IN THE
INDIANA COURT OF APPEALS

Case No. 20A-EX-01384

SOLARIZE INDIANA, INC.,	)	
	)	Appeal from Indiana Utility
Appellant/Objector Below,	)	Regulatory Commission
	)	
v.	)	
	)	30-Day Filing Nos. 50331 & 50332
SOUTHERN INDIANA GAS AND	)	
ELECTRIC COMPANY d/b/a VECTREN	)	
ENERGY DELIVERY OF INDIANA,	)	Hon. James F. Huston,
INC., INDIANA UTILITY REGULATORY	)	Chairman,
COMMISSION and INDIANA OFFICE	)	Hon. Sarah E. Freeman,
OF UTILITY CONSUMER COUNSELOR,	)	Hon. Stefanie Krevda,
	)	Hon. David Ober,
Appellee/Petitioner, Administrative	)	Hon. David E. Ziegner,
Agency & Statutory Party	)	Commissioners
Below.	)	

BRIEF OF APPELLEE SOUTHERN INDIANA GAS AND ELECTRIC COMPANY D/B/A VECTREN ENERGY DELIVERY OF INDIANA, INC.

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STATEMENT OF THE ISSUES

The Commission's 30-day filing process allows the Indiana Utility Regulatory Commission ("Commission") to efficiently and expeditiously review routine utility filings, such as rate proposals that are regularly updated to reflect current financial data, or customer-specific contracts that comply with a previously approved rate structure. This is an appeal from the Commission's approval of two of Vectren's 30-day filings. The questions presented are:

1. Whether the Commission reasonably interpreted its own rules for 30-day filings when it concluded that Solarize's Objection was improper.

2. Whether an objecting party must exhaust the administrative remedies available to it before appealing the Commission's approval of a 30-day filing to this Court.

3. Whether the Commission's General Counsel correctly determined the objections raised for the first time in the objector's reply were without merit under applicable regulations and law.

STATEMENT OF THE CASE

I. The Commission's 30-day filing rule provides for expedited review of updates to tariffs.

The Public Utilities Regulatory Policies Act of 1978 ("PURPA") requires public utilities like Southern Indiana Gas and Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc. ("Vectren"), to purchase energy and capacity produced by qualifying small power production and cogeneration facilities ("Qualifying Facilities"). Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified at 16 U.S.C. § 824a–3).

Those facilities are largely made up of renewable resources with a generating capacity of less than 80 megawatts ("MW") (*e.g.*, rooftop solar panels or small solar fields). PURPA established a framework for determining the price public utilities must pay to purchase this energy and authorized state utility commissions, such as the Commission, to determine prices that comply with this framework. In 1984, the Commission adopted rules establishing formulae for determining that price. 170 Ind. Admin. Code 4-4.1-8, 9 (2019). Because the financial metrics used in the formulae change over time, Vectren and other public utilities are required to submit updated prices utilizing the formulae annually by February 28 (the "Annual CSP Update"). 170 I.A.C. 4-4.1-10. This appeal involves Vectren's February 28, 2020, update to this offer price, as well as its request that the Commission approve a new and supplemental standard contract developed for a customer seeking service under that rate structure.

For many years, Vectren has utilized the Commission's "30-day filing" process for approval of the Annual CSP Update as required by 170 I.A.C. 4-4.1-10. This process enables efficient processing of administrative filings that are noncontroversial pursuant to regulations set forth at 170 Ind Admin. Code 1-6-1 through 9 (2020) (the "30-Day Filing Rule"). Relevant here, the 30-Day Filing Rule allows efficient and expeditious approval of changes to a utility's tariff in instances when a hearing is unnecessary. 170 I.A.C. 1-6-1(a). In contrast, proceedings that require a hearing, referred to as "docketed proceedings," typically require six to twelve months or more to resolve. When a utility submits a 30-day filing, it must be

accompanied by a cover letter explaining the filing, as well as "[a]ll work papers supporting the filing, including revenue and cost projections, which must be clearly explained. . . ." 170 I.A.C. 1-6-5(a)(4).

A person or entity may submit a written objection to the 30-day filing prior to its approval by the Commission. 170 I.A.C. 1-6-7. If an objection that complies with section 7 is timely submitted, the filing is considered "controversial" and will not be presented to the Commission for approval under the 30-Day Filing Rule. 170 I.A.C. 1-6-7(c). For a filing deemed controversial, a filing to initiate a docketed proceeding with a full hearing is required to obtain approval.

The 30-Day Filing Rule specifically delineates the grounds on which an objector may rely to claim a filing is controversial. Specifically, an objection may assert that the filing violates "applicable law" or a Commission order or rule, that information in the filing is inaccurate, or that the filing is otherwise incomplete or prohibited. *Id.* at 1-6-7(b). These bases are designed to ensure a filing qualifies for the 30-Day Filing Rule while constraining the misuse of objections to stymie efficient resolution of routine filings.[1] Consequently, if the Commission staff determines the objection does not comply with the 30-Day Filing Rule, the 30-day filing may still be recommended for approval by the Commission at its next conference, which must be at least thirty days after the original filing date. 170 I.A.C. 1-6-8.

[1] For example, absent this staff review process, a customer intending to delay paying an appropriately calculated rate that qualifies for submission through the 30-Day Filing Rule could simply object with baseless reasons, force the filing to a docketed proceeding, and delay implementation of the revised rate for many months.

II. Vectren's two 30-day filings complied with the 30-Day Filing Rule.

Vectren's 2020 Annual Rate CSP Update was filed on February 28, 2020, pursuant to the Commission's 30-Day Filing Rule, consistent with years of prior practice. (Appellant's App. Vol. II. at p. 30.) In accordance with 170 I.A.C. 1-6-5, Vectren's 30-day filing was accompanied by "work papers" showing how the revisions to the capacity and energy charges were derived after applying the formulae set forth in 170 I.A.C. 4-4.1-8(a) and 4-4.1-9(c) and (d). (Appellant's App. Vol. II at pp. 35-51.) Ultimately, the formulae resulted in an increase to the amount Vectren pays for capacity produced by Qualifying Facilities (from $5.90 to $6.08 per kW) and decreases to the amount paid for on-peak energy (from $0.03545 to $0.03016 per kWh) and off-peak energy (from $0.02670 to $0.02413 per kWh). (*Id.* at p. 34.)

On March 2, 2020, Vectren filed a new "Standard Offer and Contract Form for Qualifying Facilities that Elect to Net Generation Output" (the "Net Generation Contract") for Commission review pursuant to its 30-Day Filing Rule. (Appellant's App. Vol. II at p. 56.) The Net Generation Contract was filed in accordance with 170 I.A.C. 4-4.1-11(a), which provides:

> each generating electric utility shall submit for approval via the commission's thirty (30) day filing process a standard form contract which it would enter into with a qualifying facility in connection with the generating electric utility's purchase of energy or capacity or both. The standard form contracts shall be prepared in a manner and form which will permit their use in the majority of circumstances with only minor modifications, although it is recognized that in unique situations a standard form contract may have to be revised significantly.

170 I.A.C. 4-4.1-11(b) sets forth certain provisions that must be included in a standard form contract.

Vectren's cover letter submitted along with the Net Generation Contract indicated that it was being filed to accommodate a recent request from an existing customer installing solar generation facilities that constitute a qualifying facility and is "elect[ing] to sell only their generation output that is net of their own use of electric service provided by [Vectren]." (Appellant's App. Vol. II. at p. 56.) The customer is installing a distributed generation facility in excess of 1 MW and will be compensated at the retail rate for production from the facility that offsets electric service Vectren provides the customer. (*Id*. at p. 144.)

Importantly, Vectren's cover letter explained the Net Generation Contract does not replace its existing "standard form contract," available to Qualifying Facilities, but is instead a "separate" offering created for a customer seeking another option. (*Id*. at p. 56.) Vectren stated that the existing standard form contract "will remain available in its current form." (*Id*.)

III. Solarize filed an objection that did not comply with Section 7 of the 30-Day Filing Rule.

On April 24, 2020, Solarize filed an "objection" to Vectren's 30-day filings (the "Objection") alleging that they were "insufficient and incomplete with respect to PURPA compliance in multiple respects." (Appellant's App. Vol. II. at p. 92.) Although Solarize listed seven reasons ((A) through (G)) in support of "its perspective on this matter," none of the reasons complied with the basis for an objection in Section 7 by alleging a particular violation of law, Commission order, or regulation. (*Id*. at pp. 92-94.)

Instead, Solarize noted the Commission's "rules implementing PURPA have been procedurally readopted several times, [but] have not been substantively revised in any material respect since 1995." (*Id*. at p. 94.) Accordingly, Solarize suggested a "relatively small service territory such as Vectren's could serve as a 'laboratory' in which the franchised utility and the various other affected interests could present their perspectives, issues and concerns relating to PURPA compliance for one another's as well as the Commission's consideration." (*Id*.) Solarize stated (among other things) that: "assessing whether all of Vectren's current and prospective PURPA tariff offerings, in combination, . . . sufficiently . . . comply with PURPA's goals and standards would be best-served by the consolidated proceeding." (*Id*. at p. 94.) Solarize indicated it had concerns about the 30-day filings because of "their significant inter-relationship to Vectren's imminent filing in a separate docketed proceeding relating to . . . [its proposed] Rate EDG, another tariff offering by Vectren to certain Qualifying Facilities." (*Id*. at p. 92.) Solarize also stated that from its "perspective, after consultation with multiple other interests, the procedural approach which would most likely be conducive to productive discussions among the parties . . . would be for the Commission to consolidate Vectren's pending [30-day filings] with Vectren's impending Rate EDG filing in the same docketed proceeding relating to their collective PURPA compliance." (*Id*.)

In accordance with 170 I.A.C. 1-1.1-6, Vectren filed a response to Solarize's objection on May 5, 2020. Vectren stated that Solarize had "opine[d], without any specificity that [the 30-day filings] are not consistent with the requirements of federal

law, in particular [PURPA]." (*Id.* at p. 142.) Vectren further noted Solarize "states its general perspective on PURPA policy and changes to market conditions that have occurred over time, but never explains how this discussion demonstrates that the [30-day filings] contravene[ ] Indiana law." (*Id.* at p. 143.) Vectren also stated that arrangements involving "netting," like that set forth in the Net Generation Contract, are not governed by PURPA. (*Id.* at p. 144.)

On May 8, 2020, Solarize filed what it characterized as a Reply to Vectren's Response to Objections Made by Indiana DG, Solarize Indiana, and Morton Solar to 30-Day Administrative Filings Nos. 50331 and 50332 (the "Reply"). (Appellant's App. Vol. II at p. 147.) In its Reply, Solarize, for the first time, cited PURPA requirements that it claimed were "violated" by Vectren's 30-day filings. (*Id.* at 147-53.)

IV. The Commission's General Counsel reasonably concluded that the Objection did not comply with the Commission's rules, and, regardless, that the allegations were without merit.

On June 19, 2020, the Commission's technical staff, including the Commission's General Counsel, submitted a Memorandum to the Commission setting forth their recommendations regarding Vectren's 30-day filings in accordance with 170 I.A.C. 1-6-8. (Appellant's App. Vol. II at pp. 10-29.) The Commission's General Counsel concluded Solarize's "objection is not compliant with 170 IAC 1-6-7" as to both the Annual Rate CSP Update and the Net Generation Contract. (*Id.* at pp. 24, 26.)

Initially, the General Counsel reasoned that "170 IAC 1-6-7 does not provide for a reply being submitted to the utility's response to the objection or for multiple

filings providing additional explanation." (*Id.* at pp. 23, 26.) The General Counsel stated "170 IAC 1-6 provides for a shortened administrative process and, given the shorter timeframe, 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 IAC 1-6-7(b)(2)." (*Id.*)

In addition, the General Counsel found Solarize's allegations that Vectren's filings were "incomplete" were based on its contention that the filings fail to fully satisfy PURPA. However, the General Counsel found the Commission "adopted Rule 4.1 [of its rules] in 1985 to implement . . . PURPA [and Solarize] does not provide any statement that Vectren's filing, which was made under Rule 4.1, violates Rule 4.1." (*Id.* at pp. 23-24, 26.) The General Counsel stated the PURPA "allegations and concerns are without foundation because Rule 4.1 was adopted as part of the State of Indiana's implementation of PURPA." (*Id.* at p. 26.)

The General Counsel further noted that several 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." (Appellant's App. Vol. II at pp. 24, 26.) The General Counsel concluded Solarize "has intervened in 45378 and that is the appropriate proceeding in which to provide its arguments and supporting evidence for those arguments." (*Id.*)

The Commission's technical staff agreed with the General Counsel's findings and made the following recommendation to the Commission:

> Staff agrees with General Counsel's analysis and findings that the Objections to the Filing are not compliant with Commission rules. Filing requirements have been met. Recommend approval.

(*Id.* at pp. 24, 27.) Based on the foregoing recommendation, the Commission approved Vectren's 30-day filings and found them not "controversial" by Order dated June 24, 2020. (Appellant's App. Vol. II at p. 9.)

V. Solarize did not seek further review of the 30-day filings through the proscribed administrative processes.

The Commission's 30-Day Filing Rule provides that it does not restrict a party's ability to: (i) file an informal complaint with the Commission's Consumer Affairs Division ("CAD") following the process set forth in Ind. Code § 8-1-2-34.5; or (ii) initiate a Commission investigation pursuant to Ind. Code § 8-1-2-54. 170 I.A.C. 1-6-7(f).

Since the issuance of the Order approving the 30-day filing, Solarize has neither filed a complaint objecting to the terms of Vectren's tariffs applicable to Qualifying Facilities nor initiated an investigation of those tariffs, despite the express ability to do so under the 30-Day Filing Rule. Solarize, however, has intervened in Cause No. 45378.

STATEMENT OF FACTS

The facts relevant to the issues on appeal are contained in the Statement of the Case.

SUMMARY OF ARGUMENT

The Commission rejected Solarize's objection because it did not comply with the 30-Day Filing Rule. So contrary to Solarize's suggestion, this case revolves on the question of whether that conclusion was proper, not on the question of whether

PURPA is applicable law, which was not the basis for the Commission's decision. There are three primary reasons this Court should affirm, and any one of them alone is sufficient.

First, the Commission correctly determined that Solarize's Objection did not comply with the 30-Day Filing Rule. The purpose of the 30-day filing process is to facilitate expedited review and approval of tariff and contract filings, so the 30-Day Filing Rule requires objections to specifically state how a routine filing, like those at issue here, violates applicable law, is based on inaccurate information, is incomplete, or otherwise non-compliant with the 30-Day Filing Rule. Solarize's Objection failed to do this, including that it alleged no particular violation of state or federal law.

Instead, Solarize's Objection focused on reasons why it believed it would be better to consolidate Vectren's 30-day filing into a broad-scale investigation of the State's compensation for distributed generation resources, using Vectren's service territory as a "laboratory" in which various interests could present their views relating to PURPA compliance. This did not comply with the 30-Day Filing Rule's requirements for objections, and it would be completely at odds with the purposes of the 30-day filing process. Rather than expedited administrative review, the sort of investigation Solarize proposed would likely have lasted most of 2020, and Vectren's customer who was seeking approval of a contract to establish compensation for the renewable generation it was installing would have faced long delays without knowing how it would be compensated by Vectren. Accordingly, the Commission correctly concluded Solarize's request for a consolidated review of Vectren's cogeneration

offerings was not a claim that the 30-day filings at issue were a violation of "applicable law" and therefore, the Objection was not "compliant with 170 IAC 1-6-7."

Solarize did ultimately file a reply in support of its Objection, which, for the first time, sought to raise specific alleged violations of PURPA. But the Commission correctly concluded that, just as in this Court, it is too late to make arguments for the first time in a reply brief. Not only was the Commission's analysis on this point sound, the Commission's interpretation of its own procedural rules is an area that is especially appropriate for administrative deference. Nonetheless, as discussed below, the Commission considered Solarize's belated arguments.

Second, Solarize failed to exhaust the available administrative remedies before appealing to this Court. The 30-Day Filing Rule allows an objecting party that disagrees with the Commission's approval of a tariff or contract to (a) file an informal complaint with the Commission's Consumer Affairs Division pursuant to Ind. Code § 8-1-2-34.5, or (b) initiate a Commission investigation pursuant to Ind. Code § 8-1-2-54, but Solarize did neither. These processes have been used to review the Commissions 30-day filing decisions, and this Court does not permit parties to pursue appeals of Commission rulings until after they have exhausted the available administrative remedies – even when exhaustion of those remedies is not specifically required in the regulations.

Third, neither the proposed annual update to the Rate CSP nor the Net Generation Contract violates PURPA. To begin with, the Commission has adopted

rules to implement PURPA, and as Solarize notes in its brief, PURPA offers states the latitude to implement its terms through rulemaking. (Appellant's Br. at pp. 24-25.) Because Vectren's filing complied with those rules, the filing also complied with PURPA.

More specifically, contrary to Solarize's suggestions, Vectren's contract does not set a minimum threshold of 1 MW in violation of PURPA. The contract that Vectren submitted is separate from the "Standard Offer and Form Contract for As-Delivered Capacity and Energy" that the Commission approved in 1985 and which applies to Qualified Facilities with capacity both above and below 1 MW. The contract Vectren submitted was responsive to the specific needs of a new customer who will produce in excess of 1 MW; it does not create a new 1 MW minimum threshold for customers, and the same terms would be available to customers with less than 1 MW. It also does not preclude other customers from entering into other contracts that are available for long-term purchases. As for Vectren's Annual Rate CSP, contrary to Solarize's suggestion, avoided transmission, line loss, and emissions are included in the avoided cost calculation set forth in the Commission's rules implementing PURPA. At bottom, Solarize's concerns broadly relate to the Commission's regulations implementing PURPA. Therefore, those objections are more appropriately addressed through the rulemaking process or a Commission investigation proceeding.

ARGUMENT

I. Standard of Review

This is an appeal of the Commission's interpretation of its own 30-Day Filing Rule and its regulations implementing PURPA. Among other things, the General Counsel of the Commission found Solarize's objection to Vectren's 30-day filings was "not compliant with 170 IAC 1-6-7," and the Commission consequently concluded that the 30-day filings were noncontroversial. The General Counsel also concluded that the expedited 30-day filing process was not the appropriate forum for a broad-scale investigation of the compensation formulae for energy produced by distributed generation resources that are set forth in the Commission's rules implementing PURPA (*i.e.*, 170 I.A.C. 4-4.1-1 *et seq.*).

An administrate agency's reading of its own rules is entitled to substantial deference, unless the interpretation would be inconsistent with the law itself. *Ind. Dep't. of Env't. Mgmt. v. Steel Dynamics, Inc.*, 894 N.E.2d 271, 274 (Ind. Ct. App. 2008), *trans. denied*. Indeed, when a court determines that an administrative agency's interpretation of its own rules is reasonable, it should terminate its analysis and not address the reasonableness of the other party's interpretation. *Id.* (citing *Shaffer v. State,* 795 N.E.2d 1072, 1076 (Ind. Ct. App. 2003) and *Ind. Wholesale Wine & Liquor Co. v. State ex rel. Ind. Alcoholic Beverage Comm'n,* 695 N.E.2d 99, 105 (Ind. 1998)). The General Counsel's determination that Solarize's Objection was "not compliant" with the Commission's own rules and the Commission's resulting conclusion that Vectren's 30-day filings were noncontroversial should be reviewed in

this light, as should the conclusion that Solarize's Objection relates broadly to the Commission's rules implementing PURPA as opposed to Vectren's 30-day filings specifically.

II. The Commission correctly determined that Solarize's Objection, which alleged no particular violation of state or federal law, did not comply with 170 I.A.C. 1-6-7, and raising new arguments in the Reply was not permissible under the 30-Day Filing Rule.

A. Solarize's Objection did not allege a specific PURPA violation or other violation of "applicable law."

Solarize's Objection failed to articulate a proper basis under the 30-Day Filing Rule for rejecting Vectren's 30-day filings. Critical here, those rules provide only three potential bases for rejecting a 30-day filing. 170 I.A.C. 1-6-7(b)(2). The first basis is that the filing "is a violation of" an "applicable law," "a prior commission order," or a "commission rule." *Id.* at 1-6-7(b)(2)(A). The second is that "information in the filing is inaccurate." *Id.* at 1-6-7(b)(2)(B). The third is that the filing is either "incomplete" or seeks a prohibited category of requests. *Id.* at 1-6-7(b)(2)(C). Solarize's Objection did not identify any of these bases.

Instead, Solarize's Objection focused on reasons why it believed it would be better for the Commission to consolidate Vectren's Annual CSP Update into a broad-scale investigation of how the State should compensate distributed generation resources, and for the Commission to use Vectren's service territory "as a 'laboratory' in which . . . the various . . . affected interests could present their perspectives, issues and concerns relating to PURPA compliance for one another's as well as the Commission's consideration." (Appellant's App. Vol. II at p. 94.) The Objection

suggested that as a result of the consolidated proceeding, Vectren could offer additional tariff options for self-generating customers. (*Id.* at 93-94.)[2] But the Objection did not identify any inaccuracies, illegalities, or omissions in Vectren's 30-day filings, which are the only proper bases for rejecting a 30-day filing under the Commission's rules.

Solarize's objection was also fundamentally at odds with the purpose of the 30-Day Filing Rule, which is to "facilitate expedited review and approval" of tariff and contract filings, particularly those designed to be updated annually. *See Indiana Bell Telephone Co., Inc.*, No. 40178, 1997 WL 184325, ¶ 8 (Ind. U.R.C. Feb. 13, 1997). As the Commission's General Counsel explained, the 30-Day Filing Rule provides for a "shortened administrative process" so that updates can be made to tariffs to ensure rates are not based on outdated information. (Appellant's App. Vol. II at pp. 23, 26.)

By contrast, Solarize's proposed investigation would likely have lasted most of 2020 and unnecessarily delayed implementation of the Annual Rate CSP Update for 2020—possibly even until the 2021 update due on February 28, 2021. During this time, the Company's CSP rate would have been based on outdated data. Moreover, the customer seeking approval of a contract to establish compensation for renewable generation it was installing would have faced long delays in knowing how it was to be compensated by Vectren.

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[2] The Objection alleges "there is nothing in PURPA's framework of regulatory oversight which precludes franchised electric utilities such as Vectren from making multiple, variegated tariffed offerings to customer generators . . . ." (Appellant's App. Vol. II at p. 93.)

Attempting to shoehorn its appeal into the framework of the 30-Day Filing Rule, Solarize's appellate arguments are premised on the notion that the Commission approved Vectren's 30-day filings based on the conclusion that PURPA was not "applicable law." But that was not the basis for the Commission's decision. Instead, the Commission explained that Solarize's Objection failed because it did not comply with the 30-Day Filing Rule, including because it failed to identify any particular violation of applicable law. The Commission's General Counsel explained "persons submitting an objection [must] provide a statement on which the objection is based and that accurately articulates a basis for the objection pursuant to 170 IAC 1-6-7(b)(2)" and the Commission's Staff "agree[d] with General Counsel's analysis and findings that the Objections to the Filing[s] are *not compliant with Commission rules*." (Appellant's App. Vol. II at pp. 23, 24 (emphasis added).)

Solarize cites two pages of its Objection to suggest that it did specifically identify PURPA violations. (Appellant's Br. at p. 31 (citing Appellant's App. Vol. II at pp. 93-94).) But to the contrary, the portion of Solarize's Objection found on pages 93 to 94 of its Appendix argued for an examination of all of "Vectren's current and prospective tariff offerings, in combination" through a consolidated proceeding. (Appellant's App. Vol. II at p. 94.) Solarize did not claim the 30-day filings violate PURPA but instead stated "there are differences in circumstances among prospective customer-generators which are at least as critical to achieving PURPA's goals," including the location and type of facility when it comes to determining "avoided costs." (*Id.*) Solarize suggested those differences justified the examination of various

PURPA tariff offerings in a consolidated proceeding. (*Id*. at 93-94.) Mere references to "avoided cost" or the general requirement that rates be "non-preferential and non-discriminatory" do not equate to a specific objection regarding the manner in which avoided costs were calculated.

Solarize also incorrectly contends that "Vectren acknowledged . . . Solarize . . . asserted both filings were inconsistent with the requirements of federal law, specifically PURPA, but Vectren argued that there was no showing of a violation of 'Indiana law' and that PURPA was inapplicable." (Appellant's Br. at p. 11.) However, Vectren's response to the Objection did not "acknowledge" Solarize asserted a PURPA violation. Instead, Vectren responded: "[Solarize] states its *general perspective on PURPA policy and changes to market conditions that have occurred over time, but never explains how this discussion demonstrates that [the 30-day filings] contravene[ ] Indiana law*." (*Id*. at p. 143 (emphasis added).) Vectren further responded that Solarize had not made any specific PURPA objections to which it could answer, stating: "[Solarize] opine[s], *without any specificity*, that both Filings are not consistent with the requirements of federal law, in particular [PURPA]." (Appellant's App. Vol. II at p. 142 (emphasis added).) Vectren further stated that its filings "are not in violation of any applicable law." (*Id*. at 143.)

Further evidence that Solarize sought to misuse Vectren's 30-day filings to initiate a broad-based investigation is that the relief Solarize sought in its Objection is not permitted by the 30-Day Filing Rule. The 30-day Filing Rule does not allow objecting parties to propose, or the Commission to require, a utility's 30-day filing to

be consolidated for consideration in a separate proceeding filed by a utility relating to another tariff. Nor does the 30-Day Filing Rule contemplate denying a 30-day filing so the utility's service territory can be used a "laboratory" for alternative and additional future tariff offerings.

The Commission's General Counsel and Staff correctly concluded Solarize's request for a consolidated review of Vectren's cogeneration offerings was not a claim that the 30-day filings at issue were a violation of "applicable law" and therefore, the Objection was not "compliant with 170 IAC 1-6-7." (Appellant's App. Vol. II at p. 24.)

B. Solarize's Reply, even if permissible under the 30-Day Filing Rule, inappropriately raised new arguments, which the Commission ultimately considered anyway.

Solarize's May 8, 2020, Reply, for the first time, sought to raise specific alleged violations of PURPA. The Commission's 30-Day Filing Rule, which establishes specific procedures for Commission review of 30-day filings, do not expressly authorize an objecting party to file a "reply." Under the 30-Day Filing Rule, after a utility makes a 30-day filing: "[i]f any person or entity has an objection . . . , the objection shall be submitted to the secretary of the commission." 170 I.A.C. 1-6-7(a). A utility may respond to the objection, clarify the filing, provide additional information, amend the filing or withdraw its filing. 170 I.A.C. 1-6-7(c)(1)-(5). The 30-Day Filing Rule does not provide for a reply from an objecting party.

In its Appellant's Brief, Solarize argues that while the "rule on objections to 30-day filings does not expressly provide for submission of a reply . . . , it does not follow that replies are prohibited." (Appellant's Br. at p. 37.) This is like arguing

that just because the Rules of Appellate Procedure do not expressly prohibit an appellee from filing a surresponse and an appellant from filing a surreply, it does not follow that surresponses and surreplies are prohibited.[3] Solarize also argues Vectren "did not make any objection" to its Reply or argue that it was "untimely." However, the 30-Day Filing Rule does not allow for motions, likely because any motions would extend the approval process far beyond the 30-day review process.[4]

Regardless of whether the 30-Day Filing Rule permits an objecting party to file a reply, Solarize's Reply is improper. Solarize made entirely new arguments in its Reply, containing new legal theories. "Reply briefs are for replying, not raising new arguments or arguments that could have been advanced in the opening brief." *Reis v. Robbins*, No. 4:14–cv–00063–RLY–TAB, 2015 WL 846526, at *2 (S.D. Ind. Feb. 26, 2015) (quoting *Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.,* 249 F.R.D. 530, 536 (N.D. Ill. 2008)). Just as this Court will not consider new arguments made in a reply brief on appeal, the Commission should not either. *See Osmulski v. Becze,* 638 N.E.2d 828, 836 n.9 (Ind. Ct. App. 1994).

In contrast to the Objection, the "Reply" includes citations to approximately fifteen cases and multiple federal statutes and regulations, never referenced in the Objection. These arguments did not merely clarify or expand on arguments made in

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[3] It is just as important to recognize what a regulation does not say as it is to recognize what it does say. *Van Orman v. State*, 416 N.E.2d 1301, 1305 (Ind. Ct. App. 1981).

[4] In a fully-docketed Commission proceeding, parties have ten days to respond to a motion and the movant may reply within seven days. 170 I.A.C. 1-1.1-12(e)-(f).

the Objection; instead, they advance new legal theories. Vectren had no express opportunity to respond to these new theories under the 30-Day Filing Rule.

The Commission's General Counsel and Staff correctly determined the Reply was "not compliant with 170 IAC 1-6-7," and this Court should defer to the Commission's interpretation of its own rules. The General Counsel specifically noted the impropriety of raising new arguments in the Reply, as opposed to the actual Objection:

> 170 IAC 1-6-7 does not provide for a reply being submitted to the utility's response to the objection or for multiple filings providing additional explanation. 170 IAC 1-6 provides for a shortened administrative process and, given the shorter timeframe, *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 IAC 1-6-7(b)(2).*

(Appellant's App. Vol. II at p. 23 (emphasis added).) As the General Counsel noted, waiting until a "reply" to raise objections to a 30-day filing inappropriately burdens and delays what is designed to be an expedited process.

The General Counsel's determination regarding the impropriety of Solarize's Reply was a sufficient basis for the Commission to find Vectren's 30-day filings were noncontroversial. However, as further discussed in Section IV, *infra*, the Commission nevertheless addressed the PURPA claims Solarize raised for the first time in its Reply and found them to be "without foundation." (Appellant's App. Vol. II at p. 26.)

III. Solarize failed to exhaust available administrative remedies.

Even if Solarize had filed a proper objection, the Court should still affirm because Solarize failed to exhaust the available administrative remedies, which deprives this Court of jurisdiction.

The 30-Day Filing Rule specifically allows an objecting party that disagrees with the Commission's approval of the tariff or contract to either: (i) file an informal complaint with the Commission's Consumer Affairs Division ("CAD") following the process set forth in Ind. Code § 8-1-2-34.5; or (ii) initiate a Commission investigation pursuant to Ind. Code § 8-1-2-54.[5] When an informal complaint is filed pursuant to Ind. Code § 8-1-2-34.5, the CAD reviews the complaint, and after allowing the utility to respond, issues a written decision. If the complaining party or the utility disagree with the CAD's decision, they can appeal to the full Commission (170 I.A.C. 1-1.1-5(b)) or initiate a Commission investigation under Ind. Code § 8-1-2-54 (170 I.A.C. 1-1.1-5(c)).

If a party that disagrees with a Commission's ruling on a 30-day filing would rather proceed directly to a fully-docketed Commission proceeding, it can initiate an investigation under Ind. Code § 8-1-2-54. In a Commission investigation proceeding, the objecting party and utility present testimony and other evidence supporting their

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[5] 170 IAC 1-6-7(f) provides: "Nothing in this rule shall restrict: (1) a person's or entity's rights regarding, or access to, the complaint processes and procedures of the commission; or (2) the commission's investigatory authority."

respective positions, and the Commission issues an appealable Order following a full evidentiary hearing.

The investigation process has been used following the Commission's approval of tariff changes pursuant to the 30-day filing process under analogous circumstances. In *In re Indiana Payphone Ass'n*, Cause No. 42303, 2004 WL 2464635 at ¶¶ 1 and 2 (Ind. U.R.C. Sept. 29, 2004), the Indiana Payphone Association (the "IPA") initiated an investigation following approval of tariffs filed by various local exchange carriers pursuant to the 30-day filing process. Among other things, the IPA contended the revised tariffs did not comply with guidelines promulgated by the Federal Communications Commission. *Id.* at ¶ 3. After a full evidentiary hearing, the Commission ordered the local exchange carriers to revise their respective tariffs. *Id.* (Ordering ¶¶ 1-3.)

Solarize likewise could have asked the Commission to initiate an investigation proceeding to consider the PURPA issues raised in its Reply pursuant to Ind. Code § 8-1-2-54 but chose not to pursue this or an alternative administrative remedy. Importantly, had an investigation been initiated as provided for under the 30-Day Filing Rule, Vectren's Annual Rate CSP Update and the customer contract would have been approved and in effect during the pendency of that proceeding. This would have avoided the harm caused by having a tariff rate based on outdated data and making a customer wait to enter into a contractual arrangement for the purchase of energy from its resource.

This Court has not allowed parties to pursue appeals of Commission rulings until they have exhausted their administrative remedies. *Haggard v. PSI Energy, Inc.*, 575 N.E.2d 687, 690 (Ind. Ct. App. 1991), *trans. dismissed* (citing *Indiana Forge and Machine Co., Inc. v. Northern Indiana Pub. Serv. Co.*, 396 N.E.2d 910 (Ind. Ct. App. 1979).[6] It is irrelevant that the Commission's regulations do not require an entity opposing an approved 30-day filing to file a complaint or initiate an investigation pursuant to Ind. Code § 8-1-2-34.5 or Ind. Code § 8-1-2-54. "Where an administrative remedy is available, such remedy must be pursued before the claimant is allowed access to the courts." *Save the Valley, Inc. v. Ind. Dept. of Env't Mgmt.*, 724 N.E.2d 665, 668 (Ind. Ct. App. 2000), *trans. denied* (citing *Johnson Oil Co. v. Area Plan Comm'n of Evansville & Vanderburgh Cty.*, 715 N.E.2d 1011, 1014 (Ind. Ct. App. 1999). Said another way, "resort to the judicial process must ordinarily be postponed until administrative remedies capable of rectifying the claimed error have been pursued to finality." *Indiana State Dep't of Welfare, Medicaid Div. v. Stagner*, 410 N.E.2d 1348, 1351 (Ind. Ct. App. 1980) (citing *Reidenbach v. Bd. of Sch. Trustees of W. Noble Sch. Corp.*, 398 N.E.2d 1372, 1374 (Ind. App. 1980)). Direct

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[6] In *Haggard*, a consumer wrote a letter to the Commission's CAD complaining of PSI's denial of service based on the customer's failure to pay prior bills. *Id.* at 690. The CAD declined to require PSI to serve the customer. Rather than taking the complaint to the full Commission or initiating an investigation under Ind. Code § 8-1-2-34.5 or Ind. Code § 8-1-2-54, respectively, the customer appealed. The Court held the customer had not "exhaust[ed] his administrative remedies with the [Commission] because he failed to 1) file a formal complaint pursuant to I.C. 8-1-2-54, or 2) he failed to seek review of the IURC's response to his October 12, 1987 letter pursuant to I.C. 8-1-2-34.5." *Id.* at 691.

judicial review can be allowed where the harm to the party outweighs the interests of the administrative agency in developing a factual record upon which to exercise discretion or avoiding deliberate or flouting of established administrative processes. *Young v. Ind. Dep't. of Nat. Resources*, 789 N.E.2d 550, 557 (Ind. Ct. App. 2003), *trans. denied*.

Here, the 30-Day Filing Rule specifically authorizes a party dissatisfied with the Commission's approval of a 30-day filing to initiate a complaint or investigation proceeding. Both administrative avenues were "capable of rectifying the claimed error" of the Commission's approval of the 30-day filings. Moreover, Solarize has not specified any harm it incurred as a result of the Commission's approval of the 30-day filings. The Annual Rate CSP Update resulted in a modest decrease to payments made to Qualifying Facilities during 2020 for energy ($0.00529/kWh during peak periods and $0.0025/kWh during off peak periods) and an 18¢ increase per kW to the capacity payments to Qualifying Facilities. (Appellant's App. Vol. II at p. 21.)[7] The Net Generation Contract has no impact on customers aside from the customer that was waiting for it to be implemented. (Appellant's App. Vol. II at p. 25.)

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[7] These changes were in line with the changes approved for other utilities on the same day. (Appellant's App. Vol. II at pp. 10-29.) For instance, Indianapolis Power & Light's ("IP&L") peak energy purchase rate decreased by $0.0044/kWh and off-peak energy purchase rate decreased by 0.002/kWh. (*Id.* at 15.) At the same time, IP&L's capacity purchase rate decreased by $0.42 kW. While the rates of different utilities can vary for multiple reasons and are not necessarily comparable, the Commission's Technical Division Memorandum shows that the rates paid by Vectren to Qualifying Facilities are consistent with (or more favorable than) those paid by Indianapolis Power & Light and Indiana Michigan Power Company.

In contrast, using the processes allowed under the 30-Day Filing Rule would have given the Commission an opportunity to develop a complete record and avoid interruption of the administrative process. While the revised Rate CSP and new Net Generation Contract would have been effective during the pendency of the proceeding, just as they are during this appeal, the Commission could have directed that changes be made after an investigation if it found that changes were warranted, as it did in *In re Ind. Payphone*.

Notably, Solarize carefully states in its Appellant's Brief that it is "not required, at this stage, to demonstrate the violations of PURPA." (Appellant's Br. at p. 29.) Accordingly, as a practical matter, Solarize could initiate an investigation or complaint proceeding relating to the PURPA issues raised in its Reply, even if the Court of Appeals affirms the Commission's approval of the 30-day filings. This proposed "second bite at the apple" underscores the impropriety of initiating an appeal before Solarize pursued the available administrative processes.

IV. Neither the Annual Rate CSP Update nor the Net Generation Contract violates PURPA and Solarize's broad concerns are better addressed in other proceedings.

The Commission properly concluded that the PURPA issues Solarize raised in its Reply were "without foundation." The Annual Rate CSP Update is a refresh of the financial data that has been used to determine the CSP rate since the 1980s. That financial data was correctly inserted into formulae the Commission developed to implement PURPA, and therefore, Vectren's "avoided cost" rates comply with PURPA.

Likewise, the Net Generation Contract does not violate, or even implicate, PURPA. The Net Generation Contract was developed to respond to the needs of a customer that wanted to be compensated for generation produced by its Qualifying Facility through offsets to the amount it will pay for electric service from Vectren. It does not supplant the existing contract available for Qualifying Facilities.

In short, Vectren's 30-day filings were consistent with applicable law, including PURPA.

A. The Commission's General Counsel correctly determined Vectren's Annual Rate CSP Update complied with 170 I.A.C. 4-4.1-1 *et seq.*

The Commission has adopted rules to implement PURPA, which are set forth in 170 IAC 4-4.1-1 *et seq*. (the "Indiana PURPA Rules"). Under 170 IAC 4-4.1-10 of the Indiana PURPA Rules, each "generating electric utility" must update its standard offer rates for the purchase of energy and capacity from Qualifying Facilities each year and the rates for both must be calculated using the formulae set forth in 170 I.A.C. 4-4.1-8 and 9. Vectren calculated the energy and capacity rates contained in the Annual CSP Update in accordance with 170 I.A.C. 4-4.1-8 and 9. Vectren's Annual Rate CSP Update merely updated the energy and capacity rates to be paid for energy produced by Qualifying Facilities based on the formulae set forth in 170 I.A.C. 4-4.1-8 and 9, respectively. The modifications to the energy and capacity rates were based on changes to Vectren's most recent financial results and forecasts for 2020. (*See* Appellant's App. Vol. II at pp. 34-51.)

Solarize does not claim the updates to the energy and capacity rate were inaccurate or inconsistent with 170 I.A.C. 4-4.1-8 and 9. Rather, Solarize wrongly claims the Annual Rate CSP Update does not comply with PURPA because: (i) "avoided cost" should include avoided "transmission, line loss and emissions costs," and (ii) the rates calculated pursuant to the formulae set forth in 170 I.A.C. 4-4.1-8 and -9 are "less than prices paid [to] Ohio Valley Electric Corp." (Appellant's Br. at 31; Appellant's App. Vol. II at p. 152.)

The Commission's General Counsel correctly rejected these claims. The Commission's General Counsel reasoned:

> The IURC adopted rules in 1981 to implement PURPA. The Indiana General Assembly enacted Ind. Code chapter 8-1-2.4 in 1982 to express the State of Indiana's policy and implementation of PURPA, which gives authority to the states to implement PURPA under rules that have been and may be established by the Federal Energy Regulatory Commission. The IURC adopted Rule 4.1 in 1985 to implement Ind. code chapter 8-1-2.4 and, therefore, also to implement PURPA. SI does not provide any statement that Vectren's filing, which was made under Rule 4.1, violates Rule 4.1; as a result, SI's objection does not comply with 170 IAC 1-6-7(b)(2).

(Appellant's App. Vol. II at pp. 23-24).

The General Counsel's finding that Solarize failed to allege a violation of 4.1 is *not* tantamount to finding that Indiana law renders "PURPA inapplicable" or that PURPA is not "applicable law" as Solarize suggests. The General Counsel recognized the Commission's rules comply with PURPA and therefore, Vectren's filing in accordance with those rules also complied with PURPA.

Under PURPA, FERC must promulgate rules requiring electric utilities to offer to sell electricity to, and purchase electricity from, Qualifying Facilities. FERC's

rules do not require electric utilities to pay Qualifying Facilities more than their "avoided costs" for such purchases—that is, no more than "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), 292.304(a)(2).[8] Importantly, state regulatory agencies, like the Commission, are responsible for implementing the FERC rules through their own rulemaking. 16 U.S.C. § 824a-3.

Both PURPA and FERC regulations leave "avoided cost" determinations to state commissions, which have significant discretion and flexibility in doing so. *See, e.g.*, *S. Cal. Edison Co., San Diego Gas & Elec. Co.*, 159 P.U.R.4th 381, 70 F.E.R.C. ¶ 61215, 61675 (F.E.R.C. Feb. 23, 1995) (holding that states are afforded a wide latitude in implementing PURPA because of the "important role which Congress intended to give the states" and "to avoid unnecessary interference with state efforts to maximize the development of [Qualifying Facilities]").[9] FERC explained: "states are allowed a wide degree of latitude in establishing an implementation plan

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[8] While PURPA requires avoided cost rates be "just and reasonable" and nondiscriminatory, PURPA also provides that nothing in the regulations shall require a utility to pay in excess of its incremental cost. 16 U.S.C. § 824a–3(b). PURPA defines the avoided incremental cost as the cost to the utility of the electric energy which, but for the purchase from the Qualified Facility, such utility would generate or purchase from another source. 16 U.S.C. § 824a–3(d). In FERC Order 69 (Feb. 25, 1980), FERC breaks down avoided costs into avoided energy and avoided capacity costs.

[9] *Consumers Power Co. v. Pub. Serv. Comm'n*, 472 N.W.2d 77, 94 (Mich. Ct. App. 1991) (PUC's determinations should only be disturbed if the policy is "arbitrary, capricious, unreasonable, or an abuse of discretion").

for section 210 of PURPA . . . our regulations thus provide state commissions with guidelines on factors to be taken into account, 'to the extent practicable,' in determining a utility's avoided cost. . . ." *Id.* (quoting *Am. REF-FUEL Co. of Hempstead*, 47 FERC ¶ 61161, 61533 (F.E.R.C. Apr. 28, 1989) and 18 C.F.R. § 292.304(e)).

The Commission opened an investigation on May 9, 1984, to implement PURPA and FERC's rules. *Adoption of New Rules and Regulations with respect to Cogeneration Pursuant to PURPA*, No. 37494, 1984 WL 994597 (Ind. P.S.C. Oct. 5, 1984). Parties with varying interests (including owners of Qualifying Facilities) presented evidence in the proceeding regarding the proper manner for determining rates based on avoided costs. On October 5, 1984, the Commission issued an Order adopting the Indiana PURPA Rules, including formulae for determining the rates to be paid for energy and capacity produced by a Qualifying Facility using an "avoided cost" methodology set forth in 170 I.A.C. 4-4.1-8 and 9.

The Commission found rates produced by the formulae set forth in 170 I.A.C. 4-4.1-8 and 9 to be "just and reasonable to the utilities ratepayers, nondiscriminatory to alternate energy producers and encourage the development of alternate energy production facilities." *Id.* at *8. The Commission further held the Indiana PURPA Rules:

> [I]mplement[] the "avoided cost concept" . . . The utilities and subsequently their ratepayers will pay the cogenerators a capacity charge based on the cost of the utilities' next avoidable or deferrable plant, or the cost of any long-term incremental additions to their generating capacity, i.e. the cost for a new combustion turbine. The rule

> sets rates based not only on the energy costs that the utility will save, but also on the fixed costs associated with its capacity.

Id.

The formulae do account for avoided line loss costs, and Vectren included those avoided costs in its Annual Rate CSP Update. (*See* Appellant's App. Vol. II at p. 42 "Line losses, expressed as a percentage, for the previous year. (335895/6163839)") Likewise, emissions costs are a component of the capacity calculation, which includes all capital costs, including those for pollution control equipment to reduce emissions. *See* 170 IAC 4-4.1-9(a) ("V = Investment amount . . ."). Avoided transmission costs are a component of the locational marginal price ("LMP") used in the formula to calculate avoided "energy costs." (Appellant's App. Vol. II at p. 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.

Solarize's argument appears to be an effort to persuade the Commission to modify the avoided cost formulae in the Indiana PURPA Rules to include more such costs, including "carbon costs." (Appellant's Br. at p. 31.) The matter of whether to include carbon costs, or more transmission costs, in the avoided cost calculation is relegated to the discretion of state commissions. Solarize's reliance on *Vote Solar v. Montana Department of Public Services Regulation*, 473 P.3d 963 (Mont. 2020) to suggest "carbon costs" must be included in the avoided cost calculation is misplaced. In *Vote Solar*, the Supreme Court of Montana concluded the Montana Public Service Commission erred in eliminating the so-called "carbon adder" previously included in

avoided cost rates, but based that conclusion on the fact that the Montana Public Service Commission included estimated avoided carbon emission costs in its consideration of utility "rate[s] of return" and "rate base amounts" for generation investments. *Id.* at 110-111. The Indiana Commission does not include avoided carbon emission costs in considering rate base and rates of return. As the dissent noted in *Vote Solar*, "the [carbon] adder is technically not a 'factor,' as it is not a mandated consideration under either state or federal law." *Id.* at 129 (citing 18 C.F.R. § 292.304).

Solarize's claim that Vectren's computations in the Annual Rate CSP Update results in rates lower than those paid to an affiliated supplier and are therefore "discriminatory" also is a complaint about the avoided cost formulae set forth in 170 I.A.C. 4-4.1-8 and 9. (Appellant's Br. at p. 31.) The Commission's Order in Cause No. 37494 implementing the Indiana PURPA Rules reflects that the calculation of avoided cost was a disputed issue. *Adoption of New Rules and Regulations with respect to Cogeneration Pursuant to PURPA*, 1984 WL 994597. The Commission stated that the formulae set forth in 170 IAC 4-4.1-8 and 9 were the result of its "tr[ying] to reach a compromise between the cost the utilities and their ratepayers must pay to cogenerators and the policy to be implemented which was designed to encourage cogeneration." *Id.* at *7. The Commission also stated that the formulae developed were designed to produce rates that are "just and reasonable to the electric consumers of the utilities and avoid[] unnecessary or excessive subsidies to qualifying facilities." *Id.*

There are multiple reasons rates paid to a Qualifying Facility are lower than the amount paid to the owner of a baseload generation unit. Among other things, baseload generation units are "dispatchable" and can be relied on as needed to meet customer load. These types of issues were considered in enacting the Indiana PURPA Rules. The PURPA regulations set out several factors that state commissions may consider in determining avoided cost rates. These factors include, among others: the ability of the utility to dispatch the Qualifying Facility; the extent to which scheduled outages of the Qualifying Facility can be usefully coordinated with scheduled outages of the utility's facilities; the usefulness of energy and capacity supplied from the Qualifying Facility during system emergencies; and the ability of the electric utility to avoid costs. 18 C.F.R. § 292.304(e). These factors generally result in a downward adjustment to any avoided cost calculation in the case of small distributed generation facilities providing energy only.

B. The Commission's General Counsel correctly found Solarize's claims that the Net Generation Contract violated PURPA were "without foundation."

Solarize's claim that the Net Generation Contract violates PURPA and is discriminatory and preferential is based on the misunderstanding that the Contract establishes a minimum threshold for eligibility of 1 MW and Vectren accordingly would deny "the same terms and conditions to another set of Qualifying Facilities, those with a capacity of less than 1 MW." (Appellant's Br. at p. 29.) The Net Generation Contract was created for a particular customer that owns a Qualifying Facility that produces more than 1 MW. That does not mean the same terms are not

available to other customers with different production characteristics. The same terms could be made available to any Qualifying Facility customer that operates a facility producing 80 MW or less. Vectren filed its Net Generation Contract pursuant to 170 I.A.C. 4-4.1-11(a), which provides:

> [E]ach generating electric utility shall submit for approval via the commission's thirty (30) day filing process a standard form contract which it would enter into with a qualifying facility in connection with the generating electric utility's purchase of energy or capacity or both. The standard form contracts shall be prepared in a manner and form which will permit their use in the majority of circumstances with only minor modifications, although it is recognized that in unique situations a standard form contract may have to be revised significantly.

The Net Generation Contract is separate and distinct from Vectren's "Standard Offer and Form Contract for As-Delivered Capacity and Energy" that the Commission approved in 1985 ("Standard Offer and Form Contract"). The Net Generation Contract was created for a customer with a Qualified Facility that will produce in excess of 1 MW and the customer elected to sell the output from the facility to Vectren net of the customer's own usage. (Appellant's App. Vol. II at p. 144.) In the cover letter accompanying the 30-day filing, Vectren explained the Net Generation Contract was filed: "[b]ased on a recent request from an existing customer that is installing solar generation facilities that constitute a qualifying facility, the Company now has a need to create a new and separate Standard Offer and Contract Form for those qualifying facilities that elect to sell only their generation output that is net of their own use of electric service provided by the Company." (*Id.* at 56.)

Notably, Rate CSP is available to owners of cogeneration or small power producing Qualifying Facilities of 80 MW or less, *including those with a capacity of less than 1 MW*. Nothing in Rate CSP limits its applicability to customers that have a capacity of less than 1 MW. Moreover, the Net Generation Contract is just one available contract to which Rate CSP customers can avail themselves. (Appellant's App. Vol. II at p. 56.) The Net Generation Contract did not replace or modify the previously approved Standard Offer and Form Contract, which also is available to customers that operate facilities generating less than 1 MW and meet the other requirements of Rate CSP. Accordingly, Solarize's claim that Vectren does not have a PURPA-compliant tariff for generating units smaller than 1 MW is simply wrong.

Solarize also states that: "FERC regulation requires that the Qualifying Facility be provided with three alternative pricing structures: (1) energy sold on an 'as available' basis at the utility's avoided costs at the time of delivery; (2) sales over a specified period at prices based on avoided costs at the time of delivery; or (3) sales over a specified period based on predetermined prices that are established at the time of the contract." (Appellant's Br. at pp. 29-30 (citing 18 C.F.R. §§ 292.304(d)(1), (d)(2)(i)-(ii)). This claim also is based on the misunderstanding that the Net Generation Contract is the only option available for customers.

Vectren developed the Net Generation Contract to meet the needs of one customer that chose a specific pricing structure. However, the Net Generation Contract is available to other customers that elect pursuant to 170 I.A.C. 4-4.1-5(c) to sell the output from their generation facilities that is net of their own use of electric

service provided by Vectren. The Net Generation Contract does not preclude Vectren from entering into an agreement with a customer for long-term purchases of capacity based on predetermined prices established at the time of the contract.

Moreover, Solarize's claim that Vectren is obligated to have a "predetermined" pricing option available as a standard offering "under federal law" is simply wrong. Solarize's erroneous claim is based on 18 C.F.R. § 292.304(d)(1)(ii), which provides that "[e]ach qualifying facility shall have the option:"

> (ii) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, except as provided in paragraph (d)(2) of this section, be based on either:
> (A) The avoided costs calculated at the time of delivery; or
> (B) The avoided costs calculated at the time the obligation is incurred.

The customer that the Net Generation Contract was created for did not request a "predetermined" cost arrangement. Therefore, Vectren did not need to create such a hypothetical "predetermined" avoided cost rates. Moreover, 18 C.F.R. § 292.304(d)(2) makes clear the Commission has discretion to not require utilities to establish a predetermined price for purchases of long-term capacity. Subsection (2) provides: "[n]otwithstanding paragraph (d)(1)(ii)(B) of this section, a state regulatory authority . . . may require that rates for purchases of energy from a qualifying facility pursuant to a legally enforceable obligation *vary through the life of the obligation, and be set at the electric utility's avoided cost for energy calculated at the time of delivery*." *Id.* (emphasis added). In other words, the Commission has discretion to determine whether electric generating utilities in Indiana should make a "predetermined" price

option available to Qualifying Facilities. An expedited 30-day filing process is not the appropriate forum to consider such issues – particularly when the contracting party has not requested this option.

C. The Commission's General Counsel correctly determined Solarize's concerns relating to matters that broadly related to Rule 4.1 are more appropriately addressed through its rulemaking process.

As the Commission's General Counsel found, most of Solarize's objections were "about Rule 4.1 itself . . . [which] is not a compliant objection under 170 IAC 1-6-7." (Appellant's App Vol. II at p. 24.) Changes to the methodology for determining avoided cost under 170 I.A.C. 4-4.1-8 and 9 should be accomplished by following the same process the Commission adhered to in developing the avoided cost structure – *i.e.*, a rulemaking proceeding where the Commission would consider whether the rules adopted pursuant to its Order in Cause No. 37494 should be modified. Whether a "carbon adder" or additional compensation for avoided "transmission line losses" should be included in the determination of avoided costs is a matter relegated to the discretion of state commissions. *See S. Cal. Edison Co., San Diego Gas & Elec. Co.*, 70 F.E.R.C. ¶ 61215 at 61675 (states are afforded a wide latitude in implementing PURPA). Likewise, whether Indiana utilities should provide Qualifying Facilities with a predetermined pricing structures is a matter for Commission discretion under 18 C.F.R. § 292.304(d)(2), which allows state commissions flexibility to determine whether utilities must establish a predetermined price for purchases of long-term capacity – or not.

These discretionary decisions are appropriately considered through a process by which all interested stakeholders are provided an opportunity to present their positions, as opposed to the abbreviated 30-filing process of one utility. If the Commission were to change its avoided cost policies as proposed by Solarize, those policy changes would have implications for every electric generating utility in the State. As reflected in the Commission's Order approving Vectren's annual tariff revisions, parties with interest aligned with Solarize made the same complaints regarding the determination of avoided costs in connection with the 30-day filings for revisions to the cogeneration rates of three other utilities. (Appellant's App. Vol. II at pp. 10-20.)[10] Changes to the manner in which PURPA is implemented with broad implications for utilities under Commission jurisdiction should be considered in a rulemaking, or a Commission investigation proceeding under Ind. Code § 8-1-2-54, where all interested stakeholders can participate.

The Michigan Public Service Commission recently considered whether changes to its rules implementing PURPA were appropriate through a fully docketed rulemaking proceeding and ultimately decided not to make any changes to the avoided cost formula. *Investigation into Continuing Appropriateness Current Implementation of PURPA*, 2018 WL 5924330 (Mich. P.S.C. Nov. 8, 2018). There is no reason the Commission should approach consideration of changes to the Indiana PURPA Rules through a less formal process.

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[10] Those filings were not appealed.

Solarize objects to seeking the relief it seeks through the rulemaking process, as recommended by the General Counsel, because "the disposition of a rulemaking request would not be subject to judicial review." (Appellant's Br. at p. 33.) Whether a rulemaking would be subject to appeal is not a proper consideration as to the proper forum for evaluating changes to the Indiana PURPA rules. Moreover, the 30-day filing process provides objecting parties an opportunity to initiate a Commission investigation pursuant to Ind. Code § 8-1-2-54, that Solarize could have availed itself to as described in Section III. A final order entered in a Commission investigation conducted under Ind. Code § 8-1-2-54 would be subject to judicial review.

D. Solarize is litigating the same issues in Vectren's Rate EDG case.

The Commission's General Counsel found certain of Solarize's comments and assertions relate to Vectren's proposed excess distributed generation ("EDG") rate in a pending Commission proceeding, *Petition of Southern Indiana Gas and Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc.*, No. 45378 (Ind. U.R.C.), available at https://iurc.portal.in.gov.). Solarize intervened in Cause No. 45378 and the General Counsel noted that is the "appropriate proceeding in which to provide its arguments and supporting evidence for those arguments." (Appellant's App. Vol. II at p. 26.) In its Appellant's Brief, Solarize misunderstands the General Counsel's findings as "[an] effort to relocate the contested issues to a different proceeding." (Appellant's Br. at p. 34.) To the contrary, the General Counsel correctly observed that "[m]ost 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." (Appellant's App. Vol. II at p. 24.)

Moreover, despite Solarize's contention that Cause No. 45378 "relates to a distinct statutory framework," Solarize is litigating the same four PURPA issues discussed in its Appellant's Brief in Cause No. 45378, as is evidenced from reviewing the docket that Solarize cites in footnote 3 of its Brief. (Appellant's Br. at p. 35.) Solarize suggests the Presiding Officers precluded it from raising its PURPA issues in Cause No. 45378, which is not the case.[11] (Appellant's Br. at p. 34.) In fact, Solarize witness Michael A. Mullett filed approximately ten pages of testimony regarding the PURPA issues raised on pages 29 to 31 of the Appellant's Brief.[12]

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[11] The Docket Entry Solarize cites, (Appellant's Br. at p.34), merely states: "Solarize is authorized to respond to the issues raised in Vectren's pending petition, but Solarize is not authorized to raise 'all issues legally and logically related thereto' as referenced in the Petition if this unduly broadens the issues. Solarize shall not unduly broaden the issues." As reflected below, this statement has not dissuaded Solarize from raising the same issues in Cause No. 45378 that it raised with respect to Petitioner's 30-day filing.

[12] Mr. Mullett summarizes the "affirmative relief" Solarize is requesting in Cause No. 45378 as follows:

> **Q. What is Solarize Indiana requesting the Commission to do in this proceeding regarding the PURPA-related concerns you have previously described?**
>
> A. Consistent with the applicable Commission procedural rule, Paragraph 7 of SI's Petition to Intervene is explicit and specific with respect to the affirmative relief it seeks[:]
>
> (d) FERC's rules require that each small renewable generator be offered *three options* for selling their electricity to utilities. . . . .Third, the generator can opt to enter a long-term contract with *prices over the contract term determined at contract formation (i.e., pre-determined). 18 C.F.R. § 292.304(d)(2)(ii). . .*

Simply put, there is no reason for the same issues to be considered in multiple proceedings. If Solarize does not believe its arguments regarding these same PURPA issues will be appropriately or thoroughly considered in Vectren's Rate EDG proceeding, it can initiate a complaint or investigation proceeding under Ind. Code § 8-1-2-34.5 or Ind. Code § 8-1-2-54. Given Solarize's failure to exhaust available administrative remedies before the Commission, the multiple other regulatory avenues available to Solarize to seek Commission review and consideration of the very technical PURPA issues raised in its Reply, this Court should affirm the Commission's lawful Order approving Vectren's 30-day filings.

CONCLUSION

For all the foregoing reasons, the Commission's Order should be affirmed.

> (f) . . . Of particular but not exclusive relevance here, PURPA requires that small distributed solar generators transmitting electricity to Vectren's distribution system be compensated for the *avoided transmission as well generation costs* associated with Vectren's non-PURPA "but for" generation source. . . . .
>
> Consequently, SI reaffirms at this time the requests for PURPA-related relief made in its Petition to Intervene, especially but not exclusively a fully-compliant tariff *and one or more fully-compliant standard contracts for distributed solar customer-generators with facilities of one megawatt or less.*

(Solarize Exh. 4, pp. 41-42, *Petition of Southern Indiana Gas and Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc.*, No. 45378 (I.U.R.C.).

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 14,000 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 8, 2020, the foregoing was filed and served electronically via the Indiana E-Filing System upon the following persons, in accordance with Indiana Appellate Rules 24 and 68:

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