO’s EDG Rider.

¹¹ 170 IAC 4-4.2-7(2).

¹² 170 IAC 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.”

Furthermore, one of the main changes in the statute from 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,¹³ while in the statute, the Legislature provides that the utility will procure the difference,¹⁴ now defined as “excess distributed generation,” and provides a rate for the difference.¹⁵ 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 only “outflow” or “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, NIPSCO’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,

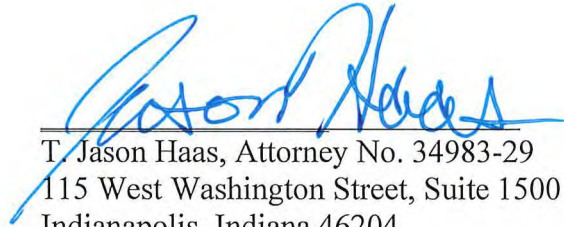
¹³ 170 IAC 4-4.2-7(2).

¹⁴ Ind. Code § 8-1-40-15.

¹⁵ Ind. Code § 8-1-40-17.

and usual meaning of the statutory language. Therefore, NIPSCO's tariff is unlawful and must be rejected. In the alternative, if the Commission decides to adopt an EDG rate for NIPSCO, 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,



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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 September 24, 2021.

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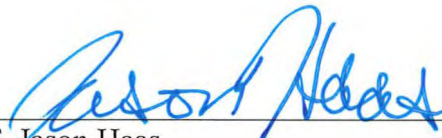
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