STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE INDIANA UTILITY REGULATORY COMMISSION'S INVESTIGATION INTO THE PUBLIC UTILITY STATUS OF DISTRIBUTED ENERGY RESOURCE AGGREGATORS	**)**	**CAUSE NO. 46043**

TESTIMONIAL STAFF'S PROPOSED ORDER OF THE COMMISSION

Testimonial Staff, by counsel, submits the following *Proposed Order of the Commission* for consideration.

Respectfully,

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PROPOSED ORDER OF THE COMMISSION

Presiding Officers:
James F. Huston, Chairman
Loraine L. Seyfried, Chief Administrative Law Judge

On April 17, 2024, the Indiana Utility Regulatory Commission ("Commission") commenced an investigation for the sole, limited purpose of allowing the Commission to consider the public utility status of distributed energy resource aggregators as contemplated under the Federal Energy Regulatory Commission's Order 2222.

The Commission designated Ren Norman, Senior Utility Analyst, as Commission Testimonial Staff with representation by the Commission's Office of General Counsel, and provided notice of this investigation to the following entities:

- Voltus
- CPower
- Octopus Energy
- Indiana Office of Utility Consumer Counselor
- Indiana's jurisdictional rate-regulated electric utilities[1]

The Commission opened its investigation in response to FERC's Order 2222 and the enactment of Indiana Code ch. 8-1-40.1. On September 17, 2020, the Federal Energy Regulatory Commission ("FERC") issued Order 2222 ("Order 2222") [2], revising its rules and requiring regional transmission organizations ("RTOs") to allow participation of distributed energy resources ("DERs") in the wholesale electricity markets through DER aggregators and aggregations.[3] FERC's rule revision is intended to enable DERs to participate alongside traditional resources in RTO wholesale electricity markets through aggregations, with the DER aggregator serving as the aggregation's wholesale market participant, allowing several types of

[1] Indiana's jurisdictional rate-regulated electric utilities include:
[2] 172 FERC ¶ 61,247
[3] 18 CFR 35.28, adding paragraphs (b)(10)-(11) and (g)(12)(i)-(iv).

DERs to aggregate in order to satisfy minimum size and performance requirements that each individual DER might not be able to meet on its own. In 2022, Ind. Code ch. 8-1-40.1 was enacted, explicitly providing the Indiana Utility Regulatory Commission ("Commission") with general rulemaking authority to implement Order 2222 and allowing the Commission to amend its interconnection and net metering rules as may be necessary to implement Order 2222.[4] Thus, the Commission may develop a rule or rules to ensure appropriate participation of the DER aggregators in the wholesale markets as envisioned by Order 2222. However, Ind. Code ch. 8-1-40.1 does not define a "public utility" or address the public utility status of a DER aggregator. Therefore, to facilitate rule development, the Commission initiated this investigation to review and consider the public utility status of a DER aggregator.

Appearances were filed by counsel for Testimonial Staff, the Indiana Office of Utility Consumer Counselor, Northern Indiana Public Service Company, Duke Energy Indiana LLC, Indiana Michigan Power Company, Indianapolis Power & Light Company, and Southern Indiana Gas and Electric Company, and Petitions to Intervene were filed by Hoosier Energy Rural Electric Cooperative Inc., Wabash Valley Power Association Inc., Advanced Energy United Inc., Citizens Action Coalition of Indiana, Tipmont REMC, Indiana Industrial Energy Consumers Inc., and Northeastern REMC, all of which were granted. Pursuant to the Commission's Prehearing Conference Order of May 29, 2024, Testimonial Staff and Advanced Energy United filed prepared testimony and Testimonial Staff, Indiana Michigan Power Company (of behalf of the Indiana Investor-Owned Electric Utilities), Northeastern REMC, and Advanced Energy United Inc. filed legal briefs on or before July 15, 2024. Northeastern REMC and Tipmont REMC joined in the legal brief of the Indiana Investor-Owned Electric Utilities. Testimonial Staff, Indiana Michigan Power Company (of behalf of the Indiana Investor-Owned Electric Utilities), Indiana Industrial Energy Consumers Inc., Northeastern REMC, and Advanced Energy United Inc. filed Responses on or before August 5, 2024. Wabash Valley Power Association Inc., Hoosier Energy Electric Cooperative Inc. and Northeastern REMC joined in the Response of the Indiana Investor-Owned Electric Utilities.

On August 19, 2024, and in response to the Indiana Industrial Energy Consumers Responsive Brief filed on August 5, 2024, Northeastern REMC filed its Motion to Strike or in the Alternative, Motion for Leave to File Supplemental Comments. On August 20, 2024, the Indiana Investor-Owned Electric Utilities[5] filed their Notice of Joinder, joining in Northeastern REMC's Motion to Strike. On August 20, 2024, the Indiana Industrial Energy Consumers filed its Opposition to Northeastern REMC's Motion to Strike. And on August 22, 2024, Northeastern

[4] Ind. Code §§ 8-1-40.1-4 and -5

[5] Per the aforementioned Notice of Joinder, the Indiana Investor-Owned Electric Utilities consist of Indianapolis Power & Light Company d/b/a AES Indiana, Southern Indiana Gas and Electric Company d/b/a CenterPoint Energy Indiana South, Duke Energy Indiana, LLC, Indiana Michigan Power Company, Inc., and Northern Indiana Public Service Company LLC.

REMC and the Investor-Owned Utilities filed their Joint Response to Opposition of Indiana Industrial Energy Consumers, Inc. to Motion to Strike or for Leave to File Further Response.

The Commission held an evidentiary hearing in this Cause on August 27, 2024, beginning at 9:30 a.m. in Room 222 of the PNC Center, 1010 West Washington Street, Indianapolis, Indiana. Counsel for ____, ____, ____ appeared and participated at the hearing, during which Northeastern REMC's Motion to Strike was denied and a legal briefing schedule on those underlying issues was set with a due by date of October 15, 2024. Testimonial Staff's and Advanced Energy United's evidence was admitted into the record without objection.

Based upon the applicable law and the evidence presented, the Commission now finds:

1. Notice and Jurisdiction. Notice of the hearing in this Cause was given and published as required by law. The Commission is authorized under Ind. Code § 8-1-2-58 to summarily initiate an investigation into all matters relating to any public utility. If the Commission becomes satisfied that sufficient grounds exist to warrant a hearing pertinent to the matters investigated, Ind. Code § 8-1-2-59 requires the public utility involved be furnished a statement notifying it of the matters under investigation. In addition to the foregoing statutory provisions, the Indiana Court of Appeals has specifically found that inherent in this grant of power is the implicit power and authority to "do that which is necessary to effectuate the regulatory scheme." *S. E. Ind. Nat. Gas v. Ingram*, 617 N.E.2d 943, 948 (Ind. Ct. App. 1993). The Commission also has the authority to determine whether a person or entity is a public utility under Indiana law. Hidden Valley Lake Property Owners Assoc. v. HVL Utilities, Inc., 408 N.E.2d 622, 629 (Ind. App. 1980). Accordingly, the Commission has jurisdiction to conduct this investigation.

2. Pre-filed Testimony.

A. Testimonial Staff Ren Norman's Pre-filed Testimony. Mr. Norman described his educational background and work history and provided a brief summary of FERC's Order 2222. Mr. Norman explained that a distributed energy resource, or DER, can include a wide array of resources, including rooftop solar panels and their equipment, electric battery storage systems, smart thermostats, energy efficiency measures, thermal energy storage systems, and electric vehicles and their charging equipment. Mr. Norman observed that DERs can be found in homes, businesses, churches, community centers, local government offices, and elsewhere. Mr. Norman noted that DERs are energy resources that are located on and distribute energy across and potentially throughout retail distribution systems, and he observed that Indiana code Section 8-1-40.1-2 defines DERs as any resource located on the distribution system of an electricity supplier, on any subsystem of an electricity supplier, or behind an electricity supplier's customer's meter, including electric storage resources, intermittent generation, distributed

generation, demand response, energy efficiency, thermal storage, electric vehicles and their supply equipment.

Mr. Norman testified that the Midcontinent Independent System Operator ("MISO") organized a Distributed Energy Resource Basics workshop through its *Distributed Energy Resources Task Force* whereat it presented and provided education on DERs and DER aggregators. Mr. Norman recounted MISO's instruction that DERs may supply all or a portion of a customer's electric load and may be capable of injecting power into the distribution system, that a DER's effect on the grid will differ depending on the type of technology being used, that DERs may simply modify loads behind a customer meter or they could export energy to the grid, that DERs can be aggregated into blocks that resemble power plants (a.k.a. virtual power plants or VPPs), and that DERs have the potential to impact the bulk electric system.

Mr. Norman explained that while a DER aggregation can be understood as a grouping or bundle of DERs, an aggregation can also be a single resource under FERC's new rule, observing both the FERC and Indiana Code Section definitions of DER aggregators. Mr. Norman testified that because DERs can be small in comparison to traditional resources like thermal power plants, the output of several or many DERs may need to be combined in aggregation so that there is a "bundle" of sufficient size for market participation. For illustration, Mr. Norman contrasted FERC's DER aggregation model with small, distributed resources participating in state-level net metering, distributed generation, or demand response programs, noting that the latter are individual, stand-alone resources that are generally offsetting a portion of retail energy usage and banking kilowatt hours for a future billing cycle, whereas FERC's new rule allows these same entities to bring various market products, through DER aggregations, to the wholesale markets.

Mr. Norman testified that a DER aggregator is an entity that brings individual DER products, such as demand response or energy, to the wholesale market and that the FERC, in its Order 2222, required RTOs and ISOs to establish DER aggregators as energy market participants. Mr. Norman underscored the definitions of a DER aggregator as put forth by the FERC, MISO and PJM.

Mr. Norman testified that Voltus, a leading aggregator of DERs across nine wholesale power markets, has been an active participant in the IURC's ongoing stakeholder implementation process regarding FERC Order 2222 in Indiana. Mr. Norman recounted that at the March 2023 Commission staff educational meeting, Voltus presented on the role of aggregators, observing that aggregators manage the complexity of aggregated assets including customer relationships, dispatching of individual DERs, scheduling, and settlements, and that aggregators must have operational oversight and control over component DERs.

Mr. Norman testified that during the ongoing rulemaking stakeholder process regarding FERC Order 2222 in Indiana, participants discussed the scope of the Commission's authority to regulate DER aggregators. Mr. Norman recounted that a concern expressed among stakeholders, including IURC staff, was that potential legal challenges around the Commission's authority to regulate aggregators, both during and after rulemakings to implement FERC's Order 2222, could delay Indiana's implementation. Mr. Norman further opined that clarity on this issue would help Commission staff in focusing its rule drafting on the entities over which the Commission has regulatory authority, and that knowing their status as a public utility could aid aggregators of DERs in determining procedurally how to interact with the Commission.

Mr. Norman opined that DER aggregators that are operating, managing, or controlling aggregations of DER resources here in Indiana for wholesale market participation are public utilities. Mr. Norman testified that this conclusion was based on his experience in the electric industry, his research and subsequent understanding of the role of the DER aggregator, and on his reading, discussions and understanding of the applicable state statutes and related case law.

Mr. Norman testified that different types of DER aggregations will behave differently in operation and that there are, generally speaking, three categories of DERs that can be aggregated for market participation: demand side management, distributed generation and distributed storage. Mr. Norman testified that DER aggregators that aggregate distributed generation type resources, like photovoltaics, batteries and microturbines, and sell energy and other injectable market products to the wholesale energy markets would plainly be operating, managing and controlling plant and equipment meant for the production, transmission, delivery, or furnishing of power and would thereby be a public utility in Indiana.

Mr. Norman further testified that by reducing end-user load, demand response and other demand side management resources provide otherwise unavailable power and scarce resources to an undifferentiated public. Mr. Norman observed that through curtailment, aggregated resources can be understood to be furnishing power to others, concluding that a DER aggregation of demand side management resources also looks like a public utility under Indiana law.

Mr. Norman testified that, in reference to Indiana laws and case precedents relied on in drawing conclusions as to the public utility status of DER aggregators in Indiana, he referenced Indiana Code section 8-1-2-1(a)(2), Indiana Code section 8-1-2-1(g)(2), as well as the matters of *US Steel vs. NIPSCO*[6] and *BP Products North America, Inc. vs. OUCC.*[7]

Mr. Norman opined that governing the activities of DER aggregators can protect distribution system reliability while enhancing grid reliability and optimizing resource

[6] 951 N.E.2d 542 (Ind. App. 2011).
[7] 947 N.E.2d 471 (Ind. App. 2011).

utilization, and testified that regulation can provide oversight of, and transparency into, the business operations of DER aggregators and can make the entire construct safe, effective and efficient. Mr. Norman further testified that regulating DER aggregators would contribute to consumer protection by way of the robust complaint resolution framework currently in place for regulated utilities in Indiana. Mr. Norman also opined that governing the activities of DER aggregators can enable fair competition by establishing a level playing field, ensuring transparency, and enforcing regulations that promote equitable market conditions.

Mr. Norman testified that establishing clear and consistent guidelines for the operation of DER aggregators ensures all market participants understand the rules and reduces the barriers to entry for new market entrants, thus promoting fair competition. Mr. Norman testified that implementing a standardized registration and certification process for aggregators ensures that all aggregators meet minimum standards, preventing unqualified players from undermining market integrity. Mr. Norman further opined that mandating transparency in the pricing, operations and financial reporting of aggregators will enable consumers and regulators to compare services and costs easily, preventing deceptive practices and fostering reliability. Mr. Norman observed that conducting regular audits and inspections of aggregator activities could ensure compliance with regulations and standards, and that governing aggregators would allow regulators the ability to develop and enforce interoperability standards for DER technologies and systems to ensure that different technologies can work together seamlessly. Mr. Norman testified that, through regulation, the Commission can create an environment where DER aggregators compete fairly, leading to better services, innovation and more choices for consumers.

Mr. Norman testified that in 2008 the Indiana Commission initiated an investigation to examine the issues associated with end use customers' participation in demand response programs offered by MISO and PJM, in part stemming from Order 719.[8] Mr. Norman recounted the Commission's ruling that Indiana end-use customers could only participate in RTO demand response programs, be it directly or through aggregators, with approval of the Indiana Commission and by way of well-designed tariffs or riders. Mr. Norman posited that the Commission may need to consider how Indiana's current construct will interact with FERC's new paradigm and determine whether it will be necessary or prudent to supersede the existing DR Order and align state/federal programs and processes through future rulemakings.

Mr. Norman, through testimony, incorporated by reference written comments, presentations and other materials regarding FERC's Order 2222, RTO implementation of DERs, aggregator operations, distribution system impacts and more, all of which were provided or

[8] See *In the Matter of the Commission's Investigation into Any and All Matters Related to Commission Approval of Participation by Indiana End-Use Customers in Demand Response Programs Offered by the Midwest ISO and PJM Interconnection*, Cause 43566, 284 P.U.R. 4th 225, 2010 WL 3073664 (Ind. U.R.C.) ("Indiana DR Participation Order").

produced, and then shared publicly[9], as part of Commission staff's informal rulemaking stakeholder process to implement FERC Order 2222 in Indiana.

B. Advanced Energy United's Pre-filed Testimony.
[To be summarized by other party(s)].

3. Legal Briefs.

A. Testimonial Staff. Staff, by counsel, provided background on FERC Order 2222 and on Indiana Code chapter 8-1-40.1 which provides the IURC with rulemaking authority to implement FERC Order 2222 in Indiana, noting that IC 8-1-40.1 does not define a "public utility, and that the public utility status of DER aggregators is not addressed elsewhere in the chapter.

Staff explained that, in response to Indiana Code section 8-1-40.1-4, the IURC staff began a stakeholder process regarding the implementation of FERC Order 2222 in Indiana. Educational meetings, which included presentations from the FERC, MISO, PJM, Voltus, Indiana electric utilities and consumer advocates, were convened in December 2022 and March 2023. Thereafter, and in an effort to focus stakeholder discussions on specific topics, a series of roundtable meetings were organized and held monthly, from June through November 2023. Notes and other materials from those meetings are made available on the IURC's website.

Staff observes that, in Order 2222, the FERC declined to exercise its jurisdictional authority over distribution level interconnections of DERs intending to participate in wholesale markets, leaving it to state level regulatory authorities to ensure that participating resources are safely and reliably interconnected to and operating on the distribution systems.

Staff cites as controlling Indiana Code section 8-1-2-1(a)(2), defining a public utility, in part, as "every corporation, company, partnership, limited liability company, individual, association of individuals, their lessees, trustees, or receivers appointed by a court, that may own, operate, manage, or control any plant or equipment within the state for the … production, transmission, delivery, or furnishing of heat, light, water, or power …." Staff further cites Indiana Code section 8-1-2-1(g)(2), defining "Utility" as "every plant or equipment within the state used for … the production, transmission, delivery, or furnishing of heat, light, water, or power, either directly or indirectly to the public …"

Staff cites as precedential authority the matter of *Hidden Valley Lake Property Owners Assoc. v. HVL Utilities, Inc.,* 408 N.E.2d 622, 629 (Ind. App. 1980) for the proposition that the Commission has the authority to determine whether a person or entity is a public utility under

[9] https://www.in.gov/iurc/home/implementation-re-ferc-order-2222/

Indiana law, and notes that, pursuant to the holding in *US Steel vs. NIPSCO*, 951 N.E.2d 542, 551-2 (Ind. App. 2011), the Commission's authority to make a threshold determination of an entity's public utility status does not give the Commission jurisdiction to regulate that entity if it does not qualify, *ab initio*, as a public utility.

Staff cites the matter of *US Steel vs. NIPSCO*, 951 N.E.2d 542 (Ind. App. 2011) for the proposition that the phrase "directly or indirectly to or for the public" must be read into the definition of a public utility as it appears in IC 8-1-2-1(a). Staff cites *BP Products North America, Inc. vs. OUCC*, 947 N.E.2d 471 (Ind. App. 2011) for the proposition that a public utility is one that is dedicated to public use, without discrimination, impressed with a public interest and a provider of service of a public character and of public consequences and concern. Further, staff cites the *BP* matter for the proposition that where an entity serves a defined, privileged, and limited group, a special class of entities that do not make up the indefinite public, that entity is engaged in a private activity, not the provision of services directly or indirectly to the public and is thus not a public utility.

Staff contends that, to be a public utility in Indiana, an entity must both: (1) own, operate, manage, or control plant or equipment within the state for the production, transmission, delivery, or furnishing of power under Ind. Code 8-1-2-1(a); and (2) do so directly or indirectly to an indefinite public under Ind. Code 8-1-2-1(g)(2) and the case law discussed above. Staff explains that DER aggregators will be the market participants in the RTO wholesale energy markets and that, consequently, DER aggregators will have, and must have, operational control over the DERs in an aggregation offered into the market, so that the DER aggregator can effectively manage and dispatch those resources as directed by the RTOs.

Staff further explains that, through contractual arrangements with its customer/clients (they being the owners of the DER assets in aggregation) DER aggregators will operate, manage, and control their clients' equipment and coordinate the market participation of their assets. The DER aggregator will be the actual wholesale market participant on behalf of the individual DER asset owners whose products are sold in the marketplace. The result, argues staff, is that by performing these functions in Indiana, a DER aggregator meets the definition of a public utility in Ind. Code 8-1-2-1(a) because it operates, manages or controls plant or equipment in Indiana meant to produce, transmit, deliver or furnish power to the wholesale markets and thus to an indefinite and undifferentiated public.

B. <u>Indiana Investor-Owned Electric Utilities</u>. The Indiana Investor-Owned Electric Utilities (IOU's) explain that DER aggregators are public utilities under Ind. Code § 8-1-2-1 and that they "fit neatly" within the definition of public utility by managing plant or equipment within Indiana for the production, delivery, and/or furnishing of power, although they may not own or operate such equipment. Further, the IOUs contend that DER aggregators are

sufficiently affected with a public interest to be treated as public utilities because they sell energy indirectly to the public, hold themselves out as ready and willing to conduct public business, and because a bad actor could potentially discriminate in serving customers. In addition, the IOUs argue that public policy supports treating DER aggregators as public utilities, so that the Commission may exercise jurisdiction over them to address any customer complaints, or to address any reliability or safety issues, that may arise in connection with the activities of DER aggregators.

The IOUs explain that DER aggregators coordinate the flow of energy between DERs and energy markets without necessarily owning the DERs. The IOUs explain that, by managing these energy producing resources collectively, aggregators can supply electrical grids by sending commands to DERs to respond to fluctuations in energy demand. And the IOUs explain that aggregators can pool excess energy produced or stored by DERs to sell at competitive rates, thus supplying the energy markets, and earning revenue for DER owners and themselves.

The IOUs reiterate that DER aggregators are public utilities even though they may not own or operate plants or equipment and that DER aggregators are sufficiently affected with a public interest to be public utilities. IOUs outline considerations in determining whether a company is sufficiently "affected with a public interest" to be a public utility, including (1) whether the company "will be in a position to discriminate in its service and in its rates and in its regulations" between customers (citing *Pub. Serv. Corn. v. Panhandle E. Pipeline Co*., 71 N.E.2d 117, 127 (Ind. 1947)); (2) whether the company sells energy "to an entity that is a mere conduit serving the undifferentiated public, at least indirectly" (citing *BP Prods. N. Am., Inc. v. Ind. Office of Util. Consumer Counselor*, 947 N.E.2d 471, 480 (Ind. Ct. App. 2011)); and (3) whether the company holds out its energy services to the public or instead serves "a defined, privileged, and limited group" of consumers (citing *BP Prods. N. Am*. at 480). Finally, IOUs note that "[w]hether a use is public does not depend upon the number using the utility, but rather whether the public has the right to use it without discrimination" (citing *Gradison v. Ohio Oil Co*., 156 N.E.2d 80, 86 (Ind. 1959)). IOUs assert that these considerations interrelate and point to DER aggregators being public utilities.

The IOUs argue that DER aggregators could potentially discriminate between clients in setting rates and providing services. If not subjected to public utility regulation, write the IOUs, DER aggregators could choose to serve some clients or areas of the state while neglecting other areas that would bring the company fewer profits. The IOUs deduce that such an attempt to cherry-pick profitable customers would cause economic disadvantages to those DER owners in ignored service areas and that it would discourage widespread adoption of DERs. (citing *U.S. Steel Corp. v. N. Ind. Pub. Serv. Co*., 951 N.E.2d 542, 556 (Ind. Ct. App. 2011)). Moreover, writes the IOUs, such a discriminatory practice would invite widespread circumvention of public

utility law by encouraging other private entities to compete with existing public utilities, which could harm consumers indirectly by causing existing public utilities to raise rates.

Further, the IOUs note that DER aggregators will in fact indirectly sell energy to the undifferentiated public. IOUs note that DER aggregators would make wholesale sales of electricity to other utility companies that would in turn sell indiscriminately to consumers. Thus, writes the IOUs, "DER aggregators are public utilities because other utility companies would act as "conduit[s]" for delivering to public consumers the energy procured by aggregators." (Citing *BP Prods*., 947 N.E.2d at 480.)

Next, the IOUs note that most DER aggregators market their excess energy purchasing programs to anyone who can access their websites. And the IOUs observe that DER aggregators do not limit their sales of excess energy to a limited number of private companies — they instead sell that energy to public distributors in regional energy markets. The IOUs contend that DER aggregators are clearly "holding out" their services to the public, and thus they are sufficiently "affected with a public interest and thus classified as a public utility." Citing *Nat'l Serv-All, Inc*., No. 40554, 1996 Ind. PUC LEXIS 508, at *10 (Ind. Util. Reg. Comm'n Oct. 9, 1996).

Lastly, the IOUs assert that public policy supports treating DER aggregators as public utilities, and that doing so will not be unduly burdensome for DER aggregators. IOUs note that DER aggregators will be interacting with utility customers and that they are affected with a public interest. The IOUs opine that Commission regulation of their activities *vis a vis* their customers and incumbent utilities is positive from a public policy point of view. The Commission is well-equipped, observes the IOUs, to handle customer complaints about utility services, as well as grid reliability and safety issues. IOUs note that DER aggregators would connect directly to both consumers and energy grids, thus exposing the public to data security risks, and posits that the public would benefit from oversight over aggregators to ensure they are fulfilling their stated goals of improving grid stability and privacy of each residential, commercial or industrial DER owning customer's personal data. The IOUs finally note that Ind. Code ch. 8-1-2.5 authorizes the Commission to decline to exercise some of its jurisdiction over energy utilities and that DER aggregators may avail themselves of this option in order to minimize their regulatory burdens.

C. <u>Northeastern REMC</u>. Northeastern REMC (Northeastern) joined in the initial comments filed by the IOUs and filed its own brief. Northeastern agrees with the IOUs that DER aggregators are public utilities subject to Commission jurisdiction under Ind. Code § 8-1-2-1(a). Northeastern notes FERC's clarification in its Order 2222 that nothing in [Order 2222] preempts the right of states and local authorities to regulate the safety and reliability of the distribution system and that all [DERs] must comply with any applicable interconnection and operating requirements.

Northeaster contends that, absent Commission regulation, there will be a significant regulatory gap that is not in the public interest, because it has the potential to harm retail customers, utilities, and regional transmission organizations. Northeastern notes that Order 2222 does not preclude or limit state or local regulation of retail rates, distribution system planning, distribution system operations, distribution system reliability, DER facility siting, or of interconnection of resources to the distribution system that are not subject to Commission jurisdiction. Further, Northeastern echoes FERC's recognition that under a relevant electric retail rate authority's jurisdiction over its retail programs, a RERRA is able to condition a DER's participation in a retail distributed energy resource program on that resource not also participating in RTO markets.

Additionally, Northeastern explains that PJM, in its FERC 2222 compliance filing, has delineated authority and jurisdiction to the state commissions over a variety of potential disputes, including disputes regarding the interconnection of component DERs, adjudication of disputes in pre-registration bilateral coordination processes between the DER aggregator and the distribution utility, disputes in the registration process, disputes regarding the operational relationship between the distribution utility, the DER aggregator, and the component DER, for purposes of physically dispatching DER aggregation resources and/or the component DER therein, and disputes arising from a distribution utility's override of an PJM's dispatch for purposes of preserving distribution system reliability.

Lastly, Northeastern posits that DER aggregators sufficiently affect public interest because they sell energy indirectly to the public, hold themselves out as ready and willing to conduct public business, and because a bad actor could potentially discriminate in serving customers. Public policy, contends Northeastern, supports treating DER aggregators as public utilities, so that the Indiana Commission may exercise jurisdiction over them to address any customer complaints, or to address any reliability or safety issues, that may arise in connection with the activities of DER aggregators.

D. Tipmont REMC. Tipmont REMC joined in the initial comments filed by the IOUs, noting their agreement that DER aggregators are public utilities subject to Commission jurisdiction under Ind. Code § 8-1-2-1.

E. Wabash Valley Power Association. Wabash Valley Power Association joined in the initial comments filed by the IOUs.

F. Advanced Energy United. Advanced Energy United (AEU) contend that DER aggregators are not public utilities as defined under Indiana Code § 8-1-2- 1(a). AEU notes

that it is a national trade association representing over 100 companies providing a range of energy technologies, including DER aggregators.

AEU explains that "DER aggregation" is a broad term encompassing multiple business models, and contends that, regardless of their business model, DER aggregators should not be defined as public utilities under current Indiana law.

AEU explains that DER aggregators benefit the grid in two basic ways, through demand response or through export of power to the grid. "This extra capacity" states AEU, "… is supplied to the utility in the same way a traditional power plant provides capacity to the utility." AEU explains that, in all of the DER aggregation scenarios, the owner of the DER voluntarily enters into an agreement with the aggregator in exchange for compensation commensurate with value provided by the DER.

AEU posits that it is necessary to understand and consider the nature of the services provided by DER aggregators before determining whether they are public utilities under Indiana law.

AEU explains that DER aggregators contract with owners of DERs to manage the DER in response to signals from the utility or transmission system operator when the grid is constrained. AEU states that an aggregator adjusts a DER in response to market signals. AEU argues that the ability of an aggregator to operate, manage, or control a DER is analogous to the authority a public utility may grant a vendor to manage a demand response program or maintain and test utility equipment.

AEU contends that aggregators are aligned with U.S. Steel in the matter of *U.S. Steel Corp. v. Northern Indiana Public Services Co*., 482 N.E. 2d 501, 504 (1985), arguing that aggregators do not own plants or equipment in the state and that title to the power remains with the end user. AEU states that, to the extent aggregators of DERs manage equipment, they do so only at the request, via contract, of the end user. AEU insists that aggregators of DERs do not carry out a business impressed with a public purpose, alleging that their operations, agreements, and purpose, are private.

AEU further asserts that the potential for discharge of power from behind the meter aggregated DERs does not make DER aggregators public utilities under Ind. Code § 8-1-2-1(a). AEU explains that Indiana public utilities are responsible for generating and delivering power to their customers and that this is beyond the role of a DER aggregator. AEU alleges that an aggregator of DERs does not supply energy and that aggregators don't take ownership of the power they are managing. The aggregator's role, according to AEU, is to identify and contract with participating [DER] owners, pass along market signals from the utility that additional power

is needed, and manage the [DER] to ensure the discharge is consistent with terms of the agreements between the [DER] owner, aggregator, and utility. AEU, citing *United States Gypsum, Inc. v. Indiana Gas Co. Inc*., 735 N.E.2d 790 (Ind. 2000), as controlling, asserts that aggregation contracts for the ancillary provision of stored power from [DERs] primarily used to serve their owner' load, though superficially similar to public utility services, are not indivisible from the utilities' operations and thus should not fall within the definition of a public utility.

AEU concludes by reiterating its position that DER aggregators are not public utilities under Indiana law, arguing that DER aggregators do not own, operate, manage, or control any plant or equipment for the production, transmission, delivery, or furnishing of power, while asserting that DER aggregators aggregate others' resources capable of benefiting the electric grid in response to signals from utilities and transmission system operators.

Lastly, AEU states that it is not arguing against any regulation of aggregators and that AUE agrees that reasonable guidelines or protections that are consumer-focused should apply to aggregations.

4. Responsive Briefs and Testimony.

A. Testimonial Staff. In its response to AEU's initial briefing and to its contention that DER aggregators are not public utilities, staff, by counsel, note AUE's acknowledgement that aggregators of DERs "occasionally" operate, manage and control DERs in aggregation and further argue that AEU's Initial Brief and accompanying Verified Testimony establish that DER aggregators operate, manage and control DERs in aggregation, DERs that produce and furnish power to the public.

In response to AUEs arguments that DER aggregators are not impressed with a public interest, Staff observes that, in conducting its business, an aggregator of DERs utilizes both retail distribution systems and interstate transmission systems to sell aggregated energy products on the wholesale energy, capacity and ancillary service markets and that, in so doing, aggregators are indirectly providing those products and services to end-use consumers. Staff asserts that this activity resounds in a public interest. Staff offers as an example an aggregator of DERs that takes on a capacity obligation. By doing so, argues Staff, that aggregator is representing that it can provide that capacity, in the form of energy, when the system needs it. "At a basic level" writes Staff "the aggregator would be representing to those who rely on the integrity of these markets that they can rely on this resource to be there when it is called upon."

Staff further points to the Verified Testimony of AEU's witness Mr. John D. Albers, wherein the witness observes that DERs in aggregation can create grid resiliency, especially during times of grid disruption, by providing greater flexibility where power is being supplied,

transported, and stored, and that a DER aggregator can offset the supply usually supplied by a power plant rendered offline during a winter storm, allowing for faster recovery and preventing additional contingencies caused by abnormal voltage and frequency deviations. Staff posits that this activity is an enormous obligation with great import to an indefinite yet reliant public, and that these activities are of great public concern, are of public consequence, and are of a public character. Staff concludes that aggregators of this sort would surely be impressed with a public interest.

Staff notes AEU's suggestion that a DER aggregator is not made a public utility by the act of directing the injection of power onto the grid and contends that power being sold by an aggregator on the wholesale market will ultimately be consumed by an end-user. Notes Staff, "the distinction that AEU draws is merely between the direct versus the indirect provision of power. Regardless, the indirect provision of power counts just the same."

In responding to AEU's argument that DER aggregators do not provide power to the public, even indirectly, Staff notes AEU's adjacent acknowledgment that "batteries provide stored power as a service to the utilities". Staff points to AEU's witness testimony explaining that DER aggregation programs exist under which an aggregator directs the export of power from behind the meter batteries. Staff notes AEU's testimony that, "[t]he stored power from the batteries is supplied to the utility in the same way a traditional power plant provides capacity to the utility." Staff explains that, under FERC's new construct, DER aggregators will provide aggregated power such as this, by way of the wholesale markets, to utilities and ultimately to their end-use customers. "It is hard to imagine a more straight-forward example of providing power, albeit indirectly, to the public" writes Staff.

Lastly, Staff addresses AEU's assertions that DER aggregators are not public utilities in Indiana because they "do not take ownership of a utilities' plants, operations, or transmission equipment", and because they "are not engaged in direct retail activity, nor are they controlling the distribution of power", arguing that these points are inconsequential to the underlying question in this matter.

B. <u>Indiana Investor-Owned Electric Utilities</u>. In its response to AEU's initial briefing, the Investor-Owned Electric Utilities (IOUs) first note that the question before this Commission is whether DER aggregators are public utilities *under Indiana law*, observing that other state determinations as to whether DER aggregators are public utilities pursuant to their state laws are irrelevant to this investigation. The IOUs observe that other states may not consider owners of merchant generating plants to be public utilities, whereas Indiana does.

The IOUs note FERC's conclusion that DER aggregators are considered public utilities under federal law, quoting Order 2222 and FERC's ruling that "to the extent a distributed energy

resource aggregator makes sales of electric energy into RTO/ISO markets, it will be considered a public utility subject to the Commission's jurisdiction."

The IOUs next argue that DER aggregators sufficiently operate, manage, and control equipment, namely DERs, to be public utilities under Ind. Code section 8-1-2-1, and that the code does not contain a *de minimus* exception or otherwise delineate the extent to which a company must own, operate, manage, or control any plant or equipment for the production, transmission, delivery, or furnishing of power to be a public utility.

IOUs challenge AEUs assertion that DER aggregators only "occasionally" operate, manage, and control DERs, observing that DER aggregators send signals to DERs multiple times per day—sometimes multiple times per second, to shift demand from peak to off-peak hours, to shed demand on the grid during supply shortages (either by reducing consumption or by serving consumption with an on-site DER), to reshape and reduce baseload consumption, or to provide ancillary services to satisfy the needs of the distribution or transmission grid. IOUs explain that, unlike a vendor that may periodically operate utility equipment to conduct tests, aggregators micromanage DERs continually. "Aggregators thus frequently and substantially, not "occasionally," operate, manage, and control DER" write the IOUs.

IOUs argue that DER aggregators do much more than "manage contracts" between themselves, DER owners, and utility companies. "Aggregators serve the same residential, commercial, and industrial customers that public utilities serve" write the IOUs. "And aggregators hold themselves out as ready and willing to do business with anyone who can access their websites."

IOUs distinguish the activities of DER aggregators from those of ProLiance, which was found not to be a public utility by the court in *U.S. Gypsum, Inc. v. Ind. Gas Co*., 735 N.E.2d 790, 794 (Ind. 2000). ProLiance, explains the IOUs, did not satisfy Indiana code Section 8-1-2-1 because it performed services for the utilities, not for the utilities' retail customers, and because the only "equipment" ProLiance owned, operated, managed, or controlled in Indiana was office equipment and clerical supplies, which the court declined to equate with the plant or equipment within the state for the production, transmission, delivery, or furnishing of heat, light, water, or power. "Aggregators are thus distinguishable from ProLiance" write the IOUs, "which worked only for a public utility and a municipal utility but not with their customers." In further distinguishing *U.S. Gypsum*, IOUs note that whether aggregators are an "indivisible part of" or have a "nexus with" existing public utilities is irrelevant for the IURC's determination in this matter.

IOUs next contend that DER aggregators are sufficiently affected with a public interest to be public utilities, challenging AEU's assertions that DER aggregators are not sufficiently

"impressed with a public purpose" to be public utilities because their operations, agreements, and purpose, are private. IOUs explain that, per Indiana law, factors relevant to determining whether a company is sufficiently affected with a public interest to be a public utility include whether the company could discriminate between customers in setting rates and providing services, whether the company sells energy at least indirectly to the public, and whether the company holds itself out as ready and willing to conduct business in public. Whether a use is public does not depend upon the number using the utility explains the IOUs, but rather whether the public has the right to use it without discrimination.

IOUs next address AEU's reliance on *U.S. Steel Corp. v. Northern Indiana Public Service Co*., 482 N.E.2d 501 (Ind. Ct. App. 1985) to support its position that DER aggregators do not carry out a business impressed with a public purpose, noting that both companies in that matter, U.S. Steel and Commonwealth Edison Company, were found to not be public utilities under Indiana code Section 8-1-2-1, but also noting that both companies are distinguishable from DER aggregators. The court in *U.S. Steel* found that neither U.S. Steel nor Commonwealth were Indiana public utilities because U.S. Steel would be "the only consumer of the power it proposes to transmit. None will be available for public consumption. Thus, U.S. Steel's utilities under the Act, are private, not public." *Id*. at 505. U.S. Steel could not have been a public utility, observes the IOUs, because it was not directly or indirectly furnishing power to the public: it was transmitting only to itself. *See U.S. Steel Corp. v. N. Ind. Pub. Serv. Co*., 951 N.E.2d 542, 555 (Ind. Ct. App. 2011) (a company must "directly or indirectly" serve the public to be a public utility).

Similarly, observes the IOUs, Commonwealth was not indirectly serving the public in Indiana because U.S. Steel did not distribute the electricity supplied by Commonwealth to anyone other than itself. The IOUs thus conclude that, unlike U.S. Steel and Commonwealth, DER aggregators operating in Indiana would serve the public both directly and indirectly. The IOUs explain, "Aggregators work directly with residential, commercial, and industrial DER owners to integrate their individual DERs into a coordinated whole and provide owners rewards for contributing to efficient grid operations. And aggregators sell excess energy wholesale to other utility companies who then furnish that energy to consumers."

The IOUs continue by observing that Commonwealth only owned, operated, managed, and controlled power plants and equipment in Illinois, whereas DER aggregators will operate, manage, and control DERs physically located in Indiana. "And unlike Commonwealth", notes the IOUs, "title to" the excess energy harnessed by aggregators will not pass only to an entity that transmits that energy solely to itself. "Title to the energy harnessed by aggregators will pass to public utilities (either directly or indirectly via wholesale markets) that then distribute that energy indiscriminately." The IOUs explain, "[a]s in *BP Products North America, Inc. v. Indiana Office of Utility Consumer Counselor*, 947 N.E.2d 471, 480 (Ind. Ct. App. 2011), DER

aggregators are public utilities because their sales to the public occur indirectly, through other utility companies acting as "conduit[s]" for delivering excess aggregated energy to the public."

Next, IOUs address AEUs argument that DER aggregator sales of energy to the public through RTO wholesale markets do not occur "indirectly" because "aggregators are at least one step removed from the provision of power." First, citing Testimonial Staff, the IOUs observe that DER aggregators do in fact serve the public directly through their operation, management, and control of DERs owned by residential and commercial customers. The IOUs, citing *U.S. Steel Corp*., 951 N.E.2d at 555, observe that direct operation, management, or control of DERs is enough to be a public utility in Indiana. Second, the IOUs argue that an aggregators' "one step removed" furnishing of power to consumers is in fact the indirect furnishing of power sufficient to satisfy section 8-1-2-1. "A company may be a public utility even if it is not the company that ultimately delivers power into the hands of consumers" observes the IOUs. In BP Products (*BP Prods. N. Am., Inc*., 947 N.E.2d at 474, 480) as an example, IOUs observe that the court there held that BP was "serving the undifferentiated public, at least indirectly" when it provided the City of Whiting with water and the City then treated and distributed that water to customers.

Another example noted by the IOUs, the Commission has found in prior cases that a business which only generates electricity and then sells that electricity directly to public utilities is itself a public utility, citing *In re Petition of Commonwealth Edison of Indiana, Inc*., Cause No. 36093 (IURC; June 12, 1980); I*n re Petition of AES Greenfield, LLC*, Cause No. 41361 (IURC; March 11, 1999) (wherein the Commission specifically found that it had jurisdiction over entities like Petitioner). The IOUs observe that, like BP and wholesale "merchant" generators, DER aggregators indirectly serve the undifferentiated public by selling electricity wholesale to utility companies that in turn sell that electricity to the undifferentiated public.

C. <u>Indiana Industrial Energy Consumers</u>. In its response to the initial briefings of Testimonial Staff, the Indiana Investor-Owned Electric Utilities, the Northeastern Rural Electric Membership Cooperatives and Advanced Energy United, INDIEC contends that the respective parties fail to address the limits on Commission jurisdiction to issue declaratory rulings and that they rely on faulty analysis regarding the scope of public utility regulation. INDIEC further argues that Staff and the IOUs' assertions that the public interest is served by subjecting DER Aggregators to Commission jurisdiction as public utilities fails to recognize and address the implications of their arguments, "including a potentially radical expansion of the Commission's jurisdiction, and whether those outcomes serve the public interest."

Noting the Commission's reliance on *Hidden Valley Lake Property Owners Assoc. v. HVL Utilities*, 408 N.E.2d 622 (Ind. Ct. App. 1980) in finding jurisdiction, INDIEC contends that *Hidden Valley* does not stand for the proposition that the commission possesses unlimited power to determine the public utility status of any entity at any time, citing *U.S. Steel v. NIPSCO*, 486

N.E.2d 1082, 1086-87 (Ind. Ct. App. 1985), for the proposition that only after the Commission's power is properly invoked does it have authority to hear evidence and then resolve a dispute as to an entity's status as a public utility.

INDIEC further asserts that the Commission has no statutory subject matter jurisdiction to issue declaratory judgments, citing several authorities. INDIEC cites the Court of Appeals for the proposition that, when requested under appropriate circumstances, the Commission has the authority to require an entity alleged to be a public utility to appear before it in order to determine that status. (*Citing Hidden Valley*, 408 N.E.2d at 629). INDIEC argues that the present matter before the Commission is materially different from that considered by the court, alleging that here the Commission seeks *sua sponte* to declare the status of a class of entities outside the context of a pending proceeding. INDIEC further claims that there has been no due notice to all affected entities. Additionally, INDIEC argues that this investigation is not a valid exercise of the Commission's rulemaking authority, explaining and citing authority for the proposition that an administrative agency may not by its rules and regulations add to or detract from the law as enacted nor may it by rule extend its powers beyond those conferred upon it by law. INDIEC declares that, by directing the Commission to adopt rules implementing Order 2222, the General Assembly did not authorize an investigative declaration of the status of DER Aggregators as public utilities.

INDIEC further argues that DER aggregators have not been shown to be public utilities through briefing. INDIEC argues that the parties' analysis of the public utility status of DER aggregators is misguided in that they focus on the statutory definition of a public utility and gloss over the issue as to whether any service being rendered is, in fact, public in nature. INDIEC states that declaring an entity a public utility implicates a government taking of private property within the scope of the Fifth Amendment. INDIEC notes that simply because an entity is providing a utility service to another does not necessarily render the entity a public utility as defined under Indiana law, noting that Indiana decisions analyze the nature of a particular arrangement between the parties to determine whether, or not, an entity is providing public utility service or simply engaged in a private arrangement.

INDIEC asserts that it is undeniable that the DERs being aggregated are privately owned and devoted to the private use of consumers, noting that DER asset owners, through private contracts, are delegating access to DER aggregators "for the purpose of providing a system benefit collectively that the consumers themselves could each provide individually." INDIEC postulates that, "[i]f the provision of such private resources by an Aggregator is a public utility service, then by theoretical consistency the same would be true of an individual DER owner providing its own resource. The consequence would be that every homeowner with a smart thermostat would suddenly become a public utility."

INDIEC argues that public utility regulation of DER aggregators would conflict with federal jurisdiction, asserting that the structure of federal and state regulation is inconsistent with the theory that the role of DER aggregators as participants in regional wholesale markets constitutes "indirect" public service subject to utility regulation in Indiana. INDIEC notes that through the Federal Power Act, FERC regulates sales for resale, *i.e.*, the wholesale market, and argues that imposing state public utility regulation on the same entities for the same activities, purely on the predicate that wholesale transactions have indirect effects on the public, would conflict with the federal jurisdiction already being exercised by FERC. INDIEC notes that MISO and PJM exercise operational control over the transmission assets of their members, and that they both manage and administer regional wholesale markets.

INDIEC notes that no party in this proceeding has suggested that MISO and PJM are public utilities subject to regulation under Indiana law in light of their management and control over transmission or their role in running the wholesale markets. INDIEC notes that RTOs and ISOs were established pursuant to FERC Order 888, "as an exercise of federal jurisdiction over the transmission grid and wholesale transactions" and contends that DER Aggregators operating under FERC Order 2222 are similarly situated. INDIEC surmises that the proposed regulation of DER Aggregators as public utilities under Indiana law effectively seeks to equate participation in the wholesale market as though it were retail operations.

INDIEC further argues that a DER aggregators public utility status is, at most, a case-by-case determination, stating that categorically declaring a diverse set of entities to be public utilities is misguided in light of significant and potentially unknown differences between and among various types of DER Aggregators. IDIEC contends that Indiana law recognizes that public utility status is dependent on the particular facts presented, requiring a fact-specific analysis. INDIEC notes that an entity that owns or operates EV charging equipment for sale or use by the public is not a public utility pursuant to IC 8-1-2-1.3 and argues that the positions put forward by Staff and the Utilities would have the Commission find that the aggregation of such DERs does constitute a public utility service. INDIEC further explains that DERs involving load management are different from DERs involving injection of energy to the grid, and that FERC considers DER aggregators that sell energy into RTO markets to be public utilities subject to FERC jurisdiction, whereas those aggregating only demand resources are not public utilities. INDIEC posits that if load modifying DERs were deemed public utilities due to an indirect effect on net load remaining for the utility to serve, that the scope of Commission jurisdiction would be dramatically expanded.

INDIEC asserts that the inclusion of demand response as a DER subject to regulation as a public utility is of particular concern to INDIEC, noting that "a number" of industrial consumers participate in demand response programs. INDIEC notes that demand response programs were the subject of a Commission investigation in 2010, and states that the suggestion by Staff that it

may be appropriate to "supersede" the 2010 Order points to a problematic expansion of regulation.

INDIEC contends that, with regard to DERs injecting energy to the grid, FERC has asserted jurisdiction such as to make Commission regulation redundant and preempted by federal law. INDIEC asserts that "this situation does not involve the certification of generating facilities within the scope of 16 U.S.C. §824(b)(1)." INDIEC further explains that Qualifying Facilities such as cogeneration and small power production units are authorized by both federal and Indiana law to sell excess power onto the grid, but that such entities do not thereby become subject to regulation as public utilities, noting the explicit rule provision (170 IAC 4-4.1-3) exempting such assets from certain regulation under IC 8-1-2.

INDIEC asserts that there is no bright line that selling power into the wholesale market automatically makes an entity an Indiana public utility, noting that DER aggregators "are not, as a rule, in the chain of title for any energy injected to the grid", concluding that the indirect relation to both the physical equipment and any energy sold, purely for resale, does not support public utility status under Indiana law. INDIEC surmises that it is unnecessary and premature to conclude that no DER aggregators are public utilities under Indiana law, but that asserting jurisdiction over all DER Aggregators, as a class, conflicts with established law.

Next, INDIEC argues that the public policy considerations asserted through briefing fail to justify an expansion of Commission jurisdiction. INDIEC contends that the regulation of DER aggregators as public utilities under Indiana law frustrates the purpose of FERC Order 2222 by erecting barriers to entry and adding layers of regulatory inefficiency. "Notably", writes INDIEC, "the interests of the Utilities in this context are not necessarily aligned with federal policy or the interests of ratepayers, as the benefits that Aggregators bring to wholesale markets and the interstate grid tend to reduce the volume of sales left for retail utilities to make, mitigating the need to build rate base capacity on which they can earn their regulated return."

INDIEC states that public utility regulation is not needed to protect the reliability of utility systems because the Commission retains authority to regulate interconnections between DERs and utility systems. Further, INDIEC states that there is no need for regulation to act as a surrogate for competition outside the regulated monopoly context because DER aggregators compete for the business of customers without exclusive sales rights or regulated returns. "The availability of competitive alternatives" writes INDIEC, "provides strong incentive for such businesses to gain customers by competing on price and offering the best service feasible."

Next, and regarding the IOUs and Staff contentions that finding DER Aggregators to be public utilities will provide the benefit of a Commission forum for complaints, INDIEC contends that MISO and PJM have a complaint resolution process and that, as competitive businesses,

DER Aggregators remain subject to the consumer protections of commercial law, enforceable outside the confines of utility regulation. INDIEC also argues that making a preliminary determination of public utility status so as to provide clarity in connection with the rulemaking process "is poor reason to impose regulatory burdens on entities that have not been shown to be public utilities."

Lastly, and in response to the IOUs and Staff's discussions regarding declinations of jurisdiction by the Commission, INDIEC argues that A DER aggregator "should not be forced to plead a fiction and prosecute a formal Commission proceeding to a conclusion, just to confirm that its operations are not subject to Commission regulation …". INDIEC asks that this investigation be closed without any finding as to the public utility status of DER aggregators, and that the Commission should proceed with the rulemaking contemplated by Ind. Code §8-1-40.1-4 with the benefit of the views and positions presented by the parties in this matter.

D. <u>Northeastern REMC</u>. Northeastern filed a responsive brief and joined in the responsive brief of the IOUs filed on August 5, 2024. Northeastern contends that DER aggregators fall squarely within the definition of public utility under Ind. Code § 8-1-2-1, in that they frequently and substantially operate, manage, and control DERs, are affected with a public interest, and both directly and indirectly serve an undifferentiated public. Northeastern points to AEUs acknowledgment of this role in its initial brief, quoting AEU for the proposition that the "aggregator [may] direct the discharge of some of the power stored in the battery [or other DER] onto the grid when signaled to do so…. This extra capacity from the batteries is supplied to the utility in the same way a traditional power plant provides capacity to the utility." Northeastern further quotes AEU for its acknowledgment that DER aggregators, "sell this [DER] collective resource to utilities or to energy, capacity, or ancillary service markets."

Northeastern observes that the public has a vested interest in grid reliability and that all resources that bid into the wholesale markets influence the reliability of the grid. Writes Northeastern, "Because the RTOs/ISOs have delineated authority and jurisdiction to the state commissions over a variety of regulation related to DER aggregation, there will be a significant regulatory gap absent Commission regulation that would increase risk and harm to the public interest, as DER Aggregators have the potential to harm retail customers, utilities, and regional transmission organizations."

Northeastern states that it is not suggesting that DER Aggregators should be strictly regulated like investor-owned utilities. Rather, Northeastern suggests that the Commission may decide to partially decline its regulatory authority over DER Aggregators pursuant to Ind. Code ch. 8-1-2.5, as it does for Independent Power Producers (IPPs), recognized public utilities in Indiana. Northeastern contends that regulation similar to the IPPs would allow the Commission

to retain sufficient jurisdiction to protect the public interest, address any bad actors as needed, and fill the regulatory gap from RTO/ISO delineated authority.

E. Wabash Valley Power Association. Wabash Valley Power Association joined in the responsive brief of the IOUs filed on August 5, 2024.

F. Hoosier Energy Rural Electric Cooperative. Hoosier Energy Rural Electric Cooperative joined in the responsive brief of the IOUs filed on August 5, 2024.

G. Advanced Energy United. In its responsive brief, AEU asserts that the DER aggregation market is complex, that operations among different aggregators can vary greatly, and that a thoughtful and nuanced approach to the question before the Commission is required. AEU advises the Commission to avoid hasty generalizations as to the public utility status of DER aggregators. Instead, writes AUE, "the Commission should carefully analyze the various approaches taken by aggregators and draw a bright line consistent with legislators' understanding and intended meaning of what kind of entity is a public utility." Further, argues AEU, "the Commission should look to the plain language of IC 8-1-40.1-4 and undergo a rulemaking process to determine the extent to which to regulate DER aggregators and reject the notion that the Commission must first determine DER aggregators are public utilities under IC 8-1-2-1(a) before it can assume jurisdiction over their operations."

AEU contends that DER aggregators that employ demand response are not public utilities. AEU notes that, to the extent an aggregator manages a DER, it does so under a contract with the DER owner, explaining that a DER aggregator acts on behalf of the DER asset owner, that a DER aggregator does not act unilaterally outside the agreement, and that in some cases, DER owners can override an aggregator's activities and decline to participate in a given event. AEU argues that DER aggregators are similar to vendors employed by utilities to manage demand-response programs and who are not labeled as public utilities by the Commission. AEU explains that the DER aggregator of demand response responds, on behalf of the DER asset owner, to calls for demand flexibility, managing equipment as a contractor for the DER owner. AEU asserts that DER owners and utilities maintain their respective ownership, management, and complete unilateral control of delivery, distribution, transportation and storage facilities, during the course of the aggregators' contractual work. This, argues AEU, makes DER aggregators analogous to ProLiance Energy in the matter of *United States Gypsum, Inc. v. Indiana Gas Co., Inc*., 735 N.E.2d 790 (Ind. 2000), which was found not to be a public utility under Indiana law.

Next, AEU contends that demand response resources do not produce, transmit, deliver, or furnish power but rather reduce the need for a utility to send power to an end user, concluding

that DER aggregators whose operations depend exclusively on demand response do not perform the functions of a public utility under Indiana law and should not be considered public utilities.

Next, AEU notes that FERC's Order 719 did not violate the Federal Power Act when it required wholesale market operators to receive demand response bids from aggregators of electricity consumers, and further asserts that the U.S. Supreme Court made an important distinction relevant to the question before the Commission. The Court, explains AEU, held that Order 719's regulation of demand response programs at the wholesale level invariably affected retail sales but is not in and of itself a rule governing retail sales. AEU argues that a demand response aggregator operating at the wholesale level is not providing retail sales, and that this fact precludes any argument they are transmitting, distributing, or furnishing energy directly or indirectly to the public. Additionally, AEU contends that FERC has concluded that demand response aggregators are not public utilities under FERC's jurisdiction when providing contractual services that are not the resale of power and controlling of equipment.

AEU addresses Testimonial Staff Ren Norman's argument that demand response resources provide otherwise unavailable power and scarce resources to an undifferentiated public, thereby furnishing power to others, arguing that the argument could have wide-ranging implications and would contradict the findings in *United States Gypsum, Inc. v. Indiana Gas Co., Inc*., 735 N.E.2d 790 (Ind. 2000). "Reducing one's demand in energy" writes AEU, "does not then make them a furnisher of energy to others no more so than taking a smaller piece of pie than one may otherwise wish to consume does not then make them a furnisher of pie to others."

Next, AEU contends that the FERC provides adequate guidance for the treatment of power exporters that are net importers of energy, citing FERC Order 129 FERC ¶ 61,146 as guidance for the proposition that net importers of power within a given period, who occasionally provide excess power to the wholesale market, do not sell power. AEU notes that FERC's decision is not controlling to the matter at hand but that it is offered as "a blueprint".

Next, AEU notes that, rather than incorporating DER aggregations in IC 8-1-2-1, the Indiana legislature enacted a new code section which established its own definitions, concluding that if DER aggregators were in fact public utilities, the enactment of IC 8-1-40.1 would have been unnecessary because the Commission would already have authority over aggregators and the ability to regulate their operations within the state. AEU urges the Commission to avoid interpreting IC 8-1-40.1 through the lens of IC 8-1-2-1.

Lastly, AEU contends that a plain reading of IC 8-1-40.1 indicates that the legislature intended for the Commission to move directly to rulemaking to regulate DER aggregation and not to do so after determining the public utility status of DER aggregators. "Without question" writes AEU, "the Commission is within its right to determine the public utility status of entities

operating in the State of Indiana, as has been reinforced over time." But, argues AEU, the Commission has already addressed this issue when it exempted third parties operating DERs in the form of customer-owned generation from being regulated as a public utility under IC 8-1-2 via the rulemaking in 170 IAC 4-4.3. Additionally, AEU argues that this matter "is an inquiry without a party", alleging that the Commission is determining the public utility status of DER aggregators in abstentia. Writes AEU, "the public interest would be better served if the Commission, at a minimum, concluded that a blanket determination of aggregators' public utility status cannot be supported and instead investigated an individual aggregator's status when warranted."

H. Tipmont REMC. Tipmont REMC joined in the responsive brief of the IOUs filed on August 5, 2024.

5. Commission Discussion and Findings.

In consideration of the testimony and legal briefings filed in this matter, and in light of applicable law, it is the finding of the Commission that aggregators of DERs that aggregate DERs located in Indiana and that sell their market products into the capacity, energy, or ancillary service markets of an RTO are public utilities under section IC 8-1-2-1. Note that, where applicable, the Commission is using terms as they are defined in Indiana Code chapter 8-1-40.1-2 and 3.

Indiana Code section 8-1-2-1(a)(2) defines a public utility, in part, as "every corporation, company, partnership, limited liability company, individual, association of individuals, their lessees, trustees, or receivers appointed by a court, that may own, operate, manage, or control any plant or equipment within the state for the … production, transmission, delivery, or furnishing of heat, light, water, or power …"

Indiana Code section 8-1-2-1(g)(2) defines "Utility" as every plant or equipment within the state used for … the production, transmission, delivery, or furnishing of heat, light, water, or power, either directly or indirectly to the public …"

Reading these two sections together, the court has concluded that the definition of "public utility" refers to utilities providing service either "directly or indirectly to the public". *US Steel vs. NIPSCO*, 951 N.E.2d 542, 554 (Ind. App. 2011); *U.S. Steel v. NIPSCO*, 486 N.E.2d 1082, 1084 (Ind. App. 1985). Further, in interpreting the meaning of the term "public utility", the word "public" must be construed to mean more than a limited class of persons. *BP Products North America, Inc. vs. OUCC*, 947 N.E.2d 471, 477-78 (Ind. App. 2011)

The court has instructed that "…a public utility is one that is dedicated to public use, under a common law duty to serve all who apply so long as facilities are available without discrimination, impressed with public interest, and a provider of service of a public character and of public consequences and concern." *Id*. at 478 (internal quotation omitted). The court held, in part, that providing certain utility services, including electricity, to only a select group of companies – a special class of entities that do not make up the indefinite public – is a private activity and not the provision of services directly or indirectly to the public. *Id.* at 480.

As a threshold matter, the Commission is not persuaded by INDIEC's argument that the Commission is without subject matter jurisdiction to reach its conclusion, and it rejects the characterization of this investigation as being declaratory in nature. The Commission has the authority to determine whether a person or entity is a public utility under Indiana law. *Hidden Valley Lake Property Owners Assoc. v. HVL Utilities, Inc*., 408 N.E.2d 622, 629 (Ind. App. 1980). And the Commission has broad investigatory powers granted it pursuant to IC 8-1-2-58 and IC 8-1-2-59. The broad grant of regulatory authority given to the IURC by the legislature includes implicit powers necessary to effectuate the statutory regulatory scheme. *S. E. Ind. Nat. Gas v. Ingram*, 617 N.E.2d 943, 948 (Ind. Ct. App. 1993). Further, this investigation is not being conducted *in abstentia* of the relative parties as AEU and INDIEC have suggested, as notice of these proceedings were provided to three aggregators of DERs who themselves have been active participants in the IURC's stakeholder process to implement FERC Order 2222, and AEU has testified that it is a trade association representing, among other entities, aggregators of DERs. "United is a national trade association representing over 100 companies providing a range of energy technologies, including DER aggregators."

The testimony of both Staff and AEU establishes that aggregators of DERs are entities that operate, manage and/or control aggregations of various distributed generation, storage and other equipment for the production or furnishing of power and other energy products to the public, via the markets. Under FERC's new rule, DER aggregators, as wholesale market participants, will sell their energy products to whomever may need them. These sales are clearly meant to serve an indefinite and undifferentiated public and will largely do so indirectly.

The Commission is not persuaded that because there is a contractual relation between aggregators and DER asset owners, or because an aggregator never takes "title" to the power that it sells or to the assets producing the power, that DER aggregators are not public in nature. The Commission finds that the magnitude of the obligation assumed by aggregators, as it is described through the testimony of both Staff and AEU, well establishes that aggregators of DERs are impressed with a public interest. AEU testified that capacity from DERs "… is supplied to the utility in the same way a traditional power plant provides capacity to the utility." AEU's witness also testified that DERs in aggregation can create grid resiliency, especially during times of grid disruption, by providing greater flexibility where power is being supplied, transported, and

stored, and that a DER aggregator can offset the supply usually supplied by a power plant rendered offline during a winter storm, allowing for faster recovery and preventing additional contingencies caused by abnormal voltage and frequency deviations. These are, as Staff suggests, enormous obligations with great import to an indefinite yet reliant public. The activities of DER aggregators are of great public concern and consequence and are by their very nature of a public character. Entities engaged in these activities are conducting business that is plainly of a public interest.

Regarding whether aggregators of strictly demand response resources should be regarded differently than aggregators of injectable resources, the Commission is persuaded by Staff's testimony describing the indirect furnishing of power to the public through demand response. Demand response and other demand side management resources, by their very nature, provide otherwise unavailable power and scarce resources to an undifferentiated public in response to market signals. Those market signals, and the responses by DR assets, have the potential to affect transmission and distribution through load curtailments and the consequential rebalancing of supply and demand. This is much more than turning down a thermostat. In aggregation, many demand response entities simultaneously curtail their demand, and in so doing they furnish needed power to other end-users in what is an undifferentiated public. This activity fits well under Indiana Code section 8-1-2-1. And whereas the Commission is not suggesting that it exercise jurisdiction over the homeowner whose thermostat or water heater is adjusted by an aggregator in response to a market signal, we view differently the aggregator that is controlling the simultaneous curtailment of what is at this time an unknown number of assets and load at unknown locations on our distribution systems and at times we cannot now predict.

In addition, and as noted by Staff and INDIEC, in 2008 the Commission initiated an investigation to examine the issues associated with end use customer participation in demand response programs offered by MISO and PJM, in part stemming from Order 719.[10] The Commission found that the benefits of demand response are best captured by permitting Indiana retail customers to participate in RTO demand response programs through their LSE.[11] Among other things, the Commission observed that this structure permits load reduction to be aligned with, and tailored to, Indiana peaks or strategic regulatory goals and provides for state regulatory oversight.[12] Because future expenditures on, and the impact of, demand response would be reflected in retail rates, the Commission found a statutory obligation to oversee those demand response programs and provisions that have sufficient capability to impact a utility's electric service.[13]

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[10] In the Matter of the Commission's Investigation into Any and All Matters Related to Commission Approval of Participation by Indiana End-Use Customers in Demand Response Programs Offered by the Midwest ISO and PJM Interconnection, Cause 43566, 284 P.U.R. 4th 225, 2010 WL 3073664 (Ind. U.R.C.) ("Indiana DR Participation Order").
[11] *Id*. at 51.
[12] *Id*.
[13] *Id*.

Accordingly, the Commission held that Indiana end-use customers could only participate in RTO demand response programs, be it directly or through aggregators, with approval of the Indiana Commission.[14] And because direct customer participation in RTO demand response has the ability to directly and significantly affect a utility's provision of electric service, the Indiana Commission held that participation in RTO demand response should be done through the retail customer's LSE.[15] "Through well designed tariffs or riders, we believe participating customers can obtain significant benefits from demand response, while preserving the utility planning process."[16]

INDIEC has indicated through its briefing that "a number" of its own members participate in these DR aggregation programs. These affected entities are thus no doubt well apprised of these proceedings as they are represented herein. Further, the Commission notes that these entities have not previously protested the Commission's exercise of authority over them via its order in 43566, this despite the Commission not having identified and noticed beforehand every possible entity that could ever be subject to its order (and the ensuing utility tariffs) going forward. The Commission did not find then, and cannot now find now, an obligation that it must identify every potential affected entity before conducting an investigation, and it is satisfied that proper notice was given to known parties here.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. Aggregators of DERs that are in fact aggregating DERs in Indiana for wholesale market participation are public utilities pursuant to IC 8-1-2-1.

2. IURC staff should proceed, pursuant to Indiana Code chapter 8-1-40.1, and under the guidance provided herein, with its rulemakings to implement FERC's Order 2222 in Indiana.

3. This order shall be effective on and after the date of its approval.

HUSTON, BENNETT, FREEMAN, VELETA, AND ZIEGNER CONCUR:

APPROVED:

I hereby certify that the above is a true
and correct copy of the Order as approved.

[14] *Id*.
[15] *Id*. at 47.
[16] *Id*.

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Dana Kosco
Secretary of the Commission

CERTIFICATE OF SERVICE

The undersigned certifies that on September 27, 2024, a copy of the foregoing was served by electronic mail to the following:

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s/ Steve Davies
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