STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF DUKE ENERGY INDIANA, LLC FOR APPROVAL OF A TARIFF RATE FOR THE PROCUREMENT OF EXCESS DISTRIBUTED GENERATION PURSUANT TO INDIANA CODE 8-1-40 ET SEQ.	)))))	**CAUSE NO. 45508**

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR'S AND JOINT PARTIES' BRIEF RECOMMENDING DENIAL OF DUKE ENERGY INDIANA'S PETITION

The Office of Utility Consumer Counselor ("OUCC"), Citizens Action Coalition of Indiana, Inc., Environmental Law & Policy Center, Indiana Distributed Energy Alliance ("IndianaDG"), Solar United Neighbors, Solarize Indiana, Inc., and Vote Solar (collectively "Joint Parties"), by counsel, submit this brief recommending that the Indiana Utility Regulatory Commission ("Commission") deny the petition by Duke Energy Indiana, LLC ("Petitioner" or "DEI") 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 DEI's proposal. If not, the Commission must reject DEI's proposed tariff. As described further below, DEI'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 DEI'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 DEI supplies to a distributed generation ("DG") customer and the electricity that the DG customer supplies back to DEI.

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[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. DEI'S FAILURE TO FOLLOW IND. CODE CH. 8-1-40

A. DEI Misinterprets 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, DEI misinterprets the statutory definition in Ind. Code § 8-1-40-5 in its Rider EDG tariff and uses measurements outside the statute to determine the amount of "excess distributed generation." DEI's tariff states: "Excess Distributed Generation (Exports) - The difference between the electricity that is supplied by the Company to a customer that produces distributed generation and the electricity that is supplied back to the electricity supplier by the customer."[3] The definition of "excess distributed generation" in the Rider EDG tariff follows the language in the statutory definition of "excess distributed generation" in Ind. Code § 8-1-40-5. However, under the "Billing" section of the tariff, it states: "2) The Company will additionally measure the instantaneously determined total Excess Distributed Generation (kWh Exported) to the Company by the customer during the billing cycle which will be valued at the Marginal DG price, reported below, resulting in an Excess Distributed Energy credit (measured in dollars)."[4] The term "instantaneously determined" is not defined in the tariff; therefore, one must look to the testimony to establish what this means and how EDG is "instantaneously determined."

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[3] Petitioner's Ex. 1-B (RAF), p. 1 of 3.
[4] *Id.*

DEI consistently describes EDG in terms of a customer's production and consumption in testimony, terms not included in Ind. Code § 8-1-40-5. DEI witness Roger Flick improperly describes EDG: "At any point in time where a DG customer is producing more electricity than it needs for its own requirements and delivers that surplus electricity to the grid, under Duke Energy Indiana's proposal, the Company will compensate 1 the customer for that 'excess' electricity at the statutorily-required EDG rate,"[5] and "Duke Energy Indiana's metering will track separately, energy supplied by the utility that is used by the customer and energy sent back to Duke Energy Indiana's distribution infrastructure (the grid) that is produced by the customer in excess of what they can use."[6] Importantly, the components used for this determination, electricity produced and used 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, DEI uses non-statutory components, a DG customer's behind-the-meter production and consumption, as the basis for determining EDG.

In contrast to DEI'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 is determined at the customer's meter. 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. DEI's interpretation of EDG pushes behind 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

[5] Petitioner's Exhibit No. 2, Rebuttal Testimony of Roger A Flick, II, p. 8, l. 21 – p. 9, l. 2.
[6] *Id.*, p. 10, ll. 17-20.

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 DEI "supplied" to a DG customer and the electricity that the DG customer "supplied back" to DEI. DEI does not "supply" the electricity that a DG customer produces and consumes behind the meter. By using customer's generation and consumption, DEI is comparing (or "netting") two non-statutory terms in direct conflict with the express language of the statute. DEI 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.

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. DEI'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, DEI's proposed methodology for calculating EDG is unlawful, and the Commission must reject it.

B. DEI Cannot Avoid the Statute's Plain Meaning.

DEI acknowledges that electricity can only flow in one direction on an instantaneous basis.[7] Therefore, 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 value exists on an instantaneous basis, there is nothing from which to take the difference as required by Ind. Code § 8-1-40-5. However, while DEI witness Flick acknowledges there is only electricity

[7] *Id.*, p. 9, ll. 17-20.

delivered to the customer or electricity delivered from the customer back to the utility, he then uses the non-existent value to calculate the difference.[8] DEI'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 measurement is not "net" of both components. Therefore, it is not physically possible to net the two components of Ind. Code § 8-1-40-5 at any moment. Duke Energy Indiana admits that "[e]nergy netting is not being performed by the Company's metering equipment," and "[i]n short, the meter is not netting any energy – the delivered and received kWh energy is captured on individual channels."[9] Also, "[r]esponding further, Duke Energy Indiana's AMI meters do not perform instantaneous netting."[10] (Solarize Indiana Ex. CX-2, DEI Resp. to SI DR 3.1a). The Commission is not free to ignore the plain meaning of the statute that requires DEI to measure (i.e., "net") the "difference between" electricity supplied to the DG customer and electricity supplied back to the utility.

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.

Both IndianaDG witness Inskeep and OUCC witness Alvarez recommend that the Commission reject DEI'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

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[8] *Id.*
[9] OUCC Ex. 1, Attachment AAA-3, DEI response to OUCC DR 2A.5(8), p. 4 of 4.
[10] Solarize Indiana Ex. CX-2, DEI Response to SI DR 3.1a.

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.[11] When the Legislature 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."[12] 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 determination. 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 DEI'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,[13] while in the EDG 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

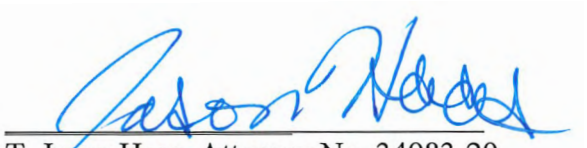
[11] 170 Ind. Admin. Code 4-4.2-7(2).
[12] 170 IAC 4-4.2-1(i): "'Net metering' means measurement of the difference between the electricity that is supplied by the investor-owned electric utility to a net metering customer and the electricity that is supplied back to the investor-owned electric utility by a net metering customer."
[13] 170 IAC 4-4.2-7(2).
[14] I.C. § 8-1-40-15.
[15] I.C. § 8-1-40-17.

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 "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, DEI'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, DEI's proposed tariff is unlawful and must be rejected. In the alternative, if the Commission decides to adopt an EDG rate for DEI, 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 foregoing ***OUCC's and Joint Parties Brief Recommending Denial of Duke Energy Indiana's Petition*** has been served upon the following counsel of record in the captioned proceeding by electronic service on December 9, 2021.

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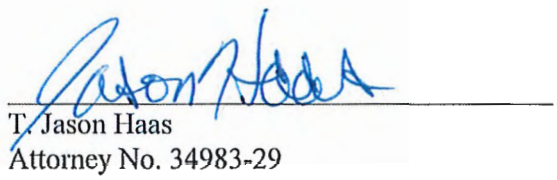

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