IN THE

INDIANA SUPREME COURT

No. _____

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR, *et al.*,	**Court of Appeals No. 21A-EX-821**
Appellants (Statutory Party and Intervenors Below),	**Appeal from the Indiana Utility Regulatory Commission**
	IURC No. 45378
v.	
	The Hon. James F. Huston, Chair
	The Hon. Sarah E. Freeman,
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY and INDIANA UTILITY REGULATORY COMMISSION,	**The Hon. Stefanie N. Krevda, The Hon. David L. Ober and The Hon. David E. Ziegner, Commissioners**
Appellees (Petitioner and Administrative Agency Below).	**The Hon. Carol Sparks Drake, Senior Administrative Law Judge**

REPLY IN SUPPORT OF PETITION TO TRANSFER OF APPELLEE SOUTHERN INDIANA GAS AND ELECTRIC COMPANY

Steven W. Krohne [# 20969-49]
Jenny R. Buchheit [# 26653-49]
ICE MILLER LLP
One American Square, Suite 2900
Indianapolis, Indiana 46282
Telephone: (317) 236-2100

P. Jason Stephenson [# 21839-49]
Heather Watts [# 35482-82]
CENTERPOINT ENERGY
211 NW Riverside Drive
Evansville, Indiana 47708
Telephone: (812) 491-5119

Peter J. Rusthoven [# 6247-98]
Nicholas K. Kile [# 15203-53]
Hillary J. Close [# 25104-49]
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Telephone: (317) 236-1313

Counsel for Appellee
Southern Indiana Gas and Electric Company

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rule of Procedure

REPLY ARGUMENT

The Decision below is the first to address the DG Statute, technical legislation with major impact on Indiana electric utilities and the millions of Hoosiers they serve. The parties' dispute presents important questions, in a case of public import, which this Court should decide. IND. APPELLATE RULE 57(H)(4).

Appellants OUCC *et al.* don't challenge this. Instead, they claim the panel below grasped the pertinent science and technology better than the IURC. *Ergo*, appellants say the Court should let stand a ruling that renders the Statute's key feature all-but meaningless and defeats the Legislature's plain intent—which appellants deem "irrelevant" under their view of the Statute's "plain language" (Resp. 7).

All this is wrong under the record, the Statute, and this Court's precedent.

I. The IURC Resolved The Dispositive Factual Dispute, Finding That Vectren's Meters Measure EDG Precisely As The Statute Requires.

Here as below, appellants insist *passim* (*e.g.*, Resp. 8) that there is no "factual dispute over how Vectren's meters work" or how they calculate "excess distributed generation" (EDG) under DG Statute Section 5 (IND. CODE § 8-1-40-5). This premise is the linchpin of appellants' case and the Decision below. The record refutes it.

This case *centers* on a highly technical, intrinsically factual dispute over how Vectren's meters work and what they measure. Vectren showed that its meters measure the "difference" between electricity "supplied by" the utility [Section 5(1)] and "supplied back" by the customer [Section 5(2)], which is the Statute's EDG definition. Appellants said Vectren's meters measure only the second component.

The IURC resolved that factual dispute. It found that "OUCC and Intervenors' position relies upon the testimony of OUCC witness Alvarez," whom "*we find is incorrect* in asserting that the outflow [Vectren]'s meter captures only recognizes Section 5(2)." App. II 49 (emphasis added). As the IURC also found, the "evidence shows" Vectren's meter "instantaneously nets both components of EDG under Section 5 at the meter to arrive at EDG. The EDG the meter measures is the difference between these components, not merely one component." *Id.*; *see* Vectren Pet. 11 (also quoting IURC findings and evidence). Again, that "difference" *is* Section 5's EDG definition.

Appellants ignore these findings. So did the Decision. This disregards this Court's command to "uphold findings of fact supported by substantial evidence, which the court does not reweigh." *Ind. Office of Util. Consumer Counselor v. Duke Energy Ind., LLC*, 183 N.E.3d 266, 2022 WL 713351, *2 (Ind. 2022). It disregards, too, that an IURC order stands "unless no substantial evidence supports it," and that a court "considers only the evidence most favorable to the [agency]'s findings.'" *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1016 (Ind. 2009).

These principles apply with special force on matters the Legislature commits to IURC expertise. Appellants profess to grasp electrical science and metering technology better than the IURC. They asked the panel below to credit their claim to superior technical insight, and substitute its judgment for the agency's. The panel accepted the invitation. This Court directs otherwise. "When it comes to technical expertise, the commission is entitled to great deference, and we will not substitute our judgment for its." *Duke Energy*, 2022 WL 713351, *3.

II. The Decision Defeats The DG Statute's Plain Intent, Which Reinforces The IURC Reading Of The Statute's Plain Terms.

Appellants also say the IURC and Vectren are arguing that "policy" and legislative "intent" trump the DG Statute's "plain language." Resp. 7, 15-17. Not so. The IURC *applied* the plain language of the Statute's EDG definition, finding that Vectren's meters measure the "difference" between electricity "supplied by" the utility [Section 5(1)] and "supplied back" by the customer [Section 5(2)].

The DG Statute's plain intent simply reinforces the IURC's application of its plain language. Under established statutory construction principles (*see* Vectren Pet. 15), the Statute's intent shows that appellants' views, mistakenly embraced below, would fail *even if* the Statute's language were unclear. As Vectren showed (Pet. 18-20), the Decision perpetuates the net metering retail EDG credit that the Statute sunsets, and renders the Statute's new wholesale-based credit all-but meaningless.

Appellants have no credible response. They say the Decision didn't render the wholesale-based EDG rate "meaningless" because it didn't "alter" that rate. Resp. 12. This misses the point. No one claims the Decision "altered" the new rate; it instead rendered the rate *inapplicable* in virtually all circumstances. *See* Vectren Pet. 19-20. Appellants don't dispute that under the Decision, almost all EDG will continue to be credited at retail rates, just as under the net metering system the Legislature sunsetted in the Statute. Indeed, this is precisely what appellants want.

Appellants also don't dispute that the panel's ruling that EDG must continue to be measured on a monthly basis perpetuates net metering's retail credit. Nor can

appellants defend the panel's saying that the Legislature "selected" monthly measurement, which in fact was set by IURC rule. *See* Vectren Pet. 18. So instead, appellants say the Statute ended net metering for "new customers," but left it in place for current ones. Resp. 13 (citing I.C. § 8-1-40-21(a)).

This is beyond misleading. Section 21(a) says net metering stays in effect "[s]ubject to" other sections, which delineate when and how net metering sunsets for different customers. *See* I.C. §§ 8-1-40-10 to -19. Appellants know net metering does *not* remain in effect after it sunsets for a customer. They know that, post-sunset, the Statute replaces net metering's retail credit with the new wholesale-based credit. And appellants know that monthly measurement—which the Statute does *not* "select" for post-sunset crediting—perpetuates net metering's retail credit. Again, perpetuating this retail credit, despite the DG Statute, is what appellants want.

CONCLUSION

The Decision misunderstood and misapplied the DG Statute. The panel below disregarded the IURC's findings, substituting its own scientific and technical views for the agency's. Appellants present no credible defense of this improper result, which perpetuates the retail EDG credit that appellants prefer, but the Legislature chose to replace.

The Court should grant transfer and affirm the Commission.

Respectfully submitted,

/s/ *Peter J. Rusthoven*

Steven W. Krohne [# 20969-49]
Jenny R. Buchheit [# 26653-49]
ICE MILLER LLP
One American Square, Suite 2900
Indianapolis, Indiana 46282
Telephone: (317) 236-2100

P. Jason Stephenson [# 21839-49]
Heather Watts [# 35482-82]
CENTERPOINT ENERGY
211 NW Riverside Drive
Evansville, Indiana 47708
Telephone: (812) 491-5119

Peter J. Rusthoven [# 6247-98]
Nicholas K. Kile [# 15203-53]
Hillary J. Close [# 25104-49]
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Telephone: (317) 236-1313

Counsel for Appellee
Southern Indiana Gas and Electric Company

WORD COUNT CERTIFICATE

In compliance with Appellate Rule 44(E) & (F), I verify that this Reply (exclusive of Appellate Rule 44(C) items) contains no more than 1,000 words, as determined by the word processing system used to prepare the Reply (Microsoft Word 2016).

/s/ Peter J. Rusthoven
Peter J. Rusthoven [# 6247-98]

CERTIFICATE OF SERVICE

In compliance with Appellate Rules 24 & 68, I certify that on April 14, 2022 copies of this Reply were served on the following electronically, *via* the Indiana Electronic Filing System:

William I. Fine, Esquire
Randall C. Helmen, Esquire
Thomas J. Haas, Esquire
INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR
wfine@oucc.in.gov
rhelmen@oucc.in.gov
thaas@oucc.in.gov

Jennifer A. Washburn, Esquire
CITIZENS ACTION COALITION OF INDIANA, INC.
jwashburn@citact.org

Bradley Klein, Esquire
ENVIRONMENTAL LAW & POLICY CENTER.
bklein@elpc.org

Joseph P. Rompala, Esquire
LEWIS & KAPPES, P.C.
jrompala@lewis-kappes.com

Robert M. Glennon, Esquire
ROBERT M. GLENNON & ASSOCS., P.C.
robertglennonlaw@gmail.com

Russell L. Ellis, Esquire
russell_ellis@sbcglobal.net

Beth E. Heline, Esquire
Jeremy R. Comeau, Esquire
Steven L. Davies, Esquire
INDIANA UTILITY REGULATORY COMMISSION
bheline@urc.in.gov
jcomeau@urc.in.gov
sdavies@urc.in.gov

The Honorable Theodore J. Rokita
Thomas M. Fisher, Esquire
Angela N. Sanchez, Esquire
Aaron T. Craft, Esquire
Benjamin Jones, Esquire
Julia C. Payne, Esquire
Melinda R. Holmes, Esquire
OFFICE OF THE INDIANA ATTORNEY GENERAL
efile@atg.in.gov
tom.fisher@atg.in.gov
angela.sanchez@atg.in.gov
aaron.craft@atg.in.gov
benjamin.jones@atg.in.gov
julia.payne@atg.in.gov
melinda.holmes@atg.in.gov

Brian J. Paul, Esquire
FAEGRE DRINKER BIDDLE & REATH LLP
brian.paul@faegredrinker.com

/s/ Peter J. Rusthoven
Peter J. Rusthoven [# 6247-98]