

# M E M O R A N D U M

**TO: Indiana Energy Policymakers and Stakeholders FROM: Rachel Granneman and Kiana Courtney (ELPC)**

**RE: Third-Party Financing of Distributed Generation Does Not Create a “Public Utility” DATE: December 2018**

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# Introduction

This legal memorandum analyzes whether, under Indiana law, third-party owners of on-site generation (“TPOs”) should be regulated as “public utilities.” ***We conclude that third-party financing of on-site generation should not trigger regulation of TPOs as “public utilities.”*** To do so would be inconsistent with Indiana and U.S. Supreme Court case law and would not serve the purposes and goals of public utility regulation.

Like the courts in many other states in the Midwest, Indiana courts have consistently found that the existence of a “public utility” requires service “to the public.” This is a fact-specific inquiry and that simply selling or providing electricity to another entity does not constitute furnishing power to the public. An entity is not a public utility unless it sells power to the public generally and the entity is “impressed with a public interest.”

The predominant purpose of public utility regulation is to protect consumers—the public—from monopoly utility market power. *See* James C. Bonbright, *Principles of Public Utility Rates* 4 (1961). Regulating TPOs as public utilities would not protect the consuming public, but instead would protect monopoly utilities’ market share at the expense of potentially lower prices and better services, freedom of contract, protection of property rights, and customer choice.

# Factual Background

Third-party power purchase agreements (“PPAs”) are innovative financing tools for customers interested in installing on-site generation. Under this mechanism, a developer builds and owns a solar photovoltaic (“PV”) or small wind system on a customer’s property and sells all of the power to the customer under a long-term contract. This allows property owners to avoid significant upfront costs and, often, lock in immediate savings on their electricity bills. PPAs are particularly important financing tools for governments, municipalities, schools, non-profits, churches and other entities that cannot directly utilize federal or state tax credits for renewable energy, because they allow the TPO to take advantage of the tax credits and pass those savings along to customers through lower PPA pricing. PPAs are also low-risk to customers, because they only pay for the actual amount of energy generated.

Third-party financing is widely available in many states, including neighboring Illinois, Michigan, and Iowa.[1](#_bookmark0) However, there is still uncertainty in Indiana regarding the question of whether or not TPOs should be considered “public utilities” under state law. If an entity is determined to be a public utility, then it is subject to significant regulation by the Indiana Utility Regulatory Commission under Title 8, Article 1 of the Indiana Code, including regulation of rates, terms, recordkeeping, and service territory. These provisions could effectively prohibit third-party financing in Indiana if third-party owners of distributed generation are deemed to be “public utilities” under state law. The current ambiguity about the legal status of third-party

1 *See* Database for State Incentives for Renewable Energy (“DSIRE”), 3rd Party PV PPA Map (March 2018) (available at [http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2018/03/DSIRE\_3rd-Party-](http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2018/03/DSIRE_3rd-Party-PPA_March_2018.pdf) [PPA\_March\_2018.pdf](http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2018/03/DSIRE_3rd-Party-PPA_March_2018.pdf)).

financing has chilled the market and is limiting the financing options available to Indiana consumers.

# Discussion

# Public Utility Regulation under Indiana Law Is Not Triggered Unless Electricity Is Furnished *to the Public*.

Indiana Code 8-1-2-1 provides definitions for the Indiana Code chapter entitled “Utility Regulation.” In relevant part, “public utility,” means:

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.

IND. CODE § 8-1-2-1(a). While the statute is phrased broadly, Indiana courts have clarified that electricity must be produced, transmitted, delivered, or furnished *to or for the public* in order to create a *public utility*. In *U.S. Steel Corp. v. N. Indiana Pub. Serv. Co.*, 486 N.E.2d 1082, 1085 (Ind. Ct. App. 1985), the court determined that the phrase “directly or indirectly to or for the public” was inadvertently left out of the definition in amendments made to the statute in 1955— prior to 1955, the definition had explicitly included the words “directly or indirectly to or for the public.” The Court held that the phrase must be read back into the statute “(a) to make the Act workable, (b) to give it complete sense, (c) to make it express the true intent of the Legislature, and (d) to avoid an absurd and unintended result.” *Id.* at 1085. In fact, the court even held that this interpretation is required for the statute to be constitutional. “Any attempt to impress public utility status upon private property not dedicated to public use constitutes a taking thereof for public use without just compensation in violation of the Fourteenth Amendment.” *Id.*

In other places in the Indiana Code, the “to the public” provision is explicitly included in the definition of a public utility or electricity supplier. In the chapter on Public Utility Fees, for example, a public utility is defined as:

every corporation, company, cooperative organization of any kind, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever that on or after March 15, 1969, 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, . . . for service directly or indirectly to the public.

IND.CODE § 8-1-6-3.[2](#_bookmark1) The court in *U.S. Steel* applied the “subsequent legislation rule” of statutory construction, finding that this latter statutory definition also indicates that the “to the

2 *See also* IND. CODE § 8-1-2.3-2. Also of interest are the statutory provisions for “alternative utility regulation,” under which an energy utility may request that the Utility Regulatory Commission decline to exercise jurisdiction

public” restriction must be understood to be part of the general “public utility” definition. *Id.* at 1084-85.

The statutory language in combination with case law clearly shows that no public utility regulation can attach to an entity unless it provides utility services “to the public.”

# Indiana Case Law Is Clear that Sale of Power to Another Is Not Necessarily Sale to the Public and an Entity Must Be “Impressed with the Public Interest” in Order to be Regulated as a Public Utility.

Two relatively recent Indiana Appellate Court decisions directly establish that providing electric service to a limited group does not trigger public utility regulation, and that a true “public interest” must be involved to justify regulation.

## BP Products North America, Inc. v. Indiana Office of Utility Consumer Counselor (2011)

In *BP Products North America, Inc. v. Indiana Office of Utility Consumer Counselor*, 947 N.E.2d 471 (Ind. Ct. App. 2011), *adhered to in part on reh'g*, 964 N.E.2d 234 (Ind. Ct. App. 2011), as an ancillary part of its crude oil refinery operations in Whiting, Indiana, BP provided electricity, gas, water, and sewer treatment to a handful of nearby and co-located facilities. For example, BP provided steam to the adjacent U.S. Steel facility, steam and sewer service to the adjacent Ineos Chemical Plant, and water, electricity, steam, and natural gas to Marsulex, which had operations on-site. BP had filed a petition with the Commission asking for a determination that these contracts did not make it a public utility, and in the alternative, requested that the Commission decline to exercise jurisdiction. The Commission determined that BP was a public utility “with respect to the provision of steam, electricity, water and wastewater/process sewer services” and held that providing electricity services to an entity other than itself necessarily made BP a public utility. *Id.* at 476-78.

The court emphatically rejected the position that simply providing electricity to another entity triggered public utility regulation.[3](#_bookmark2) The court explained, “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. The court noted that BP “is in the business of refining oil, not producing utility services for the undifferentiated public.” *Id.* at 480. BP had contracted specifically with a handful of nearby entities and “[b]ecause BP served these selected companies—a special class of entities that did not make up

over the energy utility. IND. CODE. § 8-1-2.5. Note however, that for the Commission to decline to exercise jurisdiction, it must first be found to have jurisdiction. If a third-party owner is not a public utility and not subject to Commission jurisdiction in the first place, a petition under this Chapter would neither be appropriate nor necessary. 3 The court looked to analogous cases in other states for guidance, including two Supreme Court of Wisconsin cases that held that the provision and sale of electricity to an entity’s tenants and/or adjacent properties did not make that entity a public utility. *See City of Sun Prairie v. Pub. Serv. Comm'n*, 37 Wis.2d 96, 154 N.W.2d 360 (1967) and *Cawker v. Meyer*, 147 Wis. 320, 133 N.W. 157 (1911).

the indefinite public—it was engaged in a private activity, not the provision of services directly or indirectly to the public.”[4](#_bookmark3)

## U.S. Steel Corp. v. NIPSCO (2011)

In another case decided the same year, the Indiana Appellate Court again found that provision of electricity to another entity did not create a public utility. *U.S. Steel Corp. v. NIPSCO*, 951 N.E.2d 542 (Ind. Ct. App. 2011). U.S. Steel and a competitor, ArcelorMittal, both had large steel-making operations in northern Indiana. They agreed to “swap facilities located within their respective industrial complexes,” so U.S. Steel owned a facility within ArcelorMittal’s industrial complex, and vice-versa. *Id.* at 548. ArcelorMittal initially purchased electricity and gas from

U.S. Steel for the facility it now owned within U.S. Steel’s operations. ArcelorMittal then entered into an agreement with the Northern Indiana Public Service Company (“NIPSCO”), under which NIPSCO delivered power to U.S. Steel, which transmitted the power through its infrastructure to ArcelorMittal’s facility. NIPSCO metered how much electricity was used by ArcelorMittal and billed ArcelorMittal for that amount, while subtracting it from U.S. Steel’s bill.

The Commission determined that this arrangement made U.S. Steel a public utility because it was providing electricity to an entity other than itself, and was therefore in violation of state law due to its provision of electricity in NIPSCO’s service territory. The court reversed, citing to the Oxford English Dictionary for the definition of “the public”—“[t]he community or people as a whole; the members of the community collectively.” *Id.* at 555. Because U.S. Steel “provided electricity to only one customer located within its industrial complex pursuant to a special agreement,” this did not constitute service to the public, and did not trigger public utility regulation.[5](#_bookmark5)

## U.S. Steel I and II (1985)

These decisions are consistent with and build off of earlier decisions that discuss public utility regulation. Both *BP Products* and *U.S. Steel* cite to two earlier U.S. Steel cases. In *U.S. Steel Corp. v. NIPSCO (U.S. Steel I)*, 482 N.E.2d 501 (Ind. Ct. App. 1985), U.S. Steel owned two steel plants, one in Gary, Indiana (served by NIPSCO), and one in Chicago, Illinois (served by Commonwealth Edison). U.S. Steel proposed to “transmit and ‘mix’ some of the electric power it purchases from each of these public utilities for use at these plants, that is, power purchased from Commonwealth will be transmitted and mixed with NIPSCO's for use at Gary Works, and

4 The court *did* find that BP was acting as a public utility when it provided water to the City of Whiting, which in turn distributed it to its residents, because “[t]he contract provides for the provision of water to an entity that is a mere conduit serving the undifferentiated public, at least indirectly.” *Id.* at 480. On rehearing, the court found that BP was also acting as a public utility based on its provision of natural gas to Marsulex, under a statutory provision that held that any entity “engaged in the transportation of gas solely within this state on behalf of any end use consumer or consumers” is a public utility for purposes of that chapter. *Id.* at 236. This provision does *not* apply to the provision or sale of electricity.

5 As in *BP Products*, U.S. Steel did trigger a specific public utility law by its provision of natural gas to ArcelorMittal, under IND. CODE § 8–1–2–87.5(b).

vice-versa.” U.S. Steel sought a declaratory judgment that this would not make it a “public utility.”

The court easily found that there was no provision of service to the public and delved into a deeper discussion of the history and purpose of public utility regulation, citing extensively from *Folz v. City of Indianapolis*, 234 Ind. 656, 130 N.E.2d 650, 654–656, 659 (1955), which dealt with public parking facilities:

It is an essential requirement that a business or enterprise must in some way be impressed with a public interest before it may become a public utility. Accordingly, whether the operator of a given business or enterprise is a public utility depends on whether or not the service rendered by it is of a public character and of public consequence and concern, which is a question necessarily dependent on the facts of the particular case.

*Id.* at 506, citing *Folz v. City of Indianapolis*, 234 Ind. 656, 130 N.E.2d 650, 654–656, 659

(1955) (citing 73 C.J.S., Public Utilities, § 2, p.991).

In *U.S. Steel Corp. v. NIPSCO (U.S. Steel II)*, 486 N.E.2d 1082 (Ind. Ct. App. 1985), on a motion for rehearing, the court reaffirmed, rejecting the argument that the absence of “to the public” in the definition of public utility was determinative. As referenced above in Section A, the court held that it was impermissible to “engraft public utility status upon U.S. Steel even though no electricity mixed and transmitted by its proposed facilities will be distributed directly or indirectly to the public.” *Id.* at 1084. Failure to read “to or for the public” into the statutory definition of public utility would lead to an “absurd result.” *Id.* Further, “[a]ny attempt to impress public utility status upon private property not dedicated to public use constitutes a taking thereof for public use without just compensation in violation of the Fourteenth Amendment.” *Id.*

# Additional Case Law

The idea that an entity is not subject to public utility regulation unless it provides service to the public generally is not new. In *Public Service Commission of Indiana v. City of New Castle*, 212 Ind. 229, 8 N.E.2d 821 (1937), the city of New Castle had at various times over a couple of decades provided electrical lighting services for city streets, public areas, a couple private buildings, and at railroad crossings. The court referenced several Wisconsin state court cases for the position that the number of consumers is not the operative question—rather, “The question is whether the plant is built and operated to furnish power to the public generally.” *Id.* at 242. Electricity service to a city employee’s residence and his neighbor was “incidental” and did not establish the city as a public utility. The court also raised doubt as to whether a small generator “could in any sense be considered as a plant suitable for devotion to the public service,” indicating that the proper question is whether a specific generation facility is used to provide electricity to the public. *Id.*

Additional case law provides legal and policy support for the Utility Regulatory Commission to not exercise jurisdiction over TPOs. Although the facts of *Rasp v. Hidden Valley Lake, Inc.*, 519 N.E.2d 153, 156 (Ind. Ct. App. 1988) are not very analogous, the opinion sheds light on relevant

policy considerations. Plaintiffs owned lots in a subdivision, and the lot deeds included a covenant under which they were required to pay “availability” fees for having water and sewer service available to those lots, even though Plaintiffs never hooked up to the water and sewer lines. Plaintiffs challenged the availability payments as contrary to public policy.

The court explained that public utility regulation is intended “to protect consumers from the abuses of monopoly” and “provide a surrogate for competition.” *Id.*, quoting *Citizens Action Coalition v. NIPSCO*, 485 N.E.2d 610, 614 (1985). The court also acknowledged that “[p]rivate entrepreneurial endeavor is one of the touchstones of the free enterprise system We

judicially know it is the public policy of this state to promote and encourage private enterprise in the least restrictive manner possible.” *Id.* at 156.

It is important to distinguish *Public Service Commision v. Panhandle E. Pipeline Co.*, 224 Ind. 662, 71 N.E.2d 117, aff'd sub nom. *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 68 S. Ct. 190 (1947). In the case, Panhandle delivered natural gas from its pipeline to “various municipalities and public utility corporations,” as well as “directly to selected, large industrial consumers of gas within practical distance of its through line.” *Id.* 666. The case primarily focused on whether state regulation of Panhandle would violate the dormant commerce clause and impermissibly tread into an area that could only be regulated by the federal government.

Near the end of the opinion, the court noted that the “[s]uggestion is made by appellee, but not very vigorously urged, that it is not a public utility” when it came to its direct service to individual consumers. *Id.* at 684. Noting that the determinative question was whether Panhandle was providing gas “directly or indirectly to or for the public,” the court found that it was providing gas indirectly to or for the public because it was selling gas to municipalities and utility companies, which in turn provided service to the public at large. *Id.* at 685-86. The court determined that Panhandle was also a “gas utility,” defined as a public utility selling or furnishing gas “directly to any consumer,” due to its sales directly to industrial customers. *Id.* at 685. The court explained that:

[The direct sales] part of its business and its interstate transportation and its sales to local distributing utilities are so integrated that in any practical consideration of the state’s right to regulate direct sales to consumers that activity must be appraised as a part of its entire business in Indiana. Its rights and duties with reference to such direct sales, must be determined in the light of its over-all character in the State of Indiana.

*Id.* at 686. This is clearly very distinguishable from the case of a TPO for distributed generation. The “over-all character” of Panhandle’s primary business involved service “to the public.” TPOs, on the other hand, do not provide service “to the public” as any part of their business. PPAs are offered as financing tools for their primary business of developing and installing on-site distributed generation systems for individual customers.

In dicta, the court goes on to quote a 1939 Ohio case:

*It may well be urged that a corporation, calculated to compete with public utilities and take away business from them, should be under like regulatory restriction* if effective governmental supervision is to be maintained. Actual or potential competition with other corporations whose business is clothed with a public interest is a factor to be considered; otherwise corporations could be organized to operate like appellant and in competition with bona fide utilities until the whole state would be honey-combed with them and public regulation would become a sham and delusion.

*Id.* at 686-87, quoting *Industrial Gas Co. v. Public Utilities Commission of Ohio*, 135 Ohio St. 408, 21 N.E.2d 166, 168 (1939) (emphasis in original). Although the decision was affirmed on appeal to the United States Supreme Court, the opinion there was focused on the issue of federal versus state authority to regulate interstate gas pipelines.

As an initial matter, the court presents competition with public utilities as merely “a factor to be considered,” rather than determinative. Indeed, this was not determinative in even this case. In addition, if any “actual or potential” competition with a public utility triggered public utility regulation, this could lead to absurd results. A hardware store that leases out generators, or the seller of batteries, or a private chauffeur for a single family, could be seen as “in competition” with a public utility, yet no one would suggest that public utility regulation would be appropriate.

Notably, this idea that an entity that “competes” with a public utility must be regulated has not been adopted into Indiana jurisprudence over the past 70 years since *Panhandle* raised the concern in dicta. Indeed, more recent cases have distinguished *Panhandle*. For example, in the

*U.S. Steel* case discussed above, in which U.S. Steel provided electricity service to another entity on its property, the court explained:

The concerns that motivated our supreme court's conclusion in *Panhandle* are not present here. U.S. Steel never attempted to compete with NIPSCO; U.S. Steel is in the business of steel production, not the provision of utility services. Because of the unique circumstances presented by the November 2003 facilities swap, ArcelorMittal became the owner of one facility located deep within Gary Works.

U.S. Steel provided electricity not in an attempt to displace NIPSCO as an electricity supplier, but out of convenience and as a continuance of its previous distribution of electricity to itself when it owned the Plate Mill. Nor can it be said that the potential for discrimination in services and rates raises a legitimate concern here. U.S. Steel distributed electricity to ArcelorMittal only, within the confines of the Gary Works industrial complex, solely for the operation of the Plate Mill. U.S. Steel did not attempt to cherry-pick profitable customers, nor did its decision to service only ArcelorMittal leave others without needed utility service. For these reasons, and under the unique circumstances presented here, we conclude that *Panhandle* is not controlling.

*U.S. Steel Corp. v. N. Indiana Pub. Serv. Co.*, 951 N.E.2d 542, 556 (Ind. Ct. App. 2011) (emphasis added).

For all of the reasons that *Panhandle* did not control the outcome in *U.S. Steel*, it is also inapplicable in the circumstances of TPOs of distributed generation. First, TPOs are in the business of developing, installing, and maintaining distributed renewable energy facilities. They are not in the business of providing a utility service. Rather, third-party PPAs are simply one financing mechanism offered “out of convenience” for customers who wish to self-generate. TPOs are not attempting to “cherry-pick” specific customers; rather, they can only offer their services to the limited category of customers who have the correct circumstances to make distributed generation possible (e.g., for rooftop solar, the roof must have adequate space, the correct angle, lack of shading, etc.). Moreover, it is the customer who would ultimately decide whether to enter into a PPA for financing purposes, as opposed to an outright purchase of the distributed generation facility. Nor do TPO arrangements leave any customers without access to grid power from the utility.

Further, TPOs are even less like public utilities than U.S. Steel was in the above case. U.S. Steel was providing the exact same service as the utility—the provision of grid electricity. TPOs, on the other hand, provide customers the ability to self-generate renewable electricity, with behind- the-meter facilities, a service which most utilities do not even offer.

An Indiana court similarly rejected baseless speculation as a justification for public utility regulation in *Knox Cty. Rural Elec. Membership Corp. v. PSI Energy, Inc.*, 663 N.E.2d 182 (Ind. Ct. App. 1996). There, the Commission had determined that a coal mining company could not permissibly transmit electricity that it had purchased from one utility by means of private equipment to the part of its mine that underlay the service area of another utility.[6](#_bookmark4) The Commission raised concerns about a “veritable Pandora’s box of problems [that] would ensue” if a private company were allowed to transmit power that it purchased in one utility service territory for its own use in an adjacent service territory. *Id.* at 195. The court dismissed these concerns as “merely speculative.” *Id.* Analogous speculative concerns about allowing TPOs should likewise be dismissed.

Moreover, the purpose of public utility regulation is to protect the public interest, not to protect utilities from any new technology that might lead to decreased demand for grid power. The purpose of the Indiana Utility Regulatory Commission “is to insure that public utilities provide constant, reliable, and efficient service to Indiana citizens” and to “protect the public from excessive charges.” *Citizens Action Coal. of Indiana, Inc. v. N. Indiana Pub. Serv. Co.*, 796 N.E.2d 1264, 1267 (Ind. Ct. App. 2003), quoting *Indiana Payphone Ass'n v. Indiana Bell Tel. Co.*, 690 N.E.2d 1195, 1197 (Ind.Ct.App.1997); *see also Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 715 N.E.2d 351, 354 (Ind. 1999). As discussed below, public utility regulation of TPOs would not be in the public interest, and in fact, would be contrary to the public’s interest in freedom of contract and the advancement of renewable energy.

6 Although the Commission acknowledged that the coal mining company was not a public utility and could not be directly regulated, the Commission asserted its ability to restrict the first utility from providing electricity service to the mine in the first place, although ultimately the Commission adjusted the service area of the relevant utilities to allow for the situation.

\* \* \*

Indiana law is clear: public utility regulation only attaches when an entity generates or furnishes electricity to or for the public, and this requires provision of power from a specific facility to the public generally, such that there is a dedication to public use. Offering electricity service to select entities by private contract does not trigger public utility regulation. The offer of competitive private services to customers from behind-the-meter facilities located *on their own private property*, which necessarily can only serve one customer, provides even less justification to find that service to be “impressed with the public interest” under Indiana law.

# Application of Indiana law and Traditional Justifications for Utility Regulation to TPO Scenarios Demonstrates that Public Utility Regulation Is Not Triggered.

Indiana case law is consistent with and reflects the traditional understanding of the justification for public utility regulation.

The traditional and best explanation for public utility regulation is that it is for the benefit and protection of the public, and that this protection is considered necessary due to the monopoly power of public utilities and the “indispensable” nature of the service. James C. Bonbright, Principles of Public Utility Rates 8 (1961) (“Necessity and monopoly are almost prerequisites of public utility status.”). First common carriers, and later, public utilities, were formed when the government granted a charter for a private corporation in a situation of natural monopoly— where infrastructure was costly enough to create a barrier to entry into the market, competition would lead to duplicative infrastructure, and there were significant economies of scale. Because these companies provided what was seen as a necessary or “indispensable” service, the government granted them special privileges so that they could be practically and economically viable. The requirements of a “fair” rate of return and full recovery of “reasonable” operating expenses, for example, are designed to serve the public interest by “enabl[ing] the company to live up to its obligations to serve the community.” Bonbright, *supra*, at 50.

The U.S. Supreme Court has explained that the need for public regulation “depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared.” *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 539 (1923). Rate regulation is appropriate where there is a threat of “exorbitant charges and arbitrary control.” *Id.* at 538. While the process of ratemaking “involves a balancing of the investor and the consumer interests,” the Court has been clear that the “primary aim” of utility regulation is the protection of the consuming public. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 610 (1944). This is reflected in Indiana courts’ repeated statement that the Utility Regulatory Commission’s purpose is “to insure that public utilities provide constant, reliable, and efficient service to [their] customers, the citizens of this state.” *Indiana Bell Tel. Co.*

1. *Indiana Util. Regulatory Comm'n*, 715 N.E.2d 351, 354 (Ind. 1999), quoting *Office of Utility Consumer Counselor v. Public Serv. Co. of Indiana, Inc.,* 463 N.E.2d 499, 503 (Ind. Ct. App. 1984). Importantly, “this Commission ... has only such jurisdiction as is specifically delegated by statute.” *Indiana Bell Tel. Co.*, 715 N.E.2d at 354 n.3, quoting *In re Madison Light & Power Co.,*

1924C Pub. Util. Rep. (PUR) 517, 519 (IPSC 1924). In other words, the Indiana Utility Regulatory Commission may not seek to regulate beyond its statutory authority.

# No Dedication to Public Use

A primary factor that justifies public utility regulation is whether goods or services are “clothed in the public interest” due to their great public importance or dedication to public use. In the seminal case of *Munn v. Illinois*, 94 U.S. 113 (1877), the U.S. Supreme Court upheld an Illinois law setting prices for grain warehouses. The Court opined:

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.

*Id.* at 126. In finding that grain warehousing was “clothed with a public interest,” the Court focused on the importance of the grain trade, the practical necessity of using grain warehouses when participating in the grain trade, and the virtual monopoly on providing grain warehousing. As discussed above, Indiana case law also requires a company to be “dedicated to public use” and “impressed with public interest” before public utility status attaches. *See, e.g.*, *BP Products*, 947 N.E.2d at 478.

This fundamental requirement for regulation is absent with TPOs. The general public does not have an interest in another person’s behind-the-meter solar, biogas, or small wind system. All members of the public remain connected to the electricity grid for their general electricity needs. A farmer does not dedicate his biogas facility to a public use, and the business of supplying solar panels to individual customers is in no way dedicated to public use.

# No Monopoly or Lack of Competition

The existence of a natural monopoly is one of the factors that traditionally justifies public utility regulation. One important element in the “conditions which produce monopoly” is the “absence of a substitute.” Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 156, 172 (1903). Early electric and gas industry customers were at the mercy of monopoly providers because they had no alternative way to provide themselves with these essential products in the market.

Thus, courts have historically distinguished between ordinary goods and services that can be bargained for in a competitive market and those that are “clothed in a public interest” because they present an “inevitable monopoly” in their supply. An early law journal article explains:

What, after all, is that element in the situation which differentiates the vending of candles from the purveying of gas? Is it not this,—that the box of candles may be sent from any factory into any market, a condition which preserves virtual

competition in the sale of candles; while a thousand feet of gas can only be got by the consumer from the local gas company, a situation which presents an inevitable monopoly in the supplying of gas.

Wyman, *supra*, at 169.

This justification is also reflected in Indiana case law. As noted above, public utility regulation is intended “to protect consumers from the abuses of monopoly” and “provide a surrogate for competition.” *Rasp*, 519 N.E.2d at 156. “Utility regulation is premised on a ‘regulatory compact’ in which the State sanctions a utility's monopoly within a defined service area and subjects the utility to various regulatory restrictions and responsibilities.” *NIPSCO Indus. Grp. v. N. Indiana Pub. Serv. Co.*, 100 N.E.3d 234, 238 (Ind. 2018), *modified on reh'g* (Sept. 25, 2018).

With distributed generation, of course, this natural monopoly justification does not apply. The development of on-site distributed generation is not a natural monopoly, nor are TPO developers granted monopoly status by the state. Rather, they must compete vigorously in the market. Solar developers are much more like vendors of “merchandise . . . like soap, candles or hats” than railroad barons or gas company monopolists.

# Respect for Private Property and Private Contract

Courts have been generally unwilling to extend public utility jurisdiction into areas that would infringe on private property and private rights of contract without a clear public interest justification. “It is an essential requirement that a business or enterprise must in some way be impressed with a public interest before it may become a public utility.” *U.S. Steel I*, 482 N.E.2d at 506. A state cannot “engraft public utility status” onto an entity whose property does not serve the public. *U.S. Steel II*, 486 N.E.2d at 1084. “Any attempt to impress public utility status upon private property not dedicated to public use constitutes a taking thereof for public use without just compensation in violation of the Fourteenth Amendment.” *Id.*

Other states are similarly cautious to avoid overextending state jurisdiction into areas where it is not clearly warranted to protect the public interest. The Iowa Supreme Court has expressed a “conservative principle” that state regulatory “jurisdiction should be extended ‘only as necessary to address the public interest implicated’” and no farther. *SZ Enterprises, LLC v. Iowa Utilities Board*, 850 N.W.2d 441, 455-56 (Iowa 2014). The Wisconsin Supreme Court has been cautious to avoid crossing the line between public and private services lest “the constitutional provisions pertaining to the ownership, control, and management of private property [be] completely submerged.” *Chippewa Power Co. v. Railroad Commission of Wisconsin*, 205 N.W. 900, 902 (Wis. 1925). The Minnesota Supreme Court explained that the police power over common carriers (predecessors to modern-day utilities) “must be exercised reasonably. Every attempt to exercise it unreasonably only injures public interests, by bringing the police power of the state into disrepute.” *State ex rel. Railroad & Warehouse Commission v. Minneapolis & St. Louis Railroad Co.*, 79 N.W. 510, 512-13 (Minn. 1899).

This fundamentally conservative approach to public regulation is particularly relevant to third- party financing of distributed generation. ***Defining TPOs as “public utilities” would require the***

***state to override private business contracts for competitive services on the private property of Indiana residents and businesses without a clear public interest purpose.*** This would not serve the purposes of public utility laws and would cross the public/private line that has been established in many prior cases.

# No Use of Public Infrastructure

Another justification for utility regulation is utilities’ traditional use of public roads and rights- of-way for siting street car tracks, gas and water pipes, and power lines. Distributed generation does not use public rights-of-way. *C.f.*, *Portland Nat. Gas & Oil Co. v. State*, 135 Ind. 54, 34

N.E. 818, 818–19 (1893) (finding that a natural gas company “occupying the streets of a town or city with its mains, owes it as a duty to furnish those who own or occupy the houses abutting on such street”). Customer-sited distributed generation facilities and equipment are all located on the customer’s property.

# No Duplication of Utility Facilities

Another common rationale for public utility regulation is to avoid unnecessary and/or uneconomic duplication of facilities, such as would occur if individual electric utilities each built their own system of power lines to serve the same area. For example, the Indiana Code chapter titled “Electricity Suppliers' Service Area Assignments” divides unincorporated areas of Indiana into territories, in which “an assigned electricity supplier has the sole right to furnish retail electric service to customers.” This provision is intended to “encourage the orderly development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, to prevent the waste of material and resources, and to promote economical, efficient, and adequate electric service to the public.” IND.CODE § 8-1-2.3-1.

Third-party owned customer-sited facilities do not duplicate existing services because each is designed to serve a specific property with behind-the-meter generation. No additional utility facilities are necessary for this on-site service.

# Not a Necessary Service

Another justification for public utility regulation is that it ensures that necessary services are available to all at just and reasonable rates and terms. For example, in *Hockett v. State,* 105 Ind. 250, 5 N.E. 178 (1886), the court explained the justification for public utility regulation of telephone service:

The telephone is one of the remarkable productions of the present century, and, although its discovery is of recent date, it has been in use long enough to have attained well-defined relations to the general public. It has become as much a matter of public convenience and of public necessity as were the stage-coach and sailing vessel a hundred years ago, or as the steam-boat, the railroad, and the telegraph have become in later years. It has already become an important instrument of commerce. *No other known device can supply the extraordinary facilities which it affords*. It may therefore be regarded, when relatively

considered, as an *indispensable instrument of commerce*. The relations which it has assumed towards the public make it a common carrier of news,–a common carrier in the sense in which the telegraph is a common carrier,–and impose upon it certain well-defined obligations of a public character.

*Id.* at 182 (emphasis added). While customer-sited distributed generation may be considered new and important technology, it is not of the same nature as utility services. It is not a necessary or indispensable technology, since all customers remain connected to the electric grid and may continue to receive power from an electric utility, regardless of whether or not they choose to also install on-site generation. Nor is third party PPA financing of distributed generation a “necessary service.”

\* \* \*

Application of Indiana and U.S. Supreme Court case law to the TPO scenario clearly demonstrates that public utility regulation of TPOs is not justified.

# Indiana Utility Regulatory Commission Precedent Demonstrates that Ownership of a Generation Facility for Financing Purposes Does Not Create a Public Utility.

Generally the Indiana Utility Regulatory Commission (“Commission”) has the statutory authority and duty to determine if an entity is a public utility. *See In re Whiting Clean Energy, Inc.*, 41530, 1999 WL 1568610 (Dec. 29, 1999) (citing *Hidden Valley Lake Property Owners v.*

*HVL Utilities*, 408 N.E.2d 622, at 629 (Ind. App. 1980) (*reh’g den*., 411 N.E.2d 1262). Its exercise of this authority supports the proposition that TPOs are not public utilities.

In *In re Whiting Clean Energy, Inc.*, for example, the Commission determined that a third-party financer of a steam and power facility was not a public utility. Whiting Clean Energy planned to operate a co-gen plant, where it would sell power on the wholesale market and sell the steam to Amoco, from whom it was leasing land on which to build the plant. The petitioner was working with Merrill Lynch as a financial advisor. The Commission explained “Merrill Lynch has developed a program whereby Petitioner will lease the facility from a third party lessor, Mattco Funding, Limited Partnership (‘Mattco’). Mattco will issue and sell notes to investors to fund the plant's construction, and Mattco will own the facility. When the facility is constructed, Mattco will lease it to Petitioner, whose lease payments will fund repayment of the lessor's notes.” *Id.* Accordingly, Mattco would not be a public utility, because “[t]he uncontroverted evidence in this case is that the lease arrangement is in substance a financing transaction” and Mattco would be a “passive owner” and not involved in operation. *Id.*

Similarly, in *In re Acadia Bay Energy Co.*, LLC, 41966, 2002 WL 1004042 (Jan. 30, 2002), the Commission found that a passive third-party owner was not a public utility under Indiana law, noting that “the lease arrangement is in substance a financing transaction.” Although the opinion was later revoked, because the parties decided not to go forward with their plans to construct a power plant, this still reflects how the Commission will likely think about third-party financing.

As discussed at length above, TPOs are not in the business of providing electricity service to the public and a PPA “is in substance a financing transaction” just as in the *Whiting Clean Energy* and *Acadia Bay* cases.

The Commission also acknowledged that inherent in public utilities is serving a public purpose. Specifically, in *In re National Serv-All, Inc.*, the Commission stated:

It is generally held that whether the operator of a given business or enterprise is a public utility depends on whether or not the service rendered by it is of a public character and of public consequence and concern. 73B C.J.S. *Public Utilities* §3 (1983). The owner or person in control of property becomes a public utility only when and to the extent that his business and property are *devoted* to a public use. *Id.* Another criteria to determine whether a business or enterprise is a public utility is whether or not the public may enjoy it of right, or by permission only. The distinction between a public utility and a “private” provider of similar services is that, in the case of a private unregulated provider, service to each customer is permissive service.

*In re Nat’l Serv-All, Inc.*, 40554, 1996 WL 760049 (Oct. 9, 1996) (emphasis added). National Serv-All was a solid waste disposal service that asked the Commission to, among other requests, decline to exercise jurisdiction in its transportation and sale of landfill methane gas. *Id.* National Serv-All entered into a contract with a construction company to transport and sell National Serv- All’s landfill methane gas for the construction company’s use in the production of asphalt. *Id.* The Commission explained that it did not have jurisdiction over National Serv-All in this instance because National Serv-All did not advertise nor hold itself out to the general public as a public utility. *Id.* Accordingly, the transportation and sale of the resource was not a public utility service.

The Commission noted that this determination was consistent with its holding in *In re GTE Mobilnet of Indianapolis*. There, the Commission explained:

when a business is neither a natural monopoly, nor deeply affected with the public interest, government regulation of that enterprise interferes with the natural forces of the marketplace, encourages the growth of unnecessary government bureaucracy, hampers development, and provides no identifiable benefit to either society in general or consumers.

*In re Nat’l Serv-All, Inc.*, 40554, 1996 WL 760049 (Oct. 9, 1996) (citing *In re GTE Mobilnet of Indianapolis Ltd. P’ship*, 60 P.U.R.4th 166, 169 (Apr. 19, 1984)).

The Commission in *In re GTE Mobilnet of Indianapolis*, explained that the relatively new service of reselling cellular mobile telephone service was not a public utility. *In re GTE Mobilnet of Indianapolis Ltd. P’ship*, 60 P.U.R.4th 166 (Apr. 19, 1984). The Commission premised its decision upon the fundamental theory that government regulation of public utilities is necessary because certain businesses are natural monopolies and are deeply affected with the public interest, and consumers cannot choose the company that serves them. The existence of the

multiple resellers in the market would provide the consumers with a choice between companies. *Id.* at 169-170. In considering the new technology, the Commission cautioned against distorting the objective of the law by interpreting the statutory definition of “telephone service” too broadly. *Id.* at 169. The statute at its inception focused on landlines, but over time encompassed other business entities. *Id.* However, the inclusion of resellers of cellular mobile telephone service under the Commission’s regulatory authority went beyond the boundaries of the statute.[7](#_bookmark6) Commission authority over “every conceivable new technology” in the telecommunications field was not appropriate. *Id.*

The Commission has also found a “public utility” was not created if there was not service to “the public at large.” *In re St. Vincent Health, Inc.*, 42675, 2004 WL 3219938, at \*3 (Dec. 22, 2004). When St. Vincent Health, Inc. created a private telecommunications network for individuals and entities affiliated with St. Vincent, it raised the question as to whether St. Vincent qualified as a public utility. The Commission found it has authority over St. Vincent for the limited purpose of determining that its current business practices do not qualify it as a public utility. The Commission determined that at no time did St. Vincent “attempt[] to provide service to the public, or any section thereof.” *Id.* at \*6. Rather, “St. Vincent, in conjunction with its affiliated entities, designed a communications system responsive to the needs of the health care system and consistent with St. Vincent's plan for the provision of health care service.” *Id.*

A case currently pending before the URC raises a question about what constitutes a public utility. In *Petition of Whiting Clean Energy, Inc. and BP Products North America, Inc., Seeking Termination of Alternative Regulatory Treatment*, Ind. URC, Cause No. 45071, petitioners requested a determination that Whiting Clean Energy (“WCE”) was no longer a public utility. In a previous case, WCE was a corporate affiliate of a public utility and provided steam to BP, but all electricity was sold at wholesale. The Commission determined that WCE was a public utility, although it declined to exercise jurisdiction. WCE is now owned by BP Products and has self- certified as a Qualifying Facility under the Public Utilities Regulatory Policy Act (“PURPA”). WCE is generating steam and electricity for BP, and sells a smaller amount of excess electricity into the wholesale market. Since WCE is now self-supplying service to BP and only selling excess power, and is a Qualifying Facility, petitioners argued that it was no longer a public utility.

Although the Commission’s decision in the case will likely turn on factors not directly relevant to most TPOs, the parties’ discussion of PURPA provides support for the position that TPOs should not be regulated as public utilities. The parties in the case have signed a settlement agreement, which the Commission has not yet acted upon, and explained in a related document that QF facilities are not regulated as public utilities, pursuant to federal and Indiana law. *Petition of Whiting Clean Energy, Inc. and BP Products North America, Inc., Seeking Termination of Alternative Regulatory Treatment*, Ind. URC, Cause No. 45071, Response of the

7 While the Commission explicitly stated that this decision did not alter existing commission regulatory treatment of resellers of water, natural gas, electricity, or other telecommunications services, the premise that agencies should not overbroadly apply regulations, especially in the context of new services or technologies not contemplated by the authors of the law, still holds true.

Settling Parties to the Commission’s November 29, 2018 Docket Entry (Nov. 30, 2018). The parties quote from PURPA legislative history:

The conferees recognize that cogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis a vis the sale of power to the utility and whose risk in proceeding forward in the cogeneration or small power production enterprise is not guaranteed to be recoverable. . . . The establishment of utility type regulation over them would act as a significant disincentive to firms interested in cogeneration and small power production. The conferees do not

intend cogenerators or small power producers to be subject, under the commission’s rules, to utility-type regulation.

*Id.*, quoting H.R. Conf. Rep. No. 95-1750 at 97-98. The purposes for not regulating PURPA Qualifying Facilities as public utilities apply just as much to TPOs. Like Qualifying Facilities, TPOs are not guaranteed a recovery of capital or a profit, and utility regulation would disincentivize distributed renewable generation.

# Recent Cases from Other States Support the Conclusion that TPOS are not Public Utilities.

Courts often look to decisions made in other jurisdictions when considering a case of first impression. The Supreme Court of Iowa and several state commissions have recently held that third-party owners of solar energy systems are not public utilities. Given the similar legal structure and precedent, it is likely that Indiana courts would find these decisions, particularly the Iowa decision, to be influential and persuasive.

# The Eagle Point Solar Case

In *SZ Enterprises, LLC v. Iowa Utilities Board*, 850 N.W.2d 441 (Iowa 2014) (hereinafter “*Eagle Point Solar*”), the Iowa Supreme Court determined that SZ Enterprises, doing business as Eagle Point Solar, could construct and operate a solar energy system on City of Dubuque property and sell the resulting electricity to the city under a PPA without being regulated as a public utility or an electric utility. The Iowa Supreme Court determined that “the proper test” in deciding whether an entity was a public utility was “to examine the facts of a particular transaction on a case-by- case basis to determine whether the transaction cries out for public regulation.” *Id.* at 466. The Iowa court applied a multi-factor “public interest test,” to help determine whether TPOs are “clothed with the public interest,” rejecting the state’s position that a sale of electricity on a “per- kWh” basis to any member of the public necessarily triggers regulation as a public utility. *Id.*

The Iowa court looked beyond the mere fact that Eagle Point’s PPA involved a sale of electricity and conducted a more “pragmatic assessment of what is actually happening in the transaction.” *Eagle Point Solar*, 850 N.W.2d at 466. The Court found that the solar panels on Dubuque city rooftops were “no more dedicated to public use than the thermal windows or extra layers of insulation in the building itself.” *Id.* at 467. Moreover, on-site solar energy is an optional service, “not an indispensable service that ordinarily cries out for public regulation.” *Id.*

All of Eagle Point’s customers remain connected to the public grid, so if for some reason the solar system fails, no one goes without electric service. Behind-the-meter solar equipment is not an essential commodity required by all members of the public. *Id.* Similarly, the Iowa Court found that Eagle Point “is not producing a fungible commodity that everyone needs” like “water that everyone old or young will drink, or natural gas necessary to run the farms throughout the county.” *Id.* Instead, Eagle Point is providing a “customized service to individual customers.” *Id.* All of these factors cut against a finding that Eagle Point’s service was “clothed with the public interest.”

The Court also found that Eagle Point was not a natural monopoly nor did it exert unequal bargaining power over its customers. “There is simply nothing in the record to suggest that Eagle Point is a six hundred pound economic gorilla that has cornered defenseless city leaders in Dubuque.” *Id.* Indeed, the court characterized Dubuque’s PPA as a “low risk transaction”; Dubuque owes nothing unless the solar panels actually produce electricity. *Id.*

The Court found that rooftop solar is not an “essential public good.” Indeed, solar is not viable for customers with a shaded or obstructed roof. *Id.* Moreover, Dubuque would not be “left high and dry” if its deal with Eagle Point falls through because it could “seek another vendor while continuing to be served by a regulated electric utility.” *Id.*

The Iowa utilities relied on a 27-year-old Florida case, *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281 (Fla. 1988) to support their unsuccessful attempt to restrict third party financing. In that case, the Florida Public Service Commission determined that sales to an industrial complex from a behind-the-meter cogeneration facility triggered public utility status under Florida law.[8](#_bookmark7) Although Indiana courts do not explicitly apply a multi-factor test, they do take a practical approach and look at whether the public interest is truly implicated before finding that public utility regulation is appropriate.

# The NC WARN Case

A recent 2-1 appellate court decision in North Carolina did come out the other way, finding that a developer who retained ownership of a rooftop solar facility and sold electricity on a per kWh basis to the customer triggered public utility regulation. *State ex rel. Utilities Comm'n v. N. Carolina Waste Awareness & Reduction Network*, 805 S.E.2d 712, 713 (N.C. Ct. App. 2017), *aff'd*, 812 S.E.2d 804 (N.C. 2018).[9](#_bookmark8)

North Carolina Waste Awareness and Reduction Network (“NC WARN”) installed a solar facility on a church’s roof and sold all of the resulting power to the church. NC WARN

8 Note that the Florida PSC recently issued a declaratory order that TPO *leases*, as proposed by Sunrun, would not constitute a sale of electricity and would not trigger public utility regulation. Declaratory Statement, *Petition by Sunrun Inc. for Declaratory Statement Concerning Leasing of Solar Equipment*, Docket No. 20170273-EQ (May 17, 2018), available at [http://www.psc.state.fl.us/library/filings/2018/03712-2018/03712-2018.pdf.](http://www.psc.state.fl.us/library/filings/2018/03712-2018/03712-2018.pdf)

9 Note that the North Carolina Supreme Court did not make a separate determination that this case warranted further review. Because there was a dissent below, NC WARN was automatically entitled to Supreme Court review.

requested a declaratory judgment from the North Carolina Utilities Commission that this arrangement did not make it a public utility. The Commission held otherwise and NC WARN appealed.

The appellate court cited to North Carolina case law holding that utility service to a limited class of customers could constitute service to the public. For example, a 1978 North Carolina case found that a defendant that offered two-way radio service “exclusively to members of the Cleveland County Medical Society, which was comprised of only 55 to 60 people” constituted an offer of service to the public. *Id.* at 714, citing *State ex rel. Utils. Comm'n v. Simpson*, 295

N.C. 519, 522, 246 S.E.2d 753, 755 (1978). The court expressed concern that a TPO could offer on-site generation to numerous members of the public and “leave burdensome, less profitable service on the regulated portion resulting inevitably in higher prices for the service.” *Id.* at 715-

16. The court also noted that the North Carolina Public Utilities Act includes the policy of “promot[ing] the inherent advantage of regulated public utilities,” and that not regulating TPOs would run afoul of this policy. *Id.* at 716-17.

The strong dissent, almost as long as the majority opinion, engages in a thoughtful analysis of the issues and what as a practical matter is actually happening when developers offer TPO financing arrangements. Judge Dillon explains that in each of the opinion’s cited cases, the entity offered service to multiple customers. Yet with the arrangement in question, the solar panel system “is designed to generate power for a single customer.” *Id.* at 717 (Dillon, J., dissenting). The analogy of a single vehicle being used in a single community still qualifying as a common carrier is faulty, because such a vehicle is “designed to serve multiple members of the public,” while the solar panels here would only serve the church. Although the dissent does not make this observation, a true analogy would be attempting to regulate a private driver who has contracted with and serves one family as a common carrier.

The dissent also notes the arbitrary nature of the decision to regulate a TPO arrangement that involves the sale of electricity on a per kWh basis, while not regulating an almost identical arrangement structured instead as a lease. “[T]he manner in which NC WARN and the Church choose for NC WARN to be compensated—based on usage rather than based on a flat rate per month—does not convert NC WARN’s solar panel system on the Church’s property into a public utility.” The dissenting opinion further points out that a hardware store would not become a public utility if it rented a portable generator to a customer and charged in part based on the amount of power generated, nor would rental of multiple generators to multiple customers trigger utility regulation. Finally, Judge Dillon references case law finding that improper application of public utility regulation “interferes with private rights of . . . contract.” *Id.* at 720, *citing State ex rel. N.C. Utils. Comm'n v. New Hope Rd. Water Co.*, 248 N.C. 27, 30, 102 S.E.2d 377, 380

(1958).

NC WARN appealed to the North Carolina Supreme Court, which affirmed without an opinion. Although the North Carolina Supreme Court ignored the well-reasoned appellate court dissent, this is of course in no way binding in Indiana, and can be readily distinguished. As explained above, the NC WARN case relies on past North Carolina cases that found that service to a limited, discrete class of customers can be service to the public. In Indiana, case law clearly

rejects this proposition and requires service to the public generally. *BP Products*, 947 N.E.2d at 478; *U.S. Steel Corp.*, 951 N.E.2d at 555.

Notably, as explained above in the discussion of *Panhandle*, TPOs of customer-sited distribution are in no way swooping in to claim the most profitable customers from incumbent utilities. First, TPOs ability to even offer its products and services is very limited by practical siting concerns for distributed generation. For example, many utility customers could not purchase solar panels even if they wanted to, due to issues around roof slant and direction, obstructions of sunlight, and the fact that many customers rent their homes. Second, TPOs are simply offering a different financing option for customers who have already determined that they wish to self-generate their electricity.

# Administrative Decisions

In addition to the Iowa case, Indiana courts might also look for guidance to recent public utility commission orders in other states across the country. For example, New Hampshire, Arizona, Oregon, New Mexico, and Nevada have all determined that third-party owners are not public utilities.

A 2016 opinion from the New Hampshire Public Utilities Commission explicitly found that Vivint’s proposed third-party solar PPAs did not constitute sale to the public. Order Granting Petition, *Vivint Solar, Inc. Petition for Declaratory Ruling*, N.H. P.U.C., No. DE 15-303, at 19 (Jan. 15, 2016), available at [https://www.puc.nh.gov/Regulatory/Docketbk/2015/15-](https://www.puc.nh.gov/Regulatory/Docketbk/2015/15-303/ORDERS/15-303_2016-01-15_ORDER_25859.PDF) [303/ORDERS/15-303\_2016-01-15\_ORDER\_25859.PDF.](https://www.puc.nh.gov/Regulatory/Docketbk/2015/15-303/ORDERS/15-303_2016-01-15_ORDER_25859.PDF) Additionally, Vivint would not be a Competitive Electric Power Supplier, defined as “any person or entity, that sells or offers to sell electricity to retail customers in this state,” because those regulations did not contemplate this sort of business model or the proposed relationship and transactions. *Id.* at 20-21.

In a lengthy opinion, the Arizona Corporation Commission found that a third-party solar developer (SolarCity) “is not acting as a public service corporation when it provides electric service to schools, governmental entities or non-profits” under a PPA. Opinion and Order, *SolarCity Corporation*, 2010 Ariz. PUC LEXIS 286, at \*162 (July 12, 2010). The New Mexico Public Regulation Commission reached the same conclusion, explaining that third-party developers “are offering a supplemental service,” and that “[t]here is no obvious public policy basis for the Commission to regulate these third-party developers as public utilities.” Declaratory Order, *Third-Party Arrangements for Renewable Energy Generation*, 2009 N.M. PUC LEXIS 85, at \*17 (Dec. 17, 2009). The Public Utilities Commission of Nevada also concluded that “third party owners of net metered renewable energy systems are not public utilities” and “the contractual relationship between a third party system owner and a customer-generator is beyond the jurisdiction of the Commission.” Order, *Investigation and Rulemaking*, 2008 Nev. PUC LEXIS 283, at \*4 (Nov. 26, 2008).

A limited number of public utility commissions have decided that a declaratory order is not the appropriate path to regulatory certainty. In a 2016 opinion, the Delaware Public Service Commission denied a petition for a declaratory judgment from Vivint, stating that Vivint should instead petition for a rulemaking proceeding to provide clarity. Order, *In the Matter of the*

*Petition of Vivint Solar, Inc. for a Declaratory Order*, Del. PSC, Docket No. 15-1358 (Jan. 5, 2016). In a 2017 order, the Wisconsin Public Serive Commission ducked the issue, denying a petition for a declaratory ruling on the basis that the petition “raises significant public policy considerations that the Commission believes are better left for the Legislature’s determination.” Order, *Applicability of Wis. Stat. § 196.01(5)(a) to Third-Party Financing of Distributed Energy Resource Systems in Wisconsin*, Wisc. PSC, Docket No. 9300-DR-102 (Dec. 22, 2017). Of course, neither of these orders is support for regulation of TPOs as public utilities.

It is also worth mentioning that the Oklahoma Attorney General recently issued an opinion germane to this topic but of limited direct relevance due to significant and meaningful differences in Oklahoma law. Oklahoma Att’y Gen. Op. 2018-5 (June 26, 2018), available at [http://www.oag.ok.gov/Websites/oag/images/Documents/Opinions/AG/2018/AG%20Opinion%2](http://www.oag.ok.gov/Websites/oag/images/Documents/Opinions/AG/2018/AG%20Opinion%202018-5%20(T-25).pdf) [02018-5%20(T-25).pdf.](http://www.oag.ok.gov/Websites/oag/images/Documents/Opinions/AG/2018/AG%20Opinion%202018-5%20(T-25).pdf) Oklahoma’s Retail Electric Supplier Certified Territory Act (“RESCTA”), 17 O.S. § 158.21 *et seq.*, divides unincorporated areas up into service territories for retail electric suppliers. These retail electric suppliers have the “exclusive right to furnish retail electric service to all electric-consuming facilities located within its certified territory.” Retail electric service is defined as “electric service furnished to a consumer for ultimate consumption.” The AG determines that offering a PPA is “plainly” furnishing retail electric service. Oklahoma Att’y Gen. Op. 2018-5 at 4. Accordingly, in unincorporated territory, a TPO could not provide a distributed generation PPA unless it was a retail electric supplier operating within its own territory. This is clearly and significantly distinguishable from Indiana law, which requires power to be provided “to the public” before public utility regulation is triggered.

# Pathways for Resolving Legal Uncertainty

Legal uncertainty around any issue can be resolved in a number of different ways, each of which may have its own advantages and disadvantages. This section discusses various pathways for resolving uncertainty other than simply entering into TPO agreements and waiting for a potential lawsuit.

# Legislative Action

In some instances, legal uncertainty can be resolved by legislation that clarifies the issue. A legislative amendment is clear and applies to everyone. However, legislative negotiation is often a lengthy process, even when a resolution can be reached. This approach has been taken in other states, including Illinois, New Jersey, Rhode Island, and Georgia, among others. 220 ILCS 5/16-

102 (exempting “an entity that owns, operates, sells, or arranges for the installation of a customer's own cogeneration or self-generation facilities” from the definition of an alternative retail electric supplier); N.J. Stat. Ann. § 48:3-51 (“An on-site generation facility shall not be considered a public utility.”); 39 R.I. Gen. Laws Ann. § 39-26.4-2 (systems eligible for net- metering “may be owned by the same entity that is the customer of record on the net-metered accounts or may be owned by a third party that is not the customer of record”); Ga. Code Ann. § 46-3-63 (“Solar technology at or below the capacity limit may be financed by a retail electric customer through a solar financing agent utilizing a solar energy procurement agreement . . . ”).

# Request Opinion from Attorney General

A TPO could work with a state official or legislator to request an opinion from the Indiana Attorney General on the proper application of public utility regulation. IND. CODE § 4-6-2-5 provides that the Attorney General is required to provide a “legal opinion to the governor upon request, touching upon any question or point of law in which the interests of the state may be involved.” The AG must also advise “any other state officer touching upon any question or point of law concerning the duties of the officer; and also, to either house of the general assembly or to any legislative agency created under action of the general assembly, on the constitutionality of any existing or proposed law, [or] upon request by resolution of the house or legislative agency.” The AG is not required to provide an opinion to anyone else.

This approach would provide limited certainty while avoiding litigation or administrative proceedings, but would require a state official or legislator to make the request. Additionally, while AG opinions may be persuasive, they are not binding on courts. *See, e.g.*, *Miller Brewing Co. v. Bartholemew Cty. Beverage Co.*, 674 N.E.2d 193, 203 (Ind. Ct. App. 1996) (noting “the basic tenet of Indiana law that official opinions of the Attorney General, although helpful on occasion, are not binding upon the courts”).

# Declaratory Judgment Action in State Court

Another option would be to file litigation in state court for a declaratory judgment. “Courts of record within their respective jurisdictions have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” IND. CODE § 34-14-1-1. “Any person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction . . . arising under the . . . statute.” IND.CODE § 34-14-1-

2. A court has the discretion to decline to issue a declaratory judgment if a judgment “would not terminate the uncertainty or controversy giving rise to the proceeding.” IND. CODE § 34-14-1-6.

While a declaratory judgment does require litigation, and could potentially require litigation on appeal, it also provides the most legal certainty.

# Complaint at the PUC

Indiana law does not explicitly grant the PUC authority to issue declaratory rulings, and several court opinions have held that it therefore may not do so. *See, e.g.*, *Kentucky-Indiana Mun. Power Ass'n v. Pub. Serv. Co. of Indiana*, 181 Ind. App. 639, 645, 393 N.E.2d 776, 780 (1979). However, the PUC has found that “[a]lthough the Commission has no statutory subject matter jurisdiction to issue declaratory judgments under Ind. Code § 8-1-2 *et seq*., when requested under appropriate circumstances, it has authority to bring a business before it to determine if it is a public utility.” *In re St. Vincent Health, Inc.*, 42675, 2004 WL 3219938, at \*1 (Dec. 22, 2004). In *St. Vincent Health*, discussed above, St. Vincent technically applied for a Petition for a Certificate of Territorial Authority, but acknowledged that “its intent in initiating this Cause was to place before the Commission the issue of whether [its communications system] . . . qualified St. Vincent as a public utility within the meaning of Indiana law. *Id.* at 1. It is therefore at least possible that the PUC would consider a petition to determine whether a TPO is a public utility.

In addition, a TPO could potentially move forward with a TPO agreement with a customer, and if the utility takes action or fails to take action in order to obstruct the arrangement (such as refusal to interconnect the facility), a complaint could then be brought against the utility. Indiana law provides that the PSC shall investigate claims that “any of the rates, tolls, charges or schedules or any joint rate or rates in which such petitioner is directly interested are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurement, *practice or act whatsoever affecting or relating to the service of any public utility, or any service in connection therewith, is in any respect unreasonable*, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or can not be obtained.” IND. CODE § 8-1-2-54. The complaint must be made by “any mercantile, agricultural or manufacturing society,” “any body politic or municipal organization,” or by 10 “persons, firms, limited liability companies, corporations, or associations,” or by 10 “complainants of all or any of the aforementioned classes,” or by a public utility.

Notwithstanding the above provisions, the PUC has the discretionary authority to investigate complaints that do not meet those requirements:

Notwithstanding IC 8-1-2-54, the commission may investigate and enter orders on complaints filed by individual customers arising under this section. The commission may establish an appeals division to act on its own behalf regarding individual customer complaints. The decision of the division shall be binding on all parties to the complaint. The commission shall review decisions of the appeals division upon timely request by an affected party.

IND. CODE § 8-1-2-34.5.

PUC rules provide that:

1. Disputes regarding any utility service or billing matter that have not been resolved at the utility level may constitute a complaint and may be resolved through the following process:
   1. A customer may appeal a utility's proposed resolution of a dispute by filing an informal complaint with consumer affairs in accordance with section 5 of this rule.
   2. A customer or utility may request commission review of a consumer affairs decision in accordance with section 6 of this rule.

170 IND. ADMIN. CODE 16-1-3.

A PUC resolution of a complaint against a utility that attempted to obstruct a TPO agreement would likely include a finding by the PUC on the legality of TPO agreements. Final orders by the PUC are of course subject to judicial review, and questions of statutory interpretation would be reviewed without deference to the agency.

# Conclusion

The legal status of third-party financing has been clouded with uncertainty in Indiana, which has chilled the distributed generation marketplace and limited financing options for Indiana customers, to the detriment of the public interest. This comprehensive memorandum explains how Indiana court and administrative case law, decisions from other states, and the historical basis for public utility regulation all support a conclusion that third-party owners of distributed energy systems should not be regulated as public utilities under Indiana law. This is consistent with the “conservative principle” that the jurisdiction of the state over private business contracts should extend only so far as necessary to address the public interest implicated.