IN THE
COURT OF APPEALS OF INDIANA

No. 20A-EX-1384

SOLARIZE INDIANA, INC., *Appellant*, v. SOUTHERN INDIANA GAS AND ELECTRIC COMPANY, dba VECTREN ENERGY DELIVERY OF INDIANA, INC., and INDIANA UTILITY REGULATORY COMMISSION, *Appellees*.	Appeal from the Indiana Utility Regulatory Commission, 30-Day Filing Nos. 50331 and 50332, Hon. James F. Huston, Chairman, Hon. Sarah E. Freeman, Commissioner, Hon. Stefanie Krevda, Commissioner, Hon. David L. Ober, Commissioner, Hon. David E. Ziegner, Commissioner.

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STATEMENT OF THE ISSUE

The Indiana Utility Regulatory Commission's 30-Day Filing Rule provides a streamlined, less formal process for filings that have been authorized by a prior Commission order or that are allowed under the rule. 170 I.A.C. 1-6-1 *et seq*. Under this rule, certain noncontroversial utility requests are processed without a hearing, as long as no rule-compliant objections are made.

Here, Solarize Indiana, Inc., objected to two filings submitted under the 30-Day Filing Rule by Southern Indiana Gas and Electric Company (Vectren), alleging that the filings might not be compliant with the Public Utility Regulatory Policies Act (PURPA), Pub. L. No. 95-617, 92 Stat. 3117, even though the filings were made under and did not allege a violation of 170 I.A.C. 4-4.1 (Rule 4.1), which is the Commission's long-standing rule implementing PURPA. The Commission approved Vectren's filings, accepting Commission staff's findings and recommendation that Solarize's objections did not comply with the 30-Day Filing Rule.

The issue on appeal is whether the Commission, based on its technical knowledge and expertise, reasonably interpreted its own rules and acted appropriately when it accepted Commission staff's findings and recommendation that Solarize's objections were not compliant with the 30-Day Filing Rule and approved Vectren's filings.

STATEMENT OF THE CASE

On February 28 and March 2, 2020, Vectren made two filings under the 30-Day Filing Rule, each of which sought relief under Rule 4.1: The filing in #50331

sought a rate adjustment for cogeneration and alternate energy production facilities, and the filing in #50332 sought an additional contract form for qualifying facilities electing to sell their net generation output. II App. 2, 6; *see* 170 I.A.C. 4-4.1-1(a), (e) (defining "alternate energy production facility" and "cogeneration facility").

On March 26, 2020, the Office of Utility Consumer Counselor (OUCC) submitted an objection in #50331. II App. 2. After Vectren's response on April 6, OUCC submitted an amended objection on April 8. *Id*. The following day, Commission staff requested additional information regarding OUCC's objection, to which OUCC responded on April 13. *Id*. at 3. On April 24, Solarize and Indiana Distributed Energy Alliance submitted objections in both #50331 and #50332. *Id*. at 3, 6. On April 29, the Commission received an objection from Morton Solar in #50331 and #50332. *Id*. at 4, 7. Vectren submitted a response to the objections on May 5, and Solarize Indiana submitted a reply on May 8. *Id*.

On June 24, 2020, the Commission issued an order accepting Commission staff's findings and recommendations that the objections were not compliant with the 30-Day Filing Rule, finding that Vectren had satisfied the requirements of the 30-Day Filing Rule, and approving Vectren's filings. *Id*. at 9–29. Solarize filed its notice of appeal on July 24, 2020. *Id*. at 4, 7.

STATEMENT OF FACTS

A. The Commission's 30-Day Filing Rule

To use its limited resources wisely, reduce unnecessary litigation, and provide quicker decisions where warranted, the Commission has long had an informal

process for approving noncontroversial filings for certain rate and other changes that have been authorized in prior Commission orders. In 2008, the Commission formally adopted this informal process through rulemaking as the *30-day Administrative Filing Procedures and Guidelines*, 170 I.A.C. 1-6 (30-Day Filing Rule). Under this rule, the filing utility must provide notice to its customers regarding the filing, and the Commission must post the filing to its electronic gateway. 170 I.A.C. 1-6-6. The filing is reviewed by Commission staff and by OUCC, as well as any interested persons. 170 I.A.C. 1-6-7 and 1-6-8(a).

The 30-Day Filing Rule also specifies the scope and manner of permissible objections to a filing. If any person or entity has an objection to the filing, the objection must be in writing and based on a statement that: (A) the filing is in violation of applicable law, a prior Commission order, or a Commission rule; (B) information in the filing is inaccurate; and/or (C) the filing is incomplete or prohibited by the rule. 170 I.A.C. 1-6-7(b). Commission staff are required to notify the utility of the objection, and the utility has 10 days to respond, clarify, amend, or withdraw the filing. 170 I.A.C. 1-6-7(c). If the objection is resolved to the satisfaction of the objector, the utility, OUCC, and Commission staff, the filing may continue through the recommendation-and-review process under section 8 of the 30-Day Filing Rule. 170 I.A.C. 1-6-7(d). The rule further provides that a filing "shall not be presented to the commission for consideration upon an objection that complies with this section." *Id.*

After reviewing the filing, Commission staff make a recommendation for approval or denial of the filing and submit a description of the filing with the recommendation for the Commission's consideration. 170 I.A.C. 1-6-8. These recommendations are collected for the next public meeting (called "Conference") at which the Commission makes its decisions and at that point the collected recommendations are called "utility articles." *Id*. The 30-Day Filing Rule gets its name from what is generally the minimum amount of time after the filing date for the filing to be processed and the recommendations submitted to the Commission for its consideration. The Commission's approval is handled through one order for all of the utility articles submitted for that Conference. II App. 9.

B. Incentives for alternative energy production and use in Indiana

At its foundation, this appeal arose because Solarize[1], a non-profit organization promoting the use of solar power in Indiana, believes that Indiana has not gone far enough to promote the development and use of solar power in the way renewable resources are compensated. Appellant's Br. 10; II App. 89–90, 93–94, 120. As relevant here, there are three different types of incentives available under Indiana law: PURPA, net metering, and distributed generation. Each of these mechanisms is similar in that they reward those who produce energy from alternative sources—e.g., solar power. But each differs in their origin and, ultimately, their generosity in

[1] Solarize is a non-profit, volunteer-based organization, whose website states its "mission is to accelerate the transition to clean energy by increasing the number of solar owners across Indiana." *What Is Solarize Indiana?*, https://solarizeindiana.org/what-is-solarize-indiana/.

compensating those who produce or utilize renewable and other alternative energy sources.

1. PURPA and Indiana's implementation of PURPA

a. Congress enacted PURPA "to facilitate development of alternative energy sources" and "to reduce American dependence on fossil fuels," *Winding Creek Solar LLC v. Peterman*, 932 F.3d 861, 863 (9th Cir. 2019), by encouraging "the development of cogeneration and small power production facilities,"[2] *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 404 (1983). But Congress believed "that two problems impeded the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 750–51 (1982). To overcome these hurdles, PURPA requires electric utilities to offer to purchase electric energy from qualified facilities—which, among other things, must have a production capacity of less than 80 megawatts (MW) of electricity, *see* 16 U.S.C. § 796(17); 18 C.F.R. §§ 292.203(a),

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[2] A "cogeneration" facility is "a facility that produces both electric energy and steam or some other form of useful energy, such as heat." *Am. Paper Inst.*, 461 U.S. at 405 n.1 (citing 16 U.S.C. § 796(18)(A)). And a "small power production facility" is a facility with "production capacity of not more than 80 megawatts and produces electric power from biomass, waste, or renewable sources such as wind, water, or solar energy." *Id.* (citing 16 U.S.C. § 796(17)).

292.204(a)—and establishes guidelines as to the rates at which utilities purchase a qualified facility's power. 16 U.S.C. § 824a-3(a)–(b)

PURPA directs the Federal Energy Regulatory Commission (FERC) to "prescribe … such rules as it determines necessary to encourage cogeneration and small power production," including rules that "require electric utilities to … purchase electric energy from such facilities." 16 U.S.C. § 824a-3(a). And because PURPA is "not intended to require the rate payers of a utility to subsidize cogenerators or small power producers," *Swecker v. Midland Power Co-op.*, 807 F.3d 883, 884 (8th Cir. 2015) (quoting H.R. Rep. No. 95-1750, at 98 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7797, 7832), the Act also provides that FERC's rules must *not* "provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b). This "incremental cost of alternative electric energy" is "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d).

Following PURPA's directive, FERC promulgated rules to encourage the use of alternative fuels. *See* 18 C.F.R. §§ 292.303, 292.304. Rule 303 requires an electric utility to "purchase … any energy and capacity which is made available from a qualifying facility" to the utility. 18 C.F.R. § 292.303(a). And Rule 304 "provides that a rate equaling avoided costs satisfied PURPA." *Swecker*, 807 F.3d at 885 (citing 18 C.F.R. § 292.304(a), (b)(2)). Rule 304 also requires that three pricing options be made available to each qualifying facility. 18 C.F.R. § 292.304(d). At issue in this

appeal is the third option, which allows a qualifying facility "to provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term ... based on … [t]he *avoided costs* calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2)(ii) (emphasis added).

In defining the term "avoided costs," FERC used the statutory definition of "incremental cost of alternative electric energy." *Swecker*, 807 F.3d at 884. "Avoided costs" are thus "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6).

Importantly, PURPA delegated to the States the authority to decide what costs may be included in the avoided cost rates. 16 U.S.C. § 824a-3(f); *In re S. California Edison Co.*, 70 FERC 61,215, 61,675, 1995 WL 169000, at **14 (1995) ("Since 1980, [FERC] has given the States wide latitude in implementing PURPA."); *Am. Ref-Fuel Co. of Hempstead*, 47 FERC 61,161, 61,533, 1989 WL 261302, at **3 (1989) ("As we have previously indicated, states are allowed a wide degree of latitude in establishing an implementation plan for section 210 of PURPA, as long as such plans are consistent with our regulations." (footnote omitted)).

PURPA and FERC's regulations provide only some general factors for the States to use when setting their standards for what to include in the avoided cost rates. One of the factors that States must "to the extent practicable" take into account is "[t]he availability of capacity or energy from a qualifying facility during the

system daily and seasonal peak periods," which itself includes factors such as (i) the ability of the utility to dispatch the qualifying facility (i.e., to be able to call on that facility to produce when needed); (ii) the reliability of the qualifying facility; (iii) the terms (including duration) of any contract or other legally enforceable obligation; (iv) the extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the utility's facilities; (v) the usefulness of energy and capacity supplied from a qualifying facility during system emergencies; (vi) the individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and (vii) the smaller capacity increments and shorter lead times available with additions of capacity from qualifying facilities. 18 C.F.R. § 292.304(e)(2).

b. In 1982, the General Assembly enacted Indiana Code chapter 8-1-2.4, which, while it doesn't specifically refer to PURPA, uses the same definitions and the same baseline requirements as PURPA. *See* Ind. Code § 8-1-2.4-2 (definitions). The statute expresses that "the policy of this state" is "to encourage the development of alternate energy production facilities … to conserve our finite and expensive energy resources and to provide for their most efficient utilization," I.C. § 8-1-2.4-1, and it directs the Commission to encourage the participation of utilities in alternate energy production facilities, cogeneration facilities, small hydro facilities, and private generation projects," I.C. § 8-1-2.4-3. Critically, the law provides that "the commission shall require electric utilities … to enter into long term contracts to purchase … electricity or useful thermal energy from alternate energy production

facilities, cogeneration facilities, or small hydro facilities located in the utility's service territory." I.C. § 8-1-2.4-4(a)(1). But just as under PURPA, that purchasing requirement applies only to qualified facilities producing *no more than* 80 MW of electricity. I.C. § 8-1-2.4-5.

Like PURPA and FERC's regulations, the statute also sets guideposts and limits for rates. For instance, just as under PURPA, the Commission must require the utility to purchase alternative energy from qualified facilities in a just, economically reasonable, and nondiscriminatory manner. I.C. § 8-1-2.4-4(a)(1). The statute also delineates the factors on which the Commission must base the rates at which the electric utilities purchase the electricity from qualifying facilities:

> (1) The estimated capital cost of the next generating plant, including related transmission facilities, to be placed in service by the utility.
> (2) The term of the contract between the utility and the seller.
> (3) A levelized annual carrying charge based upon the term of the contract and determined in a manner consistent with both the methods and the current interest or return requirements associated with the utility's new construction program.
> (4) The utility's annual energy costs, including current fuel costs, related operation and maintenance costs, and any other energy-related costs considered appropriate by the commission.

I.C. § 8-1-2.4-4(c).

The statute, however, was not Indiana's first response to PURPA, for in 1981 the Commission had adopted 170 I.A.C. 4-4.1 (Rule 4.1) regarding PURPA. II App. 148. Following the enactment of Indiana Code chapter 8-1-2.4 in 1982, the Commission adopted the current version of the rule implementing both state law and PURPA in 1984, with an effective date of March 7, 1985. II App. 148–51. Rule 4.1 has remained substantially unchanged since that time, II App. 94, and in those 35

years, no entity has alleged that the rule in any way is inconsistent with PURPA or that a filing made under the rule violated PURPA.

Rule 4.1 sets forth the formulas to calculate avoided cost rates for energy and for capacity,[3] as well as the requirement that the electric utility submit any standard offer contracts it has for qualifying facilities. 170 I.A.C. 4-4.1-8, -9, and -11. The mathematical formulas in Rule 4.1 definitively establish what costs are to be included in the avoided cost rates, specifically including "line losses," 170 I.A.C. 4-4.1-8 and -9, which means "the percentage loss of energy experienced in a period between the generation facilities of an electric utility and the customers of that electric utility," 170 I.A.C. 4-4.1-1(m). The capacity calculation includes all capital costs, including those for pollution control equipment to reduce emissions for the avoidable unit, which for Vectren is a simple cycle gas turbine. I.C. § 8-1-2.4-4(c)(1); 170 I.A.C. 4-4.1-9(a) ("V = Investment amount…"); II App. 38.

Rule 4.1 literally establishes complex mathematical formulae into which electric utilities plug their numbers to arrive at a rate. *See* 170 I.A.C. 4-4.1-8 and -9. And generating electric utilities, such as Vectren, are required to file with the Commission each year the standard offer for the purchase of energy and capacity at rates derived from the application of these formulae. 170 I.A.C. 4-4.1-1(i), 4-4.1-10, and 4-4.1-11. Since the adoption of Rule 4.1, these annual filings have been processed informally and are currently handled under the Commission's 30-Day Filing

[3] The term "capacity" refers to "the ability to provide electric energy in a period of time." 170 I.A.C. 4-4.1-1(d).

rule, as the Commission approved or accepted this procedure for these filings. II App. 30.

2. Net metering and distributed generation

Whereas PURPA—and the accompanying FERC regulations, state statute, and Commission rules—address compensation for qualifying facilities with production capacities of 80 MW or less, the compensation for customer-owned renewable facilities of 1 MW or less has been established via Commission rule and Indiana statute, in that order. Specifically, Rule 4.2 establishes the terms for net metering, and Indiana Code chapter 8-1-40 establishes the terms for distributed generation. Both programs establish retail credits for customers who produce their own energy through alternative methods, but the credits differ. 170 I.A.C. 4-4.2-7; I.C. § 8-1-40-18. This compensation is different than and separate from the avoided cost rates set in Rule 4.1.

Net Metering: In 2004, the Commission adopted its Net Metering Rule, which allows a customer of an investor-owned electric utility to offset all or part of the customer's electricity needs through renewable energy facilities that the customer owns and operates at the customer's premises—e.g., a customer who installs solar panels on her home. 170 I.A.C. 4-4.2-1 *et seq*. Net metering measures the difference between the amount of electricity supplied to the customer by the electric utility and the amount of electricity supplied back to the utility from the customer. 170 I.A.C. 4-4.2-1(i). Under this rule, the customer receives a credit on a kilowatt-hour basis

for any excess electricity the customer produced, which then offsets the amount charged on the customer's bill at the retail rate. 170 I.A.C. 4-4.2-7.

In 2011, the Commission amended the rule to allow customer-owned facilities of up to 1 MW to qualify for net metering, and, in 2017, the Commission increased the total amount of net metering an electric utility was required to allow from all of its net metering customers, from 1% to 1.5% of the utility's summer peak load (the highest amount of electricity used by customers at a particular point in time during the summer). 170 I.A.C. 4-4.2-1(j) and -2.

Distributed Generation: In 2017, the General Assembly passed Senate Enrolled Act 309. Pub. L. No. 264-2017, § 6, 2017 Ind. Acts 3739, 3743–51 (codified at I.C. § 8-1-40-1 *et seq.*). This statute provides for the gradual elimination of net metering and replaces it with distributed generation and an excess distributed generation (EDG) rate. I.C. §§ 8-1-40-11, -13, -14, and -15. Specifically, net metering facilities installed by December 31, 2017, may continue under the utilities' net metering tariffs until July 1, 2047. I.C. § 8-1-40-14. The net metering tariff continues until July 1, 2032, for those facilities installed by the earlier of July 1, 2022 or when the utility's net metering reaches 1.5% of its summer peak load. I.C. § 8-1-40-13.

Distributed generation facilities have the same qualification requirements as net metering facilities—customer owned and operated on the customer premises, sized to replace all or part of the customer's electricity needs, and no larger than

1 MW. I.C. § 8-1-40-3. Just like for net metering, customers with distributed generation facilities will receive a credit on their retail bill for their excess generation—but the credit will be at the EDG rate. I.C. §§ 8-1-40-15 and -18.

The credit at the EDG rate is lower than the retail credit under net metering. The EDG rate is calculated by multiplying the average marginal price of electricity paid by the electric utility during the most recent calendar year times 1.25. I.C. § 8-1-40-17. The "marginal price of electricity" is basically the wholesale price, using the hourly market price of the wholesale market of the relevant regional transmission organization.[4] Ind. Code § 8-1-40-6.

When an electric utility has a total amount of net metering nearing 1.5% of its most recent summer peak load, and no later than March 1, 2021, the utility must file a petition with the Commission seeking approval of the utility's EDG rate. I.C. §§ 8-1-40-10 and -16. In May 2020, Vectren filed a petition with the Commission, docketed as IURC Cause No. 45378, in which Vectren indicated that it was at or nearing the 1.5% threshold and that it was seeking approval of an EDG rate.[5] *See* Verified Petition, *Petition of Southern Indiana Gas & Elec. Co. for Approval of Tariff Rate for Procurement of Excess Distributed Generation*, https://iurc.portal.in.gov

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[4] A regional transmission organization or RTO is a federally-regulated organization. The RTOs that cover Indiana are the Mid-continent Independent System Operator (MISO) and the PJM Interconnection, LLC. Both have wholesale energy markets regulated by FERC.

[5] Solarize has intervened in that proceeding and even requested that the Commission consolidate the 30-day filings at issue in this appeal with that pending proceeding. The Commission denied that request.

/_entity/sharepointdocumentlocation/819bc46d-9093-ea11-a811-001dd8018921/bb9c6bba-fd52-45ad-8e64-a444aef13c39?file=45378%20Vectren%20South%20EDG%20Petition%2005082020.pdf. As of the date of this brief, the Vectren EDG proceeding is still pending before the Commission.

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To recap, PURPA, net metering, and distributed generation all incentivize development of renewable energy sources by compensating those who produce alternative energy. But importantly, the qualifications and terms of compensation are not identical. With respect to qualifications, PURPA provides compensation to qualified facilities with production capacities of 80 MW or less, whereas net metering and distributed generation provide compensation through credits to customers with facilities of 1 MW or less.

All three differ in terms of compensation. The most generous is net metering, which provides a one-to-one retail credit on a kilowatt-hour basis. 170 I.A.C. 4-4.2-7. The next most generous is distributed generation, which provides compensation at essentially a rate of 1.25 times the wholesale price. I.C. §§ 8-1-40-6, -17. And the least generous is PURPA (and, of course, Rule 4.1), which provides compensation based on the utility's avoided costs in not having to self-generate the power or purchase it from another source. 18 C.F.R. § 292.304(a), (b); 170 I.A.C. 4-4.1-1(b), -8, -9.

FERC has held that retail credits—like those available through net metering and distributed generation—are not subject to PURPA and that such netting arrangements are not sales to the utility. *MidAmerican Energy Co.*, 94 FERC 61,340,

62,263, 2001 WL 306484 (2001); *Sun Edison LLC*, 129 FERC 61,146, 61,620, 2009 WL 3932884 (2009). Renewable facilities that are qualifying facilities under PURPA with production capacities of 1 MW or less may also qualify for net metering or distributed generation treatment in Indiana. It is up to the customer to choose whether to be compensated for its excess generation under PURPA or, if they qualify, under the typically more generous crediting of net metering or distributed generation. *See* 170 I.A.C. 4-4.1-2; 170 I.A.C. 4-4.2-4.

C. Vectren's 30-day filings

On February 28, 2020, Vectren submitted its annual proposed avoided cost rates for purchase of energy and capacity under Rule 4.1, including its proposed tariff sheet and the supporting data for its calculations, using the 30-Day Filing Rule and under the assigned case number of 50331. II App. 30–55. The energy cost was based on the locational marginal price (LMP) for Vectren's load node (a connection point with the regional transmission system). II App. 39. The LMP is a wholesale price established by federally regulated regional organizations, and it includes the system energy price, transmission congestion costs, and the cost of marginal line losses. *See* Energy Acuity, *What Is Locational Marginal Pricing (LMP)?*, https://energyacuity.com/blog/what-is-locational-marginal-pricing-lmp/.[6] Line losses, termed as "Energy losses" in Vectren's notes in its filing, were included in this calculation,

[6] This and other more detailed technical information regarding the pricing of electricity on the wholesale and retail level are part of the technical knowledge and expertise of the Commission and its staff and, as a result, may not be specifically laid out in the documents submitted under the 30-day Filing Rule.

with the data taken from Vectren's 2018 FERC Form 1 (an annual data report). II App. 39, 42. Line losses were also included in the calculation for the capacity cost. II App. 36, 42. Pollution control equipment costs are included in the estimated yearly capacity capital cost, which in Vectren's case was based on the estimated yearly capacity capital costs of a generic simple cycle gas turbine. II App. 38. Vectren requested approval of these avoided cost rates to be part of its tariff, specifically its "Rate CSP—Cogeneration and Small Power Production."[7] II App. 33–34.

On March 2, 2020, Vectren, again proceeding under the 30-Day Filing Rule, submitted under section 11 of Rule 4.1 a standard offer and contract form for those qualifying facilities that elect to sell only their generation output that is net of their own use and that is not separately metered; the filing was assigned case number 50332. II App. 56–69. This form is in addition to Vectren's standard offer and contract form for as-delivered capacity and energy purchases that applies to all qualifying facilities. II App. 56. Vectren noted that section 5(c) of Rule 4.1 allows for purchase and sale to occur simultaneously or the qualifying facility may elect to sell only that portion of the qualifying facility's output net of its own use. II App. 56; *see also* 170 I.A.C. 4-4.1-5(c). This additional standard offer and contract form is specifically for qualifying facilities producing more than 1 MW of energy and who have elected not to separately meter their output. II App. 59.

[7] Rate CSP applies to all qualifying facilities—that is, to all cogeneration and small power producing facilities of 80 MW or less. Southern Indiana Gas & Elec. Co., *Tariff for Electric Service*, https://www.vectren.com/assets/downloads/rates/in-south-electric-tariff.pdf, at 101.

D. Solarize's objections and the Commission's analysis and findings

1. Solarize submitted objections to Vectren's filings, but Solarize did *not* assert that Vectren's filings violated Rule 4.1. II App. 91–113. Instead, as part of its objections, Solarize stated and asserted the following:

- Vectren's filings are only for qualifying facilities that are above 1 MW in capacity. II App. 92.
- Vectren's EDG rate will become the tariff for qualifying facilities that are 1 MW or less. *Id.*
- Vectren's 30-day filings, #50331 and #50332, should be consolidated with Vectren's EDG filing in the same docketed proceeding. *Id.*
- Vectren's CSP and EDG rates both involve sales for resale subject to PURPA. II App. 93.
- The Commission should undertake a rulemaking to update Rule 4.1 and, in the meantime, use Vectren's service territory as a "laboratory." II App. 94.
- Vectren has an affiliate energy services company, Energy Systems Group, competing within its service territory with unaffiliated vendors and suppliers of alternate energy resources. Vectren also has another affiliate, Ohio Valley Electric Company, with which it has a purchased power agreement to purchase power averaging at 6.5 cents per kilowatt-hour (kwh). PURPA requires that rates and other tariff terms and conditions must be both non-preferential and non-discriminatory for qualifying facilities. *Id.*
- Solarize joined in OUCC's objection,[8] but stated that it was not in support nor in opposition to OUCC's objection, and, instead, was choosing to focus on Vectren's existing and prospective set of PURPA rates, standard contracts, and other terms and conditions. *Id.*

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[8] OUCC submitted an objection to Vectren's filing in #50331, indicating that a reasonable in-service year of the avoidable or deferrable unit under section 9(b) of Rule 4.1 should be three years, according to Vectren's most recent Integrated Resource Plan. II App. 72–74. Vectren responded that OUCC had failed to cite or discuss the standard for objections under the 30-Day Filing Rule and that Vectren had correctly calculated the monthly capacity payments based on the avoided cost of a generating unit installed today. II App. 76–78. OUCC did not submit an objection to Vectren's

- OUCC's amended objection should apply to #50332, but, if OUCC does not agree with this interpretation, Solarize "asserts as its own this same Objection to" #50332. II App. 95.

In its reply to Vectren's response that Solarize had not indicated any specific violation of law, order, or rule, Solarize provided PURPA citations and quoted extensively from the Commission's order approving Rule 4.1, II App. 147–51, stating that it is "indisputable that both Ind. Code 8-1-2.4-1 to 5 and 170 I.A.C. 4-4.1-1 to 13 were adopted pursuant to and with the provisions required by PURPA and its implementing regulations," II App. 148. Solarize then asserted that PURPA required the option of long-term contracts with predetermined prices and that Vectren failed to provide one. II App. 151. Solarize next asserted that transmission and line loss costs were not included in Vectren's proposed CSP avoided cost rate. II App. 152. And finally, Solarize asserted that it has raised the issues of whether Vectren's CSP rate is discriminatory as it pays a higher rate to an affiliate, Ohio Valley Electric Corp.,[9] and whether the additional standard contract proposed in #50332 is preferential to one large co-generator. *Id.*

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filing in #50332. *Id.* Commission staff denied OUCC's objection because Rule 4.1 does not include a requirement that the avoidable or deferrable unit service year be based on an Integrated Resource Plan prepared under 170 I.A.C. 4-7. II App. 23.

[9] Ohio Valley Electric Company was organized in 1952 to provide power under a Department of Energy Power Agreement. https://www.ovec.com/OVECHistory.pdf. That agreement terminated in 2003, and since then the power generated from OVEC's 1088 MW coal plant at Cheshire, Ohio, has been available to the companies with ownership interest in OVEC. *Id.* Vectren's share in the ownership of OVEC is 1.50%. *Id.*

2. Commission staff reviewed and analyzed Solarize's objections and found that they did not comply with 170 I.A.C. 1-6-7. II App. 22–24, 26–27. Commission staff deemed Solarize's objections not to comply with the 30-Day Filing Rule and to be meritless. For one thing, staff explained that the 30-Day Filing Rule "does not provide for a reply being submitted to the utility's response to the objection or for multiple filings providing additional explanation" because the process is intended to occur over a shortened timeframe, and so "persons submitting an objection should provide a statement on which the objection is based and that accurately articulates the basis for the objection pursuant to 170 I.A.C. 1-6-7(b)(2)." II App. 23, 26. But Commission staff did not strike Solarize's reply and addressed its arguments on the merits.

With respect to Solarize's assertion that Vectren's filings were incomplete under PURPA, Commission staff discussed the historical development of and interplay among PURPA, Rule 4.1, and Indiana Code chapter 8-1-2.4. Specifically, the Commission adopted Rule 4.1 to implement PURPA, yet Solarize did "not provide any statement that Vectren's filing, which was made under Rule 4.1, violates Rule 4.1," and so Solarize's objection failed to "comply with 170 I.A.C. 1-6-7(b)(2)." II App. 24, 26. Indeed, observed staff, Solarize's "objection appears to be about Rule 4.1 itself and [Solarize's] assertion that the rule should be updated," but that also "is not a compliant objection under 170 I.A.C. 1-6-7." II App. 24, 26. Indeed, staff observed that Solarize "has the option of submitting a request to the Commission asking for a rulemaking to amend Rule 4.1." *Id.*

Moreover, Commission staff explained that most of Solarize's "comments and assertions are regarding Vectren's filing of a proposed excess distributed generation ("EDG") rate, now docketed as IURC Cause No. 45378, and its concerns regarding EDG and the relevant statute, Ind. Code chapter 8-1-40." II App. 24, 26. But staff rejected those arguments as improper for these 30-day proceedings, observing that Solarize "has intervened in 45378 and that is the appropriate proceeding in which to provide its arguments and supporting evidence for those arguments." *Id.*

In its order, the Commission found the requirements of 170 I.A.C. 1-6 were met, accepting the recommendations and findings of Commission staff, and the filings were approved. II App. 9.

SUMMARY OF THE ARGUMENT

In determining whether the objections at issue in this appeal were compliant with its 30-Day Filing Rule, the Commission relied on its own and its staff's technical knowledge and expertise, and it made findings and approved the findings made by its staff. In interpreting its own rule and a matter under its unique technical expertise, the Commission is entitled to substantial deference.

Solarize's objections did not comply with the objection section of the 30-Day Filing Rule. Rule 4.1 is Indiana's implementation of PURPA, and Solarize provided a thorough review of why Rule 4.1 complies with PURPA. The bottom line is that a utility filing made under Rule 4.1 that complies with Rule 4.1 by its very nature complies with PURPA. None of Solarize's objections state a violation or failure to comply with Rule 4.1.

Solarize argues extensively that PURPA is the applicable law and asserts that any objection it made relating to PURPA was, therefore, compliant with the 30-Day Filing Rule and, as a result, the Commission erred in approving Vectren's filings. But as discussed in detail below, each of Solarize's assertions regarding PURPA are factually or legally mistaken. Because of their technical knowledge and expertise, the Commission and its staff understood this and appropriately recommended and found that the objections were baseless and not compliant with the 30-Day Filing rule and appropriately approved Vectren's filings.

ARGUMENT

The Commission was created by the General Assembly as a fact-finding body with the technical expertise to regulate utilities in Indiana as authorized by the legislature. *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.* (*NIPSCO*), 907 N.E.2d 1012, 1015 (Ind. 2009); *IPL Industrial Group v. Indianapolis Power & Light Co.*, ___ N.E.3d ____, 2020 WL 6479600, at *2 (Ind. Ct. App. Nov. 4, 2020). This Court reviews Commission orders using a multi-tiered standard. *NIPSCO*, 907 N.E.2d at 1016; *Citizens Action Coalition of Indiana, Inc. v. Indianapolis Power & Light Co.*, 74 N.E.3d 554, 562 (Ind. Ct. App. 2017). First, the Court determines whether the Commission's findings of basic fact are supported by substantial evidence. *NIPSCO*, 907 N.E.2d at 1016. Second, the Court determines whether the Commission's order contains "specific findings on all the factual determinations material to its ultimate conclusions" and whether the Commission's conclusions of ultimate fact are reasonable. *Id.* (citation omitted).

The Court must afford great deference to the Commission on matters within its expertise, though the Court "may examine the logic of inferences drawn and any rule of law that may drive the result." *Id.* The Commission's orders are also "subject to review as contrary to law, but this review is limited to whether the Commission stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision, ruling, or order." *Id.*

I.
Indiana's implementation of PURPA has already been established.

A. The standard of review requires the Court to defer to the Commission's expertise and reasonable interpretation of its own rules.

The review and approval of avoided cost rates and other filings under Rule 4.1 is within the Commission's unique technical knowledge and expertise and its statutory authority under Indiana Code chapter 8-1-2.4. Rate-making is a legislative, not a judicial, function that has been delegated to the Commission, and Rule 4.1 establishes the process and formulas to set avoided cost rates. Because the "complicated process of ratemaking" is "a legislative rather than judicial function," it "is more properly left to the experienced and expert opinion present in the Commission." *Citizens Action Coalition of Indiana, Inc. v. Northern Indiana Public Service Company*, 76 N.E.3d 144, 151 (Ind. Ct. App. 2017) (quoting *Office of Util. Consumer Counselor v. Pub. Serv. Co. of Indiana*, 463 N.E.2d 499, 503 (Ind. Ct. App. 1984)).

Contrary to Solarize's assertion, the Commission did make a finding regarding Vectren's filings and thereby it also accepted the analysis, findings, and recommendations of Commission staff. II App. 9–10. While it is true that the Commission did

not make as many findings as it would in a typical docketed proceeding, the finding the Commission made was appropriate given the administrative nature and process involved in Vectren's 30-day filings at issue in this appeal, which consists of plugging updated data into established mathematical formulae.

The Commission also has the authority to establish and apply its own procedural rules. I.C. § 8-1-1-3(g). Indeed, agency discretion—and thus judicial deference—is at its peak when an agency promulgates a rule governing practice and procedure before the agency. *See Charles A. Beard Classroom Teachers Ass'n v. Bd. of Sch. Trs. of Charles A. Beard Mem'l Sch. Corp.*, 668 N.E.2d 1222, 1225–26 (Ind. 1996). The 30-Day Filing Rule was established to exercise prudence in the use of limited resources, to provide quicker decisions on certain allowed filings (like those that simply require plugging updated numbers into an established mathematical formula), and to reduce unnecessary litigation. These purposes would be thwarted if the process could be stopped by baseless objections.

Because the Commission's interpretation of Rule 4.1 and the 30-Day Filing Rule stays within its statutory authority and does not seek to expand that authority, the Commission's interpretation of its own rules was reasonable. *See, e.g.*, *State Bd. of Tax Comm'rs v. Two Market Sq. Assocs. Ltd.*, 679 N.E.2d 882, 886 (Ind. 1997) ("When the meaning of an administrative regulation is in question, the interpretation of the administrative agency is given great weight unless the agency's interpretation would be inconsistent with the regulation itself." (citation omitted)); *Walker*

v. State Bd. of Dentistry, 5 N.E.3d 445, 449 (Ind. Ct. App. 2014) (similar). As a result, the Court should grant great deference to the Commission regarding the Commission's interpretation of its own rules and in consideration of its technical knowledge and expertise.

B. Rule 4.1 is the implementation of PURPA in Indiana.

The Commission adopted Rule 4.1 precisely to implement PURPA and Indiana Code chapter 8-1-2.4, which itself represents the General Assembly's adoption of PURPA. II App. 148–51. In its order adopting the current version of Rule 4.1, the Commission found that the rule provided for just and reasonable rates and was non-discriminatory to qualifying facilities. *In re Adoption & Promulgation of Rules & Regulations with Respect to Cogeneration & Alternate Energy Prod. Facilities*, No. 37494, 1984 WL 994597, at *7–8 (Ind. Pub. Serv. Comm'n Oct. 5, 1984). As stated by Solarize itself, it is indisputable that Rule 4.1 was "adopted pursuant to and with the provisions required by PURPA and its implementing regulations." II App. 148. Simply stated, Rule 4.1 is Indiana's rule for the application and implementation of PURPA. II App. 92. Consequently, a filing that is made under and that complies with Rule 4.1 also complies with PURPA.

While Solarize stated in its objection that it believes Rule 4.1 should be updated, Solarize has not alleged or argued that Rule 4.1 does not comply with PURPA. In addition, in their findings, Commission staff never stated that PURPA was not applicable law; only that Rule 4.1 was the implementation of PURPA in Indiana and that Solarize had not alleged that Vectren's filings violated that rule.

PURPA is applicable as the foundational law for Rule 4.1, but not as a basis for an objection separate from asserting a violation of Rule 4.1, especially when the objection makes no effort to identify a conflict between Rule 4.1 and PURPA and instead concedes that the rule complies with its foundational law.

C. Solarize is seeking to force litigation regarding policy matters that have already been decided by the Indiana General Assembly

What Solarize really aims to do is hijack Vectren's 30-day filing and turn it into a referendum on Indiana's policies toward developing alternative energy resources. As explained earlier, Indiana currently has three incentive schemes in place—PURPA (Rule 4.1), net metering (Rule 4.2), and distributed generation (I.C. ch. 8-1-40). PURPA has been around the longest and incentivizes larger renewable-energy operations, but it also provides the least compensation, as it limits compensation to the utility's avoided costs—i.e., what the utility would otherwise pay to self-generate or purchase. 16 U.S.C. § 824a-3(b). Net metering has been around since the Commission adopted Rule 4.2 in 2004, and it is the most generous incentive because it offers a one-to-one retail credit, but only for smaller facilities with production capacities not exceeding 1 MW. 170 I.A.C. 4-4.2-1(i) and -7. Three years ago, however, the General Assembly chose to phase out net metering and replace it with distributed generation, which provides a better incentive than PURPA by set-

ting rates at what is effectively 1.25 times the wholesale price for energy but less incentive than the one-to-one retail credit available for net metering. I.C. §§ 8-1-40-13, -14, -17, and -18.

Reasonable people can always disagree and debate these policy choices and whether they appropriately balance the myriad interests at stake. But they must do so in the proper forum. A 30-day filing is not the place to urge the Commission to adopt sweeping policy changes, especially when those changes seek to roll back policies implemented by the legislature. The General Assembly made a deliberate policy choice to enact Indiana Code chapter 8-1-40, which gradually sunsets the net metering credit and replaces it with an excess distributed generation (EDG) credit. The changes that Solarize asserts in its objections as being necessary would require that these statutory policies be changed. Solarize and its stakeholders have no legal right to force the Commission undertake a comprehensive review of the avoided cost calculation in Rule 4.1 and the EDG rate in Indiana Code chapter 8-1-40 in a 30-day filing proceeding or to force Vectren into a docketed proceeding to be used as a "laboratory" in which Solarize can run its policy experiments.

The General Assembly has adopted the energy policy for the State and chosen to promote renewable energy, consistent with PURPA. If Solarize thinks that the legislature has not gone far enough or that it should weigh Solarize's interests more heavily than other competing interests, then it needs to talk to the General Assembly. The Commission has neither the authority nor the inclination to change, amend, or expand on these statutory policies, especially in what should be a

straightforward proceeding about plugging numbers into a long-established mathematical formula.

II.
The Commission appropriately decided to reject the objections and approve Vectren's filings.

A. The objections did not comply with the 30-Day Filing Rule.

The Commission correctly determined that Solarize's objections did not comply with the 30-Day Filing Rule. The rule sets out the specific requirements and bases for making objections—a violation of applicable law, Commission order, or Commission rule, or that the filing is inaccurate or incomplete or otherwise not allowed to be submitted under the 30-Day Filing Rule. 170 I.A.C. 1-6-7. None of Solarize's objections with these requirements regarding objections.[10]

Solarize's request for rulemaking and consolidation of the 30-day filing proceedings with Vectren's EDG rate proceeding (II App. 92, 94) plainly did not fall under the permissible bases for an objection. In its brief, Solarize argues that its objections asserting PURPA violations cannot be deflected as a request for rulemaking or shifted to a different proceeding on a distinct rate proposal. Appellant's Br. 32–36. But Solarize clearly requested both a rulemaking and a consolidation of the 30-day

[10] Solarize also joined OUCC's objection, but that objection also failed to comply with the 30-Day Filing Rule. OUCC's objection to #50331 did not initially state the legal basis for the objection and sought to add a requirement to the capacity cost calculation made under section 9(b) of Rule 4.1 that is not referenced in the rule. Seeking to add a requirement to the rule is not one of the bases on which an objection may be made under the 30-Day Filing Rule and, therefore, the objection was not compliant with the rule. II App. 22–23.

filing cases with the EDG proceeding as part of its objections. II App. 92, 94. Commission staff findings merely responded to Solarize's clear requests for a rulemaking and a consolidation of cases and did not conflate those requests with Solarize's assertions of PURPA violations. II App. 24, 26

Solarize's main objection is its assertion that PURPA is applicable law and the Vectren filings do not comply with PURPA, but it does not assert any violation of Rule 4.1. In contrast, Solarize clearly states in both its objection and its brief that Rule 4.1 implements PURPA as it was "adopted pursuant to and with the provisions required by PURPA and its implementing regulations." II App. 148. As discussed above, PURPA's applicability is as the foundational law for Rule 4.1 and a filing that is in compliance with Rule 4.1 is also compliant with PURPA. Solarize has not asserted that Vectren's filings violate Rule 4.1 or that Rule 4.1 violates PURPA. And so it logically follows that if Vectren's filings are compliant with Rule 4.1, then they are also compliant with PURPA. This is what Commission staff found and the Commission approved.

B. Solarize's PURPA arguments are factually and legally mistaken.

With respect to its PURPA arguments, Solarize makes a number of arguments in support of its assertion that the Vectren filings violate PURPA. Yet it also makes much of the fact that in rejecting its objections Commission staff deemed Solarize's reply as noncompliant with the 30-Day Filing Rule. All Commission staff did was observe that the rule does not contemplate a reply, which is accurate. *See* 170

I.A.C. 1-6-7. Commission staff did not strike the reply and considered Solarize's arguments, so it is a mystery as to how Solarize could have been harmed.

To be sure, Commission staff would have been justified in refusing to consider Solarize's new arguments. The purpose of a reply is to respond to things that have already been raised, not to inject new issues and legal theories. *See, e.g.*, *Ross v. State*, 429 N.E.2d 942, 945 (Ind. 1982); *Estudillo v. Estudillo*, 956 N.E.2d 1084, 1093 n.5 (Ind. Ct. App. 2011). For that reason, courts have long held that issues raised for the first time in a reply are waived. *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 593 n.6 (Ind. 2001); *see also* Ind. Appellate Rule 46(C). Nevertheless, Commission staff addressed Solarize's arguments and rejected them because they are based on factual and/or legal misunderstandings.

First, Vectern's filing in #50331 does *not* apply only to qualifying facilities with production capacities larger than 1 MW. In point of fact, Vectren's CSP tariff applies to all qualifying facilities, regardless of size. And so Solarize's objection that both of Vectren's filings only applied only to larger facilities was factually incorrect. II App. 92. While it is true that Vectren's alternate standard offer and contract form only applies to facilities of 1 MW or more, its default standard offer and contract form applies to all sizes of qualifying facilities. *See* footnote 7, *supra*.

Second, nothing in PURPA or FERC's regulations bars a utility from having different terms and conditions for different qualifying facilities of differing size. To support its contrary argument—raised for the first time in its brief on appeal and thus waived, *see, e.g.*, *Nat'l Rural Utilities Co-op. Fin. Corp. v. Pub. Serv. Comm'n of*

Indiana, 552 N.E.2d 23, 28 (Ind. 1990)—Solarize cites only 16 U.S.C. § 796(17) and 18 C.F.R. § 292.204. But those authorities merely set a maximum production capacity of 80 MW for a qualifying facility. They say nothing remotely indicating that a utility must purchase power from *all* qualifying facilities on precisely the same terms, irrespective of the type or size of a qualifying facility.

In fact, 18 C.F.R. § 292.304(e) specifically says that the avoided cost rates should take into account "[t]he availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods." A natural gas turbine is available to generate electricity at all times—24 hours per day, seven days per week, 52 weeks per year—as long as it has fuel available, and this is the type of facility that Vectren used as its avoidable or deferrable unit. A renewable facility that's intermittent only avoids some of that cost, because it is only available when, for instance, the wind blows or the sun shines, if it hasn't added a sufficient battery. So the type of qualifying facility can impact the amount of cost it actually avoids.

Third, Vectren's EDG rate will not apply to qualifying facilities of 1 MW or less under PURPA. *Contra* II App. 92. The EDG rate is a retail credit under Indiana state law, I.C. ch. 8-1-40, not under federal law, and FERC has found that retail credit programs like distributed generation and net metering are not subject to, or violations of, PURPA. *MidAmerican*, 94 FERC ¶ 61,340, 62263, 2001 WL 306484 (2001); *Sun-Edison*, 129 FERC ¶ 61,146, 61,620, 2009 WL 3932884 (2009). For the same reason, Solarize was wrong when it objected that "Rates CSP and EDG both involve sales for resale subject to the principles and standards of PURPA." II App.

93. Vectren's CSP (avoided cost) rate is subject to PURPA, but not any future EDG rate.

Fourth, Vectren did in fact include transmission and line loss costs in its calculation, as required by Rule 4.1. 170 I.A.C. 4-4.1-8, 9; II App. 36, 39, 42. *Contra* Appellant's Br. 30–31. Vectren also included all capital costs, including emission costs, in its calculation of the avoidable unit. II App. 38.

Fifth, Vectren does in fact offer contracts at its CSP rate, which is a price that is predetermined at the time of the contract through filings made under Rule 4.1 and the 30-Day Filing Rule, as Vectren did in #50331. II App. 56. *Contra* Appellant's Br. 29–30. Moreover, neither PURPA nor FERC's regulations specify any requirements for contract duration. *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC 61,134, 2016 WL 6921612, at *3 n.13 (2016). And in other contexts FERC has determined that a one-year contract is considered a long-term contract: "While some petitioners argue that a longer-term should have been used, we continue to believe that contracts of a year or more are sufficiently long-term to meet the statutory requirement that there be 'wholesale markets for long-term sales of capacity and energy' within the meaning of section 210(m)(1)(A)(ii)." *New PURPA 210(m) Regulations Applicable To Small Power Production and Cogeneration Facilities*, 119 FERC 61,305, 2007 WL 1795501, at *8 (2007) (explaining that "the Commission has treated power sales with a contract term of greater than one year to be 'long-term' for reporting purposes.... We thus believe it is reasonable to use the convention of

treating contracts of a year or more as 'long-term' consistent with our longstanding practice.").

Solarize is simply wrong when it insists that contracts must offer price certainty over the life of an investment by a qualifying facility. Appellant's Br. 30. FERC has explained that "a legally enforceable obligation should be long enough to allow [qualified facilities] *reasonable opportunities to attract capital from potential investors*." *Windham Solar LLC*, 2016 WL 6921612, at *3 (emphasis added). Allowing reasonable opportunity to attract investment is quite different from ensuring that the contract is long enough to cover the qualifying facility's investment in renewable energy production. The *Vote Solar* case from Montana is inapposite because Montana's state statute is different from Indiana's and requires that the contracts enhance the economic feasibility of small power production qualifying facilities. Mont. Code Ann. § 69-3-604(2); *Vote Solar v. Montana Dep't of Pub. Serv. Regulation*, 473 P.3d 963, 967 (Mont. 2020). Indiana has not either by statute or by rule required contract terms be longer than one year or for the life of the investment in the qualifying facility—this is a policy decision that the General Assembly could undertake if it so desired. For over 35 years, the Commission has been consistent in not requiring contracts to be longer than one year, and the General Assembly has not imposed such a requirement. In any event, this is not an appropriate basis for an objection under the 30-Day Filing Rule.

Sixth, and lastly, Vectren's proposed avoided cost rates are not discriminatory against qualifying facilities merely because those are less than the rate Vectren

pays to an affiliate for power. *Contra* Appellant's Br. 31. PURPA prohibits discrimination against various qualified facilities. *See* 16 U.S.C. §824a-3(b)(2); 18 C.F.R. § 292.304(a)(1)(ii). But it also limits the rates at which a utility is *required* to pay a qualifying facility to avoided costs. *See* 16 U.S.C. § 824a-3(b) ("No [FERC] rule … shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy."); 18 C.F.R. § 292.304(a)(2) ("Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases."). Although PURPA would allow a utility to pay more, it certainly cannot be deemed discrimination for a utility to take advantage of the statutory limit when purchasing power from qualifying facilities, even if the utility pays more to purchase power from a non-qualifying facility.

The comparison Solarize draws is inapposite and certainly not indicative of discrimination. The affiliate appears to be Ohio Valley Electric Company (OVEC),[11] and Solarize compares the contracted rate for OVEC energy and capacity to the avoided cost rate at issue in this appeal. But OVEC is *not* a qualified facility; it is a large coal fired generation facility, not an alternative energy production facility with no greater than 80 MW production capacity. Moreover, it is not surprising that the rates are different between a small, non-dispatchable qualified facility from which a utility is obligated to buy under PURPA versus a large dispatchable generation facility which competes for contracts with all generation. And even under

[11] Considering Vectren's ownership interest in OVEC is just 1.5 %, it appears that interest may not qualify as an affiliate interest. *See* I.C. § 8-1-2-49(2).

PURPA, the dispatchability of a facility may be used as a reason for different rates. 18 CFR § 292.304(e)(2)(i).

CONCLUSION

For the foregoing reasons, the Court should affirm the Commission's order.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this Brief of Appellee contains no more than 14,000 words, not including those portions excluded by Indiana Appellate Rule 44(C).

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CERTIFICATE OF SERVICE

I certify that on December 8, 2020, I electronically filed the foregoing document using the Indiana E-filing System. I also certify that on December 8, 2020, I served the foregoing document on the following contacts through E-Service using the IEFS:

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