STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE COMPLAINT OF LONE OAK SOLAR ENERGY LLC AGAINST THE BOARD OF COMMISSIONERS AND BOARD OF ZONING APPEALS OF MADISON COUNTY, INDIANA FOR A DETERMINATION UNDER INDIANA CODE §§ 8-1-2-54 THROUGH -67, 8-1-2-101, 8-1-2-115, AND RELATED STATUTES REGARDING THE UNREASONABLENESS OF THE DECISION OF THE BOARD OF ZONING APPEALS UNDER THE COUNTY'S SOLAR ENERGY) ZONING ORDINANCE RESPONDENTS: MADISON COUNTY BOARD OF ZONING APPEALS AND MADISON COUNTY BOARD OF COMMISSIONERS	**Cause No. 45793**

MADISON COUNTY'S REPLY IN SUPPORT OF ITS OBJECTION TO LONE OAK'S PRE-FILED TESTIMONY

Madison County Board of Zoning Appeals ("BZA") and Madison County Board of Commissioners (collectively, "Madison County" or the "County"), file this Reply in Support of Its Objection to Lone Oak's Pre-filed Testimony.

Madison County's Objection to Lone Oak's Pre-filed Testimony ("Objection") argued that Lone Oak's requested relief should guide the Commission's evidentiary review. Lone Oak is not bringing a "facial challenge" to the County's Solar Zoning, which would ask the Commission to invalidate the Ordinance itself.[1] Instead, Lone

[1] An example of a facial challenge to an Ordinance is found in *Duke Energy Indiana, LLC v. Town of Avon*, 82 N.E.3d 319 (Ind. Ct. App. 2017). In that case, Duke Energy asked the IURC to find that an Ordinance requiring Duke to relocate

Oak is bringing an "as-applied" challenge, asking the Commission to invalidate the BZA's particular *application* of the County's Solar Ordinance to Lone Oak when it denied Lone Oak's project completion extension request. (Am. Compl. p. 9.) ("Lone Oak requests that the Commission…find…the following: A. The County's Solar Energy Zoning Ordinance, *as applied*, is unreasonable and void.") (emphasis added). Lone Oak requested the Commission to void the BZA's decision on Lone Oak's extension request of the project completion deadline as being unreasonable. (Objection, p. 1.) Because the Commission is sitting "in the role of a reviewing tribunal" the Commission should limit its evidentiary review to the BZA's record. (*Id*.)

Lone Oak argues that Madison County failed to properly understand "the scope of this proceeding." (Response, p. 2.) According to Lone Oak, it *is* challenging the validity of the County's Solar Energy Zoning Ordinance. (*Id*, p. 1.) That assertion, however, is flatly contradicted by its own pleadings in this proceeding.

By bringing an as-applied challenge instead of a facial challenge, Lone Oak is asking the Commission to invalidate the BZA's *decision*, not any portion of the Solar Energy Ordinance. Therefore, the central issue before the Commission is whether the BZA's decision was reasonable. As explained in Madison County's Objection, when tribunals analyze the reasonableness of administrative decisions they review

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utilities located along a proposed multi-use trail was unreasonable and void. *Id*. at 322.

only the evidence actually presented to the administrative body at the time it made its decision. (Objection, pp. 2–4.) The Commission should follow these well-founded principles by allowing only the BZA record to be admitted into evidence. Therefore, any portion of Lone Oak's testimony that was not included in the BZA record should be struck by the Commission.

Lone Oak's prefiled testimony should also be struck because significant portions violate the Indiana Rules of Evidence prohibitions on hearsay evidence and improper legal opinions. (Objection, pp. 7–8.)

In response, Lone Oak cites *Ram Broadcasting of Ind. Inc. v. MCI Airsignal of Ind., Inc.*, 484 N.E.2d 26, 34 (Ind. Ct. App. 1985) to argue that hearsay evidence is admissible as long as the Commission does not rely solely on such evidence to support its decision. (Response, pp. 3–4.) However, this argument misinterprets the *Ram* case. In *Ram*, the appellant argued that the Commission had improperly admitted hearsay evidence. *Ram*, 484 N.E.2d at 34–35. The court of appeals analyzed each hearsay claim against the Rules of Evidence and determined that the evidence either did not meet the hearsay definition or fell into an exception to the hearsay rule. *Id*. Nowhere does the opinion suggest that the Commission should ignore the Rules of Evidence and admit all hearsay evidence. *Id*.

Lone Oak also argues that its witnesses did not violate the legal conclusion prohibition because they did not offer opinions "as to how the case should be decided." (Response, p. 10.) Yet that is not true. For example, Mr. Kaplan offered his opinion that the "Commission *should* intervene" in the present case in order to

fulfill its legal duties under Indiana law. (Kaplan Test., p. 10:17–19) (emphasis added.) Additionally, Ms. Pawelczyk offered her opinion that the "BZA members showed significant bias against solar development project" in violation of "Ind. Code § 36-7-4-909(a)." In both instances, the witnesses were offering their opinions about how the Commission should apply the law to the facts of this case. Such testimony contains classic legal conclusions that are barred by the Rules of Evidence. *See, e.g.*, *Schumm v. State*, 868 N.E.2d 1202, 1204 (Ind. Ct. App. 2007) (holding that police officer's testimony regarding driver's compliance with DOT regulations was improper legal conclusion); *Walker v. Lawson,* 526 N.E.2d 968, 970 (Ind. 1988) ("It is inappropriate for a court to entertain evidence concerning a witness's interpretation of the law.")

CONCLUSION

Respondents respectfully request the Commission deny the admission of the pre-filed direct testimony of Hannah Pawelczyk and Michael Kaplan and any documents attached thereto not contained in the BZA record, and for all other just and proper relief.

/s/ Kevin D. Koons
Kevin D. Koons, Attorney No. 27915-49
Adam R. Doerr, Attorney No. 31949-53
Kroger, Gardis & Regas, LLP
111 Monument Circle, Suite 900
Indianapolis, IN 46204-5125
Phone:317-692-9000
Fax: 317-264-6832
Email:kkoons@kgrlaw.com
adoerr@kgrlaw.com

ATTORNEYS FOR MADISON COUNTY BOARD OF ZONING APPEALS AND MADISON COUNTY BOARD OF COMMISSIONERS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on the following on February 16, 2023, by electronic transmission.

Kristina Kern Wheeler
Nikki Gray Shoultz
Bose McKinney & Evans LLP
Kwheeler@boselaw.com
nshoultz@boselaw.com

Jason M. Kuchmay, #20974-02
4211 Clubview Dr.
Fort Wayne, IN 46804
Telephone: (574) 457-3300
jmk@smfklaw.com

Jason Haas
Randy Helmen
INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR
PNC Center
115 W. Washington Street
Suite 1500 South
Indianapolis, Indiana 46204
jhaas@oucc.in.gov
rhelmen@oucc.in.gov
infomgt@oucc.in.gov

/s/Kevin D. Koons
Kevin D. Koons