STATE OF INDIANA
INDIANA UTILITY REGULATORY COMMISSION

PETITION OF SOUTHERN INDIANA GAS AND ELECTRIC COMPANY D/B/A VECTREN ENERGY DELIVERY OF INDIANA, INC. FOR APPROVAL OF A TARIFF RATE FOR THE PROCUREMENT OF EXCESS DISTRIBUTED GENERATION PURSUANT TO IND. CODE § 8-1- 40 ET SEQ.	)	**CAUSE NO. 45378**

JOINT APPELLANTS' REPLY TO VECTREN SOUTH'S RESPONSE TO JOINT APPEAL TO FULL COMMISSION

The Office of Utility Consumer Counselor ("OUCC"), Indiana Distributed Energy Alliance ("IndianaDG"), Joint Intervenors, and Solarize Indiana, Inc. (collectively "Joint Appellants"), by counsel, file this Reply to Vectren South's Response to Joint Appeal to Full Commission ("Reply").

In support of this Reply, Joint Appellants respectfully show the Commission:

I. INTRODUCTION

Vectren South repeatedly raises irrelevant arguments and incorrect assumptions in its Response to Joint Appellants' Appeal ("Response"). However, despite Vectren South's attempt to confuse the issues, the full Commission should grant Joint Appellants' Appeal of the Docket Entry dated October 15, 2020 ("Docket Entry") denying the Motion for Summary Judgment. There is no genuine issue of material fact precluding summary judgment, and Vectren South's tariff in this proceeding does not properly apply the clear language and plain meaning of Ind. Code § 8-1-40-5.

II. MOTION FOR SUMMARY JUDGMENT IS APPROPRIATE TO ADDRESS ISSUE OF STATUTORY INTERPRETATION

In the Docket Entry, the "Presiding Officers initially note that summary judgment is not typical practice in Commission proceedings." (Docket Entry at p. 2). Vectren South incorrectly emphasizes what the Commission "typically" addresses in an attempt to challenge the propriety of a motion for summary judgment. Vectren South states, "the Commission typically resolves issues

of law as part of its final Order," citing to the Commission's recent decision in Cause No. 45362. (Response at p. 11). While the Commission addressed issues of statutory interpretation in the Order for Cause No. 45362, this comparison is inappropriate as neither party filed a motion for summary judgment on the issue of statutory interpretation in that proceeding, as was done here. As stated in the Joint Appeal, the "purpose of summary judgment under Indiana Trial Rule 56 is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law. *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind.2003)." (Joint Appeal at p. 2). In the Docket Entry, the Presiding Officers acknowledge, "the provisions of T.R. 56 are properly applied in appropriate cases, and the Commission has previously entertained and ruled upon summary judgment motions." (Docket Entry at p. 2). As the Commission can rule as a matter of law on the specific issue of whether the statutory language of Ind. Code § 8-1-40-5 is correctly applied in the undisputed language of Vectren South's proposed tariff, a motion for summary judgment is the appropriate vehicle to address this question.

Vectren South also raises the irrelevant argument that the reason summary judgment is not typical "may be because the Commission is imbued with broad discretion necessary for it to perform its function and arrive at its goals." (Response at p. 11, internal citation omitted). No party is arguing whether the Commission lacks the authority to address the issues before it here. However, when there are specific issues which may be decided as a matter of law without the need for a full evidentiary hearing, Trial Rule 56 and 170 IAC 1-1.1-12(h) make clear that "[t]he judgment sought shall be rendered forthwith" and "summary judgment may be rendered upon less than all the issues or claims." Additionally, Vectren South argues, "[t]he typical practice is for the Commission to exercise its informed regulatory judgment after the benefit of a full evidentiary hearing." (Response at p. 12, internal quotes omitted). However, the statistical fact that summary judgments are not typical neither logically nor practically entails that they should not be granted under the circumstances defined by Trial Rule 56 and which exist here.

The Presiding Officers also "recogniz[e] the issues are more expansive than what constitutes excess distributed generation…" (Docket Entry at p. 3). Vectren South takes this opportunity to point out additional matters in this proceeding that are not raised in the motion for summary judgment and are not relevant in this appeal. Notably, Vectren South raises the matters of the economic propriety of the excess distributed generation rate proposed by the Company

(Response at pp. 2, 6, 13) and the policy implications of the monthly netting proposed by certain intervenors. (Response at pp. 2, 10). However, the pending motion for summary judgment presents solely the matter of whether Vectren South is correctly applying Ind. Code § 8-12-40-5 in defining "excess distribution generation" in its proposed tariff. Vectren South's attempt to confuse the issues by raising irrelevant arguments should be disregarded.[1]

III. THERE IS NO GENUINE ISSUE OF MATERIAL FACT

In denying the motion for summary judgment in the Docket Entry, the Presiding Officers state that "the designated prefiled testimony evidences such a dispute and/or genuine issues with respect to how the meter works in effectuating that language and determining excess distributed generation." (Docket Entry at p. 3). The Presiding Officers also noted that the tariff was modified in Vectren's rebuttal testimony "to include the definition of excess distributed generation and the additional modifications to the definitions of inflow and outflow." (*Id.*) Vectren South incorrectly argues that Joint Appellants do not address the evidence of dispute and/or genuine issue in the Joint Appeal. However, in the Joint Appeal, Joint Appellants correctly noted that Vectren South's edits to its proposed tariff produced no substantive change. Joint Appellants addressed the tariff language because the incorrect application of the statute to the tariff is the central question in the motion for summary judgment. At no point in the summary judgment process have the Joint Appellants disputed that a meter measures electricity supplied from an electricity supplier to a customer or electricity supplied back to the electricity supplier by the customer, or how it does so. Rather, as noted in the Joint Appeal, the language of the tariff itself and Vectren South's incorrect interpretation thereof is incorrect as a matter of law. It is Vectren's application of the law to its tariff, and only the application of law thereto that is being challenged as its tariff is contrary to the meaning of the statute.

[1] Joint Appellants would note that they sought summary judgment rather than partial summary judgment because the issue raised on summary judgment involves an essential element of Vectren's claim and thus entry of judgment on that issue would be dispositive of Vectren's claim for relief even though there are other elements (e.g. the form and rate of compensation for "excess distributed generation") of that claim. *See* Reply, at pp. 7-8. *See also Bushong v. Williamson,* 790 N.E.2d 467, 474 (Ind. 2003), and *Board of School Com'rs of City of Indianapolis v. Pettigrew,* 851 N.E.2d 326, 330 (Ind. Ct. App. 2006), *trans. denied.*

The Docket Entry noted that, "the testimony some Joint Movants prefiled appears inconsistent with claims made in the Motion," citing the direct testimony of Joint Intervenors' witness Douglas Jester. (Docket Entry at p. 2). Vectren South seized on this statement, incorrectly stating, "Jester also indicated that 'Outflow' registered on the meter represents 'excess distributed generation' under Ind. Code § 8-1-40-5." (Response at p. 8). However, that segment of Mr. Jester's testimony does not refer to "excess distributed generation" in the context of Ind. Code § 8-1-40-5. Rather, the entire paragraph of testimony only refers to Mr. Jester's description of power flows, and he describes these power flows in relation to the "inflow" and "outflow" descriptions in Vectren South's testimony. *See* Joint Intervenors' Exh. 1, at pp. 9, 12. Additionally, Mr. Jester's statement reflects the issue that was previously raised in Joint Movants' Reply to Vectren South's Response to Motion for Summary Judgment, specifically that "production of the distributed generation that is greater than (i.e. 'in excess of') customer consumption is not the same as 'excess distributed generation' under Ind. Code § 8-1-40-5." (Joint Movants' Reply at p. 4).

IV. STATUTORY AMBIGUITY

Contrary to its belated assertion in its Response (page 9), Vectren has made and supported no claim in any of its filings in this proceeding that Ind. Code § 8-1-40-5 should be considered ambiguous regarding netting interval. An electronic word search of Vectren's Response to Joint Appellants' Motion for Summary Judgment does not disclose a single instance of the words "ambiguous" or "ambiguity". Similarly, there is no conclusion or even mention in the Presiding Officers' Docket Entry denying summary judgment that Ind. Code § 8-1-40-5 should be considered ambiguous regarding netting interval.

Moreover, Joint Appellants have made no direct claim of statutory ambiguity either. Vectren's argument in its Response that policy arguments made by certain of Joint Appellants' witnesses against instantaneous netting necessarily *imply* such a claim is both legally and logically incorrect. (Response at p. 9). It is entirely consistent, both logically and legally, for Joint Appellants to advance both statutory interpretation and policy arguments against Vectren's proposal. Indeed, it could be legal malpractice for Joint Appellants to forego policy arguments against Vectren's instantaneous netting proposal because their lawyers share the legal opinion that the plain meaning of the statutory definition of "excess distributed generation" in Ind. Code § 8-1-40-5 precludes Vectren's proposal.

That said, assuming *arguendo* that Ind. Code § 8-1-40-5 might conceivably be considered to be ambiguous regarding netting interval as belatedly asserted in Vectren's Response, application of well-established principles of statutory construction compel the legal conclusion that the netting interval intended by the General Assembly in enacting Ind. Code Chapter 8-1-40 is "billing period" not "instantaneous". Moreover, when necessary, statutory construction is a matter of law and not a matter of fact and thus completely appropriate for determination on summary judgment.

A. Applicable Principles of Statutory Interpretation

As the Indiana Supreme Court has explained on multiple occasions:

> The first step in interpreting any Indiana statute is to determine whether the legislature has spoken clearly and unambiguously on the point in question. *Rheem Mf'g. Co. v. Phelps Heating & Air Conditioning, Inc.*, 746 N.E.2d 941, 947 (Ind.2001). When a statute is clear and unambiguous, we need not apply any rules of construction other than to require that words and phrases be taken in their plain, ordinary, and usual sense. *Id.* Clear and unambiguous statutory meaning leaves no room for judicial construction. *Id.*

St. Vincent Hosp. & Health Care Center v. Steele, 766 N.E.2d 699, 703-04 (Ind. 2002). A statute is ambiguous when "it is susceptible to more than one interpretation." *In re Lehman*, 690 N.E.2d 696, 702 (Ind. 1997). *See also Rheem Mfg. Co.*, 746 N.E.2d at 948 *and Amoco Production Co. v. Laird*, 622 N.E.2d 912 (Ind. 1993).

When a tribunal is confronted with a statute that is ambiguous, as the Supreme Court has instructed many times:

> [W]e turn next to other applicable canons of construction. First, we note that "[o]ur main objective in statutory construction is to determine, effect and implement the intent of the legislature." *Melrose v. Capitol City Motor Lodge, Inc*., 705 N.E.2d 985, 989 (Ind.1998). *See also Seifert v. Bland*, 587 N.E.2d 1317, 1319 (Ind.1992), *reh'g denied*. In ascertaining this intent, we "presume that the legislature did not enact a useless provision" such that "[w]here statutory provisions are in conflict, no part of a statute should be rendered meaningless but should be reconciled with the rest of the statute." *Robinson v. Wroblewski*, 704 N.E.2d 467, 474–75 (Ind.1998). *See also Spaulding v. International Bakers Services, Inc*., 550 N.E.2d 307, 309 (Ind.) ("Where possible, every word must be given effect and meaning, and no part is to be held meaningless if it can be reconciled with the rest of the statute.").

Rheem Mfg. Co., 746 N.E.2d at 948.

When deciding questions of statutory interpretation, appellate courts need not defer to a trial court's or agency's interpretation of the statute's meaning. Rather, the appellate court independently reviews the statute's meaning and applies it to the facts of the case under review. *See Elmer Buchta Trucking, Inc. v. Stanley,* 744 N.E.2d 939, 942 (Ind. 2001). *See also Figg v. Bryan Rental Inc.*, 646 N.E.2d 69 (Ind.Ct.App.1995), *trans. denied*. This is because "matters of statutory interpretation present pure questions of law and are thus reviewed *de novo*." *In re Adoption of B.C.H.*, 22 N.E.3d 580, 584 (Ind. 2014) (*citing Gardiner v. State*, 928 N.E.2d 194, 196 (Ind. 2010)).

Moreover, even the Indiana Supreme Court is required to determine, give effect to, and implement the legislative intent underlying the statute and to construe the statute in such a way as to prevent absurdity and hardship and to favor public convenience. *Livingston v. Fast Cash USA, Inc.*, 753 N.E.2d 572, 575 (Ind. 2001). In so doing, the Court should consider the objectives and purposes of the statute as well as the effects and repercussions of such an interpretation. *Id.* The legislative intent as ascertained from the provision as a whole prevails over the strict literal meaning of any word or term. *Shell Oil Co. v. Meyer*, 705 N.E.2d 962, 970 (Ind. 1998). Moreover, in reading a statute, the Court will not overemphasize a strict, literal or selective meaning of individual words. *Clifft v. Indiana Dep't of State Revenue*, 660 N.E.2d 310, 316 (Ind. 1995); *Spaulding v. Int'l Bakers Serv.*, 550 N.E.2d 307, 309 (Ind. 1990); and *Park 100 Dev. Co. v. Indiana Dep't of State Revenue*, 429 N.E.2d 220, 222 (Ind. 1981).

When interpreting a statute, even the highest court's first task is to give the statute's words their clear and plain meaning, while considering the structure of the statute as a whole. *ESPN, Inc. v. Univ. of Notre Dame Sec. Police Dep't*, 62 N.E.3d 1192, 1195 (Ind. 2016) (citing *West v. Office of Indiana Sec'y of State*, 54 N.E.3d 349, 353 (Ind. 2016)). Perhaps most relevant here:

> "As we interpret the statute, we are mindful of both what it does say and what it does not say. To the extent there is an ambiguity, we determine and give effect to the intent of the legislature as best it can be ascertained." *Id.* at 1195–96 (internal citations and quotations omitted). We may not add new words to a statute which are not the expressed intent of the legislature. *Kitchell v. Franklin*, 997 N.E.2d 1020, 1026 (Ind. 2013); see also N.D.F. v. State, 775 N.E.2d 1085, 1088 (Ind. 2002) ("[W]e will not read into the statute that which is not the expressed intent of the legislature.").

City of Lawrence Utilities Service Board v. Curry, 68 N.E.3d 581, 585 (Ind. 2017).

B. Analysis of the Question Presented Here

Ind. Code § 8-1-40-5 does not expressly state whether the intended "netting interval" for "excess distributed generation" is an "instantaneous" or a "billing period" interval. Moreover, Vectren and the other parties disagree as to the statute's intent. Thus, it is arguable that a reviewing appellate court could find the statute to be ambiguous and resort to the principles of statutory construction to resolve the question.

The combined effect of the application of two principles of statutory construction resolve the issue here. The first principle is being mindful of both what the statute does say and what it does not say. Under Net Metering, there is no doubt and no dispute that the measurement interval is a "billing period" interval. *See* 170 IAC 4-4.2-7(2) ("The investor-owned electric utility shall measure the difference between the amount of electricity delivered by the investor-owned electric utility to the net metering customer and the amount of electricity generated by the net metering customer and delivered to the investor-owned electric utility during the billing period"). So, an "instantaneous interval" would be a change. Thus, the logical conclusion is that if the legislature had intended a change, it would have said so expressly. So, in this instance, the lack of an express statement of a change in "netting interval" logically implies that the General Assembly intended no change from the extant "billing period" interval.

This conclusion is reinforced because the legislature was express and specific about the change it did intend, namely in the form and rate of compensation for "excess distributed generation." Specifically, the statute expressly defines the change in the form and rate of compensation in Section 17:

> The commission shall review a petition filed under section 16 of this chapter by an electricity supplier and, after notice and a public hearing, shall approve a rate to be credited to participating customers by the electricity supplier for excess distributed generation if the commission finds that the rate requested by the electricity supplier was accurately calculated and equals the product of:
>
> (1) the average marginal price of electricity paid by the electricity supplier during the most recent calendar year; multiplied by
>
> (2) one and twenty-five hundredths (1.25).

The form of compensation is expressly and specifically changed from kwh to cents/kwh and the rate of compensation is changed from the much higher retail volumetric rate to the much lower

wholesale volumetric rate multiplied by 1.25. It would be illogical to the point of absurdity to assume that the legislature would have been so express and specific about the intended change in form and rate of compensation while being silent and non-specific in prescribing a change in netting interval had such a change been intended.

The second principle involved here is looking at the statute as a whole and giving effect and meaning to other provisions of the statute. Here the other provision of Ind. Code Chapter 8-1-40 which must be given effect and meaning in deciding the point at issue here is Section 21:

> (a) Subject to subsection (b) and sections 10 and 11 of this chapter, after June 30, 2017, the commission's rules and standards set forth in:
>
> (1) 170 IAC 4-4.2 (concerning net metering); and
>
> (2) 170 IAC 4-4.3 (concerning interconnection);
>
> remain in effect and apply to net metering under an electricity supplier's net metering tariff and to distributed generation under this chapter.
>
> (b) After June 30, 2017, the commission may adopt changes under IC 4-22-2, including emergency rules in the manner provided by IC 4-22-2-37.1, to the rules and standards described in subsection (a) only as necessary to:
>
> (1) update fees or charges;
>
> (2) adopt revisions necessitated by new technologies; or
>
> (3) reflect changes in safety, performance, or reliability standards.

Plainly, the intent of subsection (a) of this provision is to keep the provisions of the Commission's existing Net Metering and Interconnection Rules in effect *after* Ind. Code Chapter 8-1-40 takes effect except for (a) changes expressly made by Sections 10 and 11 of the statute itself, and (b) changes adopted by a formal rulemaking by the Commission. It is undisputed and indisputable that neither Section 10 nor Section 11 change the "netting interval" used for Net Metering for use with Excess Distributed Generation. It is also undisputed and indisputable that the Commission has not initiated let alone promulgated any rule after June 30, 2017, changing the "netting interval" used for Net Metering for use with Excess Distributed Generation.

C. Result of Potential Ambiguity

Even assuming that Ind. Code § 8-1-40-5 could arguably be construed as ambiguous regarding the "netting interval" for the "excess distributed generation" defined by that section, Ind. Code Chapter 8-1-40 would be subject to statutory interpretation to resolve that ambiguity. When the long-established and well-understood principles of statutory construction employed by Indiana

appellate courts are applied, the required result is a legal conclusion that the Indiana General Assembly intended the "billing period" "netting interval" in use under Net Metering to continue for Excess Distributed Generation – at least until the Commission has conducted a rulemaking and promulgated a formal rule authorizing a change to a different interval. Inasmuch as the Commission has yet to begin such a rulemaking let alone promulgate such a rule, there can be no doubt that current law requires a "billing period" "netting interval" for Excess Distributed Generation.

V. OTHER MATTERS RAISED IN VECTREN'S RESPONSE BUT EXTRANEOUS TO THE COMMISSION'S RULING ON JOINT MOVANTS' PENDING MOTION FOR SUMMARY JUDGMENT

Vectren South spends an excessive portion of its Response speculating on future actions by various parties in this proceeding. First, Vectren South incorrectly assumes that this Joint Appeal to the Full Commission "is being filed as one prerequisite to an appeal to the Indiana Court of Appeals," based on a statement in another filing, *Joint Movants' Verified Reply to Vectren South's Response to Joint Motion for All-Remote Hearing*. In that Joint Movants' Verified Reply, it states: "In fact, the Presiding Officers issued a Docket Entry today denying the Motion for Summary Judgment which, pending any appeal, will require Joint Movants to be prepared to proceed on all issues and hold what may be a lengthy hearing." Vectren South takes the language "pending any appeal" and unnecessarily speculates on future actions by the intervenors, raising the specter of appeals to the Court of Appeals when, in fact, the appeal referenced is this appeal to the full Commission. Second, Vectren references testimony for Solarize Witness Michael Mullett to infer that Solarize Indiana intends to appeal any decision by the Commission to the Court of Appeals on the determination of the rate under Ind. Code § 8-1-40-17 and then incorrectly argues that Joint Appellants "should not be given the opportunity to take multiple appeals of Orders in this proceeding." (Response at p. 13). The need for any such appeals will obviously depend on the contents of the Orders. Aside from the fact that the issue of the rate is irrelevant in the context of the Joint Appeal, the Joint Appeal addresses a specific issue that warrants summary judgment.

What a party to this proceeding may or may not do in relation to any other issue is not relevant to this appeal, and the Commission should disregard this argument.

VI. ORAL ARGUMENT

Vectren does not oppose Joint Appellants' request for oral argument, "if the Commission believes it would be helpful." (Response at p. 3). Joint Appellants believe oral argument will be a helpful opportunity for clear understanding and oral argument should be granted.

VII. CONCLUSION

The full Commission should reconsider the Docket Entry denying the motion for summary judgment. Vectren South relies on a series of incorrect assumptions and irrelevant or extraneous arguments against Joint Appellants' position, which provide no support for their opinion that the Docket Entry should be upheld. As explained in the Joint Appeal and above, there are no genuine issues of material fact, so summary judgment is the appropriate method to address the issue of Vectren's proposed tariff failing to comply with the statutory definition of "excess distributed generation" plainly stated in Ind. Code § 8-1-40-5. Accordingly, the Commission should grant this Appeal, find that Vectren South's tariff does not correctly apply the unambiguous statutory language of Ind. Code § 8-1-40-5, and grant Joint Movants' pending Motion for Summary Judgment on that dispositive issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the ***Joint Appellants' Reply to Vectren South's Response to Joint Appeal to Full Commission Brief*** has been served upon the following parties of record in the captioned proceeding by electronic service on November 2, 2020.

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