IN THE
INDIANA COURT OF APPEALS

CAUSE NO. 20A-EX-01384

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

REPLY BRIEF OF APPELLANT SOLARIZE INDIANA, INC.

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I. INTRODUCTION

Solarize Indiana, Inc. ("Solarize Indiana") submits this reply to address arguments in the appellee briefs filed by Southern Indiana Gas and Electric Company, d/b/a Vectren Energy Delivery of Indiana, Inc. ("Vectren") and Indiana Utility Regulatory Commission ("Commission"). The appellees have failed to demonstrate that federal statutory and regulatory requirements under the Public Utilities Regulatory Policies Act ("PURPA"), as amended, do not count as "applicable law" with respect to the two Vectren 30-day filings at issue, or that the Commission could approve those rate submissions as noncontroversial, without a hearing, despite Solarize Indiana's objections.

Vectren and the Commission misstate the standard of review, arguing for deference to the Commission. For utility proposals that require Commission approval, the statutory process is a formal proceeding with a hearing. Hence, the 30-day filing rule permitting approval without a hearing is limited to "noncontroversial" matters. An objection based on "applicable law" establishes that the filing is not noncontroversial. The question is whether Solarize Indiana's assertions of non-compliance with PURPA qualify as objections based on "applicable law." The Commission's contrary conclusion adopted a legal determination by its General Counsel that compliance with a Commission regulation conclusively established compliance with federal law. That is an error of law subject to *de novo* review.

On appeal, the Commission repeatedly reaffirms its legal theory: Ind. Code ch. 8-1-2.4 ("Chapter 2.4") implements PURPA, and Commission regulations at 170 Ind. Admin. Code 4-4.1 ("Rule 4.1") implement Chapter 2.4, therefore compliance with Rule 4.1 automatically demonstrates compliance with PURPA. That is not sound logic. The

30-day filing rule states a valid objection may be based on "applicable law" ***or*** a "commission rule," not only a "commission rule" exclusively. The Rule 4.1 provisions are not identical to the requirements established by PURPA, and as a matter of law cannot supersede federal law. Non-compliance with PURPA is an objection based on "applicable law," hence the Vectren filings could not be summarily approved without a hearing on the theory that they were noncontroversial.

Vectren further misstates that Solarize Indiana's PURPA objections were not sufficiently specific. The Commission, notably, disclaims Vectren's argument that the Solarize Indiana reply, as distinct from the initial objection, was properly disregarded as untimely, stating instead the reply was not stricken and was duly considered. Vectren's contention that a valid objection must exhibit a high degree of specificity is at odds with the procedural context: a threshold screening, without evidence or hearing, to assess whether a filing is controversial. The reply, submitted six weeks before the objection deadline, was timely and appropriate under the procedure prescribed for filing objections. Conclusive proof of violations cannot be required at that preliminary stage.

Even though the Commission granted approval without a hearing based on a finding there was nothing "controversial" in the submissions, Vectren and the Commission argue the merits of the PURPA objections at considerable length. Those arguments were not presented below, and were not the basis for the decision under review. It is inappropriate to treat this appeal as if it involved a decision on the merits of a contested case, where instead the Order declined to consider the objections and thus approved the filings as supposedly noncontroversial. Nevertheless, Solarize Indiana's asserted PURPA objections clearly had substance and support in the law:

- The new standard contract unambiguously limits availability to qualifying facilities ("QFs") with a capacity of 1 MW or greater, purporting to exclude smaller QFs. Vectren and the Commission argue the existing standard contract for Rate CSP does not have the same limitation, but that does not cure the discriminatory defect of the new standard contract.
- Vectren failed to provide a long-term contract option for predetermined pricing. To address that defect, Vectren mistakenly relies on a federal regulation that was not promulgated until after the Order issued, while the Commission hypothesizes, without a record or hearing, that a term of a single year might be sufficiently long-term.
- The proposed purchase rate did not reflect all components of Vectren's avoided costs. Vectren and the Commission contend the rate accounted for some transmission and line loss costs, but only those relating to the interstate grid as distinct from Vectren's distinct distribution infrastructure. They assert without evidence that all emissions costs are embedded in the computation, without identifying or accounting for the value of the emissions avoided by non-fossil fuel sources.
- The Vectren filings are discriminatory in multiple respects. Vectren and the Commission argue comparison to the price Vectren pays to an affiliate is irrelevant because the purchase context is distinguishable, but that is a fact-specific assertion without any record or supporting analysis. They fail to show, moreover, that the new standard contract's express limitation to 1 MW-plus facilities does not discriminate against smaller QFs.

The Commission granted approval in what is unquestionably a final Order, formally issued and endorsed by all five Commissioners at a duly noticed public conference. No further action on those filings is pending at the agency level. Vectren nevertheless contends the administrative process has not been exhausted, insofar as Solarize Indiana could potentially file a complaint or seek a Commission investigation. The rule provision that Vectren cites, however, is a savings clause permitting such action as an alternative to the objection process, not recourse for further administrative review from an adverse decision on a 30-day filing. What Vectren envisions would be a collateral action for prospective relief, not additional process to challenge the decision already made. The exhaustion doctrine does not require the initiation of independent proceedings that do not negate the finality of an Order concluding the agency process.

Similarly, Vectren and the Commission contest some of the proposals by Solarize Indiana, as if that resolved the PURPA violations. Solarize Indiana did contend, with justification, that Rule 4.1 is overdue for an update, and further proposed consolidation with another Vectren proceeding for procedural efficiency. That does not mean, however, that a potential rulemaking or the other Vectren proceeding became the exclusive mechanisms to address the PURPA violations that Solarize Indiana also asserted. The Vectren 30-day filings were approved, over objection, without a hearing, because the Commission refused to consider the PURPA objections. That approval would not be open for challenge in a rulemaking or another docket. This appeal is the sole avenue for review of the relief granted in the Order, in deviation from PURPA requirements.

II. ARGUMENT

Even though the Commission granted summary approval without a hearing or a developed evidentiary record, finding the Vectren submissions noncontroversial despite Solarize Indiana's PURPA objections, Vectren and the Commission nevertheless urge a deferential standard of review. See Vectren Brief at 20-21; Commission Brief at 31-33. They attempt to reframe the issue as a challenge to determinations within the Commission's expertise and discretion. Id. That is not accurate. The appeal raises a clear issue of law subject to *de novo* review.

Where a public utility rate proposal requires regulatory approval, the statutory process calls for a formal proceeding with a hearing and an evidentiary record. See Ind. Code §§8-1-1-5(a), 8-1-2-54 to -61. Accordingly, the 30-day filing rule, permitting tariff changes without any hearing, is limited only to filings that are "noncontroversial." See 170 Ind. Admin. Code §1-6-1(b). The objection process under that rule, then, is a threshold step to determine if a filing is actually noncontroversial. An objection based on "applicable law" precludes summary approval of a 30-day filing. See §7(b). Solarize Indiana objected to the Vectren filings, alleging non-compliance with PURPA. See App. vol. II at 91-95, 147-53. The Commission granted approval anyway, on the premise that an alleged PURPA violation was not a valid objection absent a showing that Rule 4.1 was also violated. Id. at 23-24, 26. That is the error of law under review here.

Contrary to the Commission's suggestion that technical or ratemaking expertise played some role in its decision (see Commission Brief at 31), the Order below granted summary approval notwithstanding the objections. The finding at issue is that there were "no controversial filings" presented for approval. See App. vol. II at 9. That conclusion was based on a legal analysis by "General Counsel" assessing the objections.

See App. vol. II at 22-24, 26-27. This is not an appeal from a decision on the evidentiary merits of a contested case. It is more like a default judgment where the opposing party appeared and pleaded objections that the tribunal summarily deemed insufficient. This Court may properly make an independent determination, as a matter of law, that Solarize Indiana's asserted objections were properly based on "applicable law" and make the filings "controversial."

A. The Commission Erred by Finding PURPA Objections Insufficient to Make the Vectren Filings Controversial

The relevant rule provision states that objections may involve a violation of ***either*** "applicable law" ***or*** "a commission rule." See 170 Ind. Admin. Code §1-6-7(b)(2)(A). Despite that unambiguous grammar, Vectren and the Commission contend the Solarize Indiana objections were deficient because they raised only non-compliance with PURPA, without also alleging a violation of Rule 4.1. See Vectren Brief at 19, 34; Commission Brief at 29, 33-34, 37. Both expressly deny that the Commission took the position that PURPA is not "applicable law." See Vectren Brief at 23; Commission Brief at 33. Given that all parties agree PURPA is applicable law, the contention is that a rule permitting objection based on "applicable law" ***or*** "commission rule" really requires an objection based on "commission rule" only. The argument that a violation of applicable law is not enough, unless accompanied by an objection based on commission rule, is contrary to the plain language of §7(b)(2)(A).

The syllogism adopted below is that Rule 4.1 implements Chapter 2.4, Chapter 2.4 implements PURPA, therefore compliance with Rule 4.1 conclusively establishes compliance with PURPA. See App. vol. II at 23-24, 26. Both appellees embrace that reasoning on appeal. See Vectren Brief at 19, 34; Commission Brief at 29, 33-34, 37.

Regardless of what "implements" what,[1] the PURPA provisions at issue are not identical to those of Rule 4.1. Compare 16 U.S.C. §§824a-3(b), (d); 18 C.F.R. §292.304 with Ind. Code §§8-1-2.4-4, -6; 170 Ind. Admin. Code §§4-4.1-8, -9. Compliance with one provision of state law cannot automatically establish compliance with another, different provision of federal law. There is nothing illogical about asserting a PURPA violation without also raising a Rule 4.1 objection.

Given the differences in the standards and requirements, the automatic-compliance theory amounts to an argument that Rule 4.1 supersedes PURPA. That is clearly incorrect. Under the Supremacy Clause, federal law is controlling. See U.S. CONST. art. IV, cl. 2. Congress directed state regulatory authorities to establish PURPA-compliant rates for utility purchases of QF power. See 16 U.S.C. §824a-3(f)(1). See also Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 751 (1982) (holding PURPA "requires each state regulatory authority and nonregulated utility to implement FERC's rules"); id. at 759 (QF provision "has the States enforce standards promulgated by FERC"). Neither Chapter 2.4 nor Rule 4.1 in any way purports to displace or revise any PURPA requirements. The Commission cannot substitute Rule 4.1 for PURPA as the controlling standard.

The Commission has a statutory duty not only to enforce Indiana utility law specifically, but also "all other laws" relating to public utilities. See Ind. Code §8-1-2-

[1] As explained in Solarize Indiana's initial brief at pp. 15-16, Chapter 2.4 was enacted by the General Assembly subsequent to PURPA and reflects parallel policies, but the statute does not directly reference PURPA or purport to replace or revise PURPA requirements in any way. Furthermore, the Commission adopted one set of regulations to implement PURPA in 1981, then after Chapter 2.4 was enacted the Commission adopted a second set of regulations in 1984, and the next year repealed the earlier PURPA regulations. Notwithstanding intervening amendments to PURPA and its regulations, Rule 4.1 has not been substantively changed since 1985.

115. PURPA is one of the "other laws" the Commission is charged with enforcing. An asserted violation of PURPA, therefore, is an objection based on "applicable law," regardless of compliance status under other legal requirements such as Rule 4.1.

B. The Objections Based on PURPA Were Specific

Vectren and the Commission differ as to whether the PURPA objections raised by Solarize Indiana were sufficiently specific. Vectren, at some length, argues the initial objection was not specific enough, and nothing presented subsequently could cure the alleged deficiency. See Vectren Brief at 21-27. Vectren admits the Solarize Indiana reply was sufficiently specific (id. at 25, asserting "specific" violations of PURPA were raised "for the first time" in the reply), but contends the reply came too late. Id. at 25-27. The Commission, by contrast, clarifies that the Solarize Indiana reply was not stricken, was not disregarded, and was duly considered. See Commission Brief at 37-38. The Commission argues the substance of the PURPA objections, without contending there was any defect in the level of specificity. Id. at 37-43. Vectren's challenge is misguided in several respects.

Vectren does not contest the specificity in the Solarize Indiana reply (see Vectren Brief at 25), which was timely submitted. A valid objection may be asserted as late as three days before Commission approval (see 170 Ind. Admin. Code §1-6-7(e)), and here the reply was submitted a full six weeks before that deadline. See App. vol. II at 9-10, 147-53. There is no other deadline for the submission of objections. Indeed, a "30-day" filing may be approved in as little as 30 days (see 170 Ind. Admin. Code §§1-6-1(d), 8(c)), and here the Commission had six weeks to consider the Solarize Indiana reply. Insofar as Vectren admits the reply was sufficiently specific, the reply was submitted within the time for asserting objections, and the Commission confirms it was duly

considered, Vectren cannot complain that Solarize Indiana failed to present specific objections in a timely manner.

Moreover, Vectren's formalistic theory of waiver (see Vectren Brief at 25-27) is out of place here. The context involves a threshold determination as to whether a 30-day filing is actually noncontroversial. As the Commission notes, it is an "informal" process. See Commission Brief at 11-12. Contrary to Vectren's rigid position that no reply is permitted, the 30-day filing rule expressly states an objection may be resolved "to the satisfaction of" the "objector," or alternatively may be "withdrawn" by the utility before being presented for Commission approval. See 170 Ind. Admin. Code §§1-6-7(c), (d). When Vectren responded to the initial objection (see App. vol. II at 142-46), Solarize Indiana promptly and appropriately reacted three days later (id. at 147-53). That reply explained pursuant to §7(d) why the Vectren response did not resolve the objections to the satisfaction of the objector, and gave Vectren good reason to withdraw or modify the filings in accordance with §7(c).

In any event, the reply did not raise new arguments, but instead reiterated the PURPA objections asserted in the initial submission. The initial objection stated that "Vectren's filings are insufficient and incomplete with respect to PURPA compliance in several respects." See App. vol. II at 92. It asserted Vectren was only offering purchase rates and contract terms under PURPA to QFs with a capacity of at least 1 MW. Id. ¶3. It stated Vectren's "avoided cost" computation failed to account for QF location on the transmission or distribution grid. Id. at 93, ¶7(E)(2). It objected that Vectren did not properly determine the economic value of avoided emissions. Id. at 93-94, ¶7(E)(3). It contended the proposed purchase rate and new standard contract did not meet the

"non-discriminatory" requirement under PURPA. Id. at 94, ¶7(G). Those same objections were reiterated in Solarize Indiana's reply. Id. at 151-52.

The context is a threshold screening process to determine whether a 30-day filing is noncontroversial. The purpose is to identify controversy, not to decide the merits of asserted objections. Yet Vectren claims the initial objection must establish a violation with a high degree of particularity, as if it were a summary judgment motion, and additional submissions within the objection period cannot be considered, as if appellate briefing rules were controlling. That perspective is contrary to the terms and structure of the 30-day filing rule, the principles of notice pleading, the policy favoring disposition on the merits, and the Commission's actual consideration of the issues in this case.

C. Solarize Indiana Properly Raised Valid Objections

The Order was based on a determination that "no controversial filings" were presented. See App. vol. II at 9. The underlying analysis by General Counsel and Staff was that Solarize Indiana's objections were not valid because they did not assert violations of Rule 4.1. Id. at 23-24, 26. At no point below did the Commission, its General Counsel or Staff evaluate the substance of the PURPA objections, beyond inferring that compliance with Rule 4.1 conclusively established compliance with PURPA. Id. The merits of the identified PURPA violations otherwise formed no part of the decision under review.

Despite that context, Vectren and the Commission argue at considerable length on appeal that the challenged filings are compliant with PURPA, after all. See Vectren Brief at 33-43; Commission Brief at 37-43. However, that was not the basis for the decision under review. The Vectren filings were summarily approved without a hearing because the Commission found them noncontroversial. This is an appeal of an Order

declining to address, not one resolving, on the merits of the controversy. The Court should reverse because the Vectren filings were incorrectly treated as noncontroversial despite the assertion of PURPA violations. In reviewing the Commission's refusal to consider the merits of those objections, the Court need not resolve the PURPA disputes as though those issues were decided below.

To the extent Vectren and the Commission contend that the Court should declare the filings did comply with PURPA, even though that was not the rationale for the decision below, the arguments are mistaken. Solarize Indiana properly raised substantial objections that are firmly grounded in established legal requirements.

1. Vectren unlawfully imposed a 1 MW threshold

Vectren asserts there is a "misunderstanding" that the new standard contract sets a minimum capacity threshold at 1 MW. See Vectren Brief at 39. The contract specifies, however, that it applies to QFs with a "nameplate production in excess of 1 MW." See App. vol. II at 59. As the Commission admits, "it is true that Vectren's alternate standard offer and contract form only applies to facilities of 1 MW or greater." See Commission Brief at 38. There is no misunderstanding in that regard.

Nevertheless, Vectren contends the reference to 1 MW only arose because the particular customer that led Vectren to propose a new standard contract was installing a facility of more than 1 MW. See Vectren Brief at 39-40. However, the tendered contract is a form presenting a standard offer, not a special contract for the particular customer only. See App. vol. II at 59-62. It was filed pursuant to §11 of Rule 4.1 (see Vectren Brief at 40), which requires Commission approval of a "standard form contract" for purchases from QFs. See 170 Ind. Admin. Code §4-4.1-11. On the terms approved in the Order, that standard form contract would only be applicable to customers with facilities of

more than 1 MW. Under PURPA, however, eligible QFs include small power production facilities having a capacity of up to 80 MW, with no minimum threshold. See 16 U.S.C. §796(17). The 1 MW criterion in Vectren's new standard contract thus introduces an eligibility barrier that deviates from the terms of PURPA.

Vectren equivocates on whether a customer with a QF of less than 1 MW could elect the service terms set forth in the new standard contract. Vectren first states "the same terms would be available to customers with less than 1 MW." See Vectren Brief at 19.[2] Vectren then asserts the same terms "could be made available" to such a customer. Id. at 40. Then Vectren says the prior standard form contract remains available, and customers with QFs of less than 1 MW could use that form instead. Id. at 41. The Commission, conversely, believes the new standard contract "only applies to facilities of 1 MW or more," and only the other preexisting standard contract would be available to customers not meeting the 1 MW criterion. See Commission Brief at 38. Apparently Vectren and the Commission disagree about the question of availability.

This is a matter of great importance to customers with smaller QFs such as rooftop solar installations. Unlike the prior standard offer, the new contract authorizes using a QF's generation to offset electricity received under a retail rate from the utility, with only the "net" energy being subject to billing or purchase by Vectren. See App. vol. II at 56, 60 §4. The effect is to reduce charges to the customer at the higher retail rate, instead of providing taxable revenue to the customer at the lower wholesale rate. Unlike the prior standard offer, moreover, the new contract maintains the initial pricing structure for at least the first three-year term. Id. at 61 §8. In order to establish PURPA

[2] If the new standard contract had not recited the minimum threshold of 1 MW, Solarize Indiana would not have objected to that 30-day filing.

compliance, Vectren evidently wishes to assure the Court the same terms would be applied to smaller QFs, despite the recited minimum threshold in the form contract. The Commission, meanwhile, suggests the standard form contract is not available to smaller QFs, which instead must submit to materially different terms. That debate was not litigated or resolved by the summary approval below.

2. Vectren failed to provide a long-term option for predetermined pricing

In its initial appeal brief, Solarize Indiana explained that Vectren's proposed standard offer failed to include one of the three pricing structures required under PURPA, specifically long-term contracts at predetermined pricing. Compare 18 C.F.R. §§292.304(d)(1), (d)(2)(i), (d)(2)(ii) with App. vol. II at 33-51. In response, Vectren argues as though the challenge concerned the new standard *contract*. See Vectren Brief at 41-42. What Solarize Indiana cited, however, was the other filing proposing new *purchase rates* (see Solarize Indiana Brief at 30, citing App. vol. II at 33-51), not the new standard contract (App. vol. II at 56-69). Indeed, the issue is less acute with the new standard contract, which unlike the purchase rate filing sets the pricing structure for at least the initial three-year term. See App. vol. II at 61 §8. Despite the apparent confusion, Vectren's response does not meet the substance of the objection.

Both below and on appeal, Solarize Indiana properly cited the relevant FERC regulations requiring three pricing structures at the option of the QF customer. See App. vol. II at 151; Solarize Indiana Brief at 29-30. Vectren, however, relies on a new provision that was not promulgated by FERC until after the Order was issued, and in fact was still not yet effective when Vectren filed its appeal brief. See Vectren Brief at 42 (citing subsequently adopted language at 18 C.F.R. §292.304(d)(2), not effective until

December 31, 2020). If Vectren's filing complies with that revised provision, it is only by coincidence. There is good reason to conclude it does not.

As noted in Solarize Indiana's initial brief at p.14 n.1, the recent revisions arose from FERC Order 872, in which FERC clarified that any impression the revised rule "has eliminated fixed rates for QFs is not correct." See 85 Fed. Reg. 54,638 (Sept. 2, 2020) at 54,645. Only a portion of the price may be variable, and only in states that "choose" that option. Id. Indiana has taken no steps to implement any change based on that revision. The Vectren rate proposal, furthermore, did not call for variable pricing as contemplated in the revised FERC rule, but rather established set purchase rates for "Year 2020." See App. vol. II at 33-45. In the filing below, Vectren did not rely on or comply with the new FERC provision, which will not be effective until December 31, 2020.

The Commission adopts a different theory, asserting without any evidence that a one-year contract is sufficiently long-term to satisfy the PURPA standard. See Commission Brief at 40-41. The proposed Vectren purchase rates would be in effect for one year, but that does not mean Vectren is offering one-year contracts at those prices. See App. vol. II at 33-45 (setting prices only for "Year 2020"). A QF customer entering into a contract halfway through the year, for example, would receive the fixed prices for only six months.

The Commission can only state that federal law does not specify a required contract duration, and "in other contexts" FERC has considered one-year contracts to be long-term. See Commission Brief at 40. Both federal and Indiana law call for rates sufficient to "encourage" small power production. See 16 U.S.C. §824a-3(a); Ind. Code §§8-1-2.4-1, -3. There is no record here supporting the theory that a one-year contract would fulfill that purpose. In Vote Solar v. Montana Dept. of Public Service Regulation,

473 P.3d 963, 981-83 (Mont. 2020), the Montana Supreme Court concluded even a 15-year limitation was not supported by sufficient evidence. The Commission argues Indiana law is different from Montana's (see Commission Brief at 41), but that does not mean a one-year commitment is enough as a matter of law. This is an issue calling for evidence and analysis, not summary approval without a hearing.

3. Vectren's avoided cost computation was deficient in several respects

Solarize Indiana asserted below that Vectren's "avoided cost" computation was understated with respect to infrastructure costs, line losses, and avoided emissions. See App. vol. II at 93-94 ¶7(E); id. at 151-52 ¶3. On appeal, Vectren and the Commission state those costs were reflected in the Vectren computation, indirectly, as embedded factors in elements of the formulae. See Vectren Brief at 37-38; Commission Brief at 24-25, 40. Specifically, transmission and line loss costs are reflected in the "locational marginal price" or "LMP" used to determine energy costs, and emissions costs are supposedly accounted for as avoided investment for pollution control equipment as part of the capacity computation. Id. However, those indirect measures capture only a portion and not all of the avoided costs.

As Vectren and the Commission note, LMP is a wholesale price established by federally regulated regional organizations. See Vectren Brief at 37; Commission Brief at 24-25. As a federal construct, that organizational structure oversees the interstate transmission grid and wholesale markets, but excludes generation facilities and distribution within a state. See 16 U.S.C. §824(b)(1). As Solarize Indiana pointed out, whether a QF on the transmission or the distinct distribution system makes a material difference in the avoided cost calculation. See App. vol. II at 93-94 ¶7(E). Smaller QFs

such as rooftop solar installations are typically connected to the local utility's distribution system, not the interstate transmission grid. An LMP-based computation reflecting only costs associated with the interstate transmission system, accordingly, does not incorporate the full value of avoided investments for QFs connected to the distribution system. See also NIPSCO Industrial Group v. Northern Indiana Public Service Co., 31 N.E.3d 1, 13-17 (Ind. App. 2015) (addressing the distinction between transmission and distribution costs).

With regard to emissions, Vectren and the Commission contend that the cost of pollution control equipment is included in the hypothetical generating facilities that Vectren can avoid building as a result of customer-owned power production. See Vectren Brief at 37; Commission Brief at 25. Notwithstanding those assertions, there is no record here that any pollution control costs at all are reflected in the calculation. The portion of the Vectren filing cited by the Commission simply recites a dollar figure for a "generic 237 MW simple cycle turbine," without any breakdown showing a cost for pollution control equipment. See App. vol. II at 38. The provision in Rule 4.1 cited by Vectren, similarly, defines "V" as an investment amount for an avoidable unit, without specifying pollution control as a component. See 170 Ind. Admin. Code §4-4.1-9(a).

Moreover, the FERC regulation governing purchase rates calls for a determination of avoided costs arising from "the reduction of fossil fuel use." See 18 C.F.R. §292.304(e)(3). Reducing fossil fuel use is not equivalent to investing in pollution controls. Vectren describes the issue as an effort to establish a "carbon adder" as discussed in Vote Solar, 473 P.3d at 975-78, characterizing that holding as idiosyncratic to Montana law. See Vectren Brief at 37-38. What the Court concluded there, however, was that the "exclusion of consideration of carbon dioxide emissions

costs from the avoided-cost rate violates PURPA." See 473 P.3d at 977. Accounting for "the reduction of fossil fuel use" in the price paid for a QF's non-fossil fuel generation is a requirement of federal law, not just Montana law. See 18 C.F.R. §292.304(e)(3).

4. Vectren's proposals are discriminatory

PURPA requires that purchase rates must be non-discriminatory. See 16 U.S.C. §824a-3(b)(2); 18 C.F.R. §292.304(a)(1)(ii). Solarize Indiana raised two grounds for non-compliance with that requirement: first, Vectren's proposed rate falls far below the established rate for its purchases from an affiliated supplier; and second, Vectren limited its new standard contract to QFs of more than 1 MW. See App. vol. II at 92 ¶3, 94 ¶7(G), 152 ¶4. In response, Vectren and the Commission argue there is no discrimination insofar as the affiliated generator has distinct characteristics as a "dispatchable" resource. See Vectren Brief at 38-39; Commission Brief at 41-43. They also contend the 1 MW criterion in the new standard contract may or may not be a limitation on availability, and if it is, some differentiation is permitted anyway and smaller customers can instead use the earlier, different standard contract. See Vectren Brief at 39-41; Commission Brief at 38-39. Those assertions do not establish compliance as a matter of law or support summary approval.

Concerning the sizable differential between Vectren's proposed purchase rates from QFs and its price for purchases from an affiliated generator, Vectren and the Commission argue the other generation facility differs from small QFs because it is "dispatchable." See Vectren Brief at 39; Commission Brief at 42-43. However, the characteristics of that facility are not part of the record because no evidence has been submitted. While "dispatchability" may be a point of analysis in a hearing below, it cannot be elevated to the status of a definitive conclusion in this appeal. Further, as an

abstract question, "dispatchability" could support a distinction in price, but that does not mean any difference automatically justifies any price discrepancy, no matter how great. Here, the affiliated generator is an available alternative for Vectren to procure the incremental power it can avoid by purchasing instead from QFs, yet according to Vectren and the Commission the price of that alternative is completely irrelevant.[3]

As for the 1 MW criterion recited in the new standard contract, Vectren and the Commission struggle to defend the limitation and ultimately suggest smaller QFs might be relegated to the prior standard contract with materially different terms. See Vectren Brief at 39-41; Commission Brief at 38-39. They simply assume sufficiency without a developed record. Even if differentiated offerings are theoretically defensible, that does not automatically demonstrate the particular distinctions proposed here are justified. PURPA prohibits discrimination, yet Vectren and the Commission ask the Court to assume the difference in treatment at issue is PURPA-compliant as a matter of law.

In all respects, the PURPA violations raised by Solarize Indiana are soundly supported by applicable law. The appeal arguments by Vectren and the Commission raise disputed points that do not resolve the objections. Those disputes contradict the premise adopted below, that the Vectren filings were noncontroversial and eligible for summary approval without a hearing.

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[3] Under PURPA, avoided cost is defined as the "but for" cost the utility would incur to "generate *or purchase from another source*." See 16 U.S.C. §824a-3(d) (emphasis added); 18 C.F.R. §292.101(b)(6). Even though incremental energy needs may be purchased by Vectren from its affiliate or other sources, Vectren's avoided cost computation is based solely on hypothetical construction costs for a new power plant, without accounting for the alternative of market purchases.

D. Solarize Indiana Is Properly Appealing a Final Order

Vectren argues that Solarize Indiana failed to exhaust its administrative remedies. See Vectren Brief at 28-32. Pointing to a provision stating the 30-day filing rule does not restrict either the right to file a regulatory complaint or the Commission's investigation authority, Vectren claims that Solarize Indiana should have initiated a separate proceeding at the Commission to reassert the PURPA challenges. According to Vectren, the Order under review is not final until that process is completed, and hence this Court lacks jurisdiction to consider this appeal. Id. The Commission, notably, does not join in that argument. Vectren's position is unfounded and contrary to established exhaustion principles.

Vectren mischaracterizes the provision in the 30-day filing rule on which it predicates its exhaustion argument. Vectren states that provision provides recourse to "an objecting party that disagrees with the Commission's approval of the tariff or contract" or "a party that disagrees with a Commission's ruling on a 30-day filing." See Vectren Brief at 28; id. at 31 ("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."). That is not accurate. The provision does ***not*** prescribe a complaint or investigation as the remedy for an adverse ruling by the Commission on a 30-day filing. Rather, it is a subsection in the "objections" section, and is in the nature of a savings clause:

> 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.

See 170 Ind. Admin. Code §1-6-7(f). Under that clause, a complaint or investigation is not precluded by the objection process, and may be pursued whether an objection is

asserted or not. That is different in kind from an administrative review process that identifies a separate proceeding as the mechanism to contest an adverse Commission decision on a 30-day filing.

The Order under review here is unquestionably a final order. It concluded the administrative process, denied the asserted objections, and granted the requested regulatory approval. It was formally issued by the Commission at a publicly noticed conference, endorsed by all five Commissioners, and duly certified by the Secretary of the Commission. See App. vol. II at 9. It states, with conclusiveness: "**IT IS SO ORDERED.**" Id. (emphasis in original). That Order contemplated no further administrative action and left no administrative process incomplete.

None of the cases cited by Vectren at pp. 30-31 of its brief involved, like here, an appeal from an order by the full Commission concluding an administrative proceeding. Those cases all concerned trial court actions initiated in lieu of available administrative remedies or skipped steps in the administrative process. In Haggard v. PSI Energy, Inc., 575 N.E.2d 687, 691 (Ind. App. 1991), the customer commenced a trial court action after an informal complaint was denied by the Commission's Consumer Affairs Division ("CAD"), failing to secure a ruling by the Commission itself. See 170 Ind. Admin. Code §16-1-6 (process for Commission review of CAD determinations). As the Court explained, "If a favorable ruling was not forthcoming from the Commission, the plaintiff must then appeal to the Indiana Court of Appeals which has exclusive jurisdiction for the judicial review of the Commission's decisions." See 575 N.E.2d at 691-92. This case, unlike Haggard, seeks review of a final Commission order, and as Haggard prescribed has been properly brought to this Court.

The Commission proceeding that Vectren cites does not support any exhaustion requirement. See Vectren Brief at 29 (citing In re Indiana Payphone Association, 2004 WL 2464635 (Ind. U.R.C. Sept. 29, 2004)). That was a complaint case filed in 2002 challenging the payphone rates of regulated carriers. The rates had been submitted as compliance filings in response to a 1996 FCC order, through the 30-day filing process. See id. ¶3. There is no indication that the later complainant raised any objection at that time, or that the complaint six years later was a reaction to the 30-day filing approval. The challenge asserted in the complaint, rather, was based on subsequent FCC rulings. Id. That proceeding does not remotely suggest that an independent complaint is a necessary administrative step to challenge a Commission ruling on a 30-day filing.

The further complaint proceeding that Vectren envisions here could only seek prospective relief, not reversal of the existing Order. Vectren has not cited any authority suggesting a collateral agency proceeding must be initiated after the administrative process has been completed. See Austin Lakes Joint Venture v. Avon Utilities, Inc., 648 N.E.2d 641, 644 (Ind. 1995) (stating exhaustion doctrine is "intended to defer judicial review until controversies have been channeled through the complete administrative process" and "to avoid collateral, dilatory action") (quoting Uniroyal, Inc. v. Marshall, 579 F.2d 1060, 1064 (7th Cir. 1978)). Here, the agency process is complete and initiation of a collateral proceeding is unnecessary.

E. Efforts to Shift the Controversy Elsewhere Cannot Justify the Refusal to Address the PURPA Violations

Vectren and the Commission have a number of ideas about how the PURPA violations raised by Solarize Indiana might instead be addressed another day through a different mechanism. In the reasoning adopted below, the Commission suggested that

Solarize Indiana request a rulemaking to amend Rule 4.1. See App. vol. II at 24, 26. The Commission also indicated Vectren's separate EDG filing provided "the appropriate proceeding" to raise the issues. Id. On appeal, Vectren contends that Solarize Indiana should commence a complaint proceeding or seek a formal Commission investigation, rather than pursue this appeal. See Vectren Brief at 28-32, 47. The Commission further asserts that Solarize Indiana "needs to talk to the General Assembly." See Commission Brief at 35. The problem with all of those suggestions, however, is that the Commission, *in the Order under review*, granted summary approval to the Vectren 30-day filings, disregarding the asserted violations of federal law.

Vectren and the Commission focus on aspects of the proposed relief in the Solarize Indiana objections, including the asserted need to update Rule 4.1, potential consolidation with Vectren's EDG proceeding, and the suggested use of Vectren's territory as a "laboratory." See Vectren Brief at 13, 24-25, 45-46; Commission Brief at 26, 28-29, 35. Certainly, Solarize Indiana supports an update to Rule 4.1, which as the Commission admits (see Commission Brief at 18) has not been materially revised since 1984, despite dramatic changes in market structure and technological advances. And Solarize Indiana advocated procedural efficiency through consolidation with the separate EDG docket also involving utility dealings with customer-owned solar facilities, seeking a comprehensive approach to serve as a "laboratory" for improved support of solar installations. See App. vol. II at 92-94. This appeal, however, does not challenge the Commission's denial of those Solarize Indiana proposals. What is at issue here, rather, is the summary approval of the Vectren 30-day filings without a hearing, despite the objections asserting non-compliance with PURPA requirements.

Vectren argues that parallel issues are being litigated in the pending EDG proceeding. See Vectren Brief at 45-47. However, even though the analysis adopted in the Order stated the other case would be "the appropriate proceeding" to raise the PURPA objections (see App. vol. II at 24, 26), the Docket Entry granting Solarize Indiana's intervention in that docket admonished that "PURPA related matters" were "not shown to be within the scope of this matter." See May 29, 2020 Docket Entry in Cause No. 45378.[4] When Solarize Indiana moved to consolidate, prior to the Order in this case, Vectren argued that consolidation would introduce "unrelated issues" and that "PURPA does not apply in this setting." See June 8, 2020 Vectren Response at 3, 14. The Commission denied the motion to consolidate, two days after the Order under review, finding the 30-day filings are "no longer pending." See June 26, 2020 Docket Entry. Unquestionably, the refusal to consider the PURPA objections here, while indicating the EDG case was "the appropriate proceeding" to raise those issues, led to a far different reception in that docket. Plainly, Vectren opposes consideration of PURPA issues in that case as well.

Finally, Vectren and the Commission improperly malign Solarize Indiana's motivations in advocating compliance with PURPA. Vectren states that Solarize Indiana engaged in a "misuse" of the objection process, and the Commission accuses it of trying to "hijack" the 30-day filing process, which would be "thwarted" by "baseless objections." See Vectren Brief at 10 & n.1, 24-25; Commission Brief at 32, 34-35.[5]

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[4] The pleadings in Cause No. 45378 are posted at https://iurc.portal.in.gov.

[5] The excess of adversarial zeal in the Commission's brief is particularly troubling, as the Commission is the agency charged with enforcing the laws relating to public utilities and will be the tribunal for any remand proceedings. See Ind. Code §8-1-1-5(a) (the Commission "shall" be "impartial" in all controversial proceedings; "The commission

Solarize Indiana is a nonprofit organization staffed by volunteers, created to promote "the adoption of clean, renewable energy through well-informed public and private energy choices." See App. vol. II at 91 ¶1. There is nothing underhanded or illicit about its mission. Achieving its policy objectives here, of course, depends on prevailing on the merits of the PURPA objections raised below. Vectren and the Commission seem to regard prompt approval as the overriding priority. See Vectren Brief at 22, 29; Commission Brief at 32, 35. That is no proper answer to the asserted violations of applicable law.

shall in no such proceeding, during the hearing, act in the role either of a proponent or opponent on any issue to be decided by it"). The Commission may defend its orders on appeal, but that does not require adopting a partisan posture and unjustly castigating a litigant that has and will appear before it in regulatory proceedings.

III. CONCLUSION

The Commission erred by granting summary approval, without a hearing, on the ground that the Vectren 30-day filings were noncontroversial, notwithstanding Solarize Indiana's express, written objections alleging PURPA violations. The Order should be reversed and the matter remanded with instructions to deny summary approval on the grounds that the filings are controversial.

Respectfully submitted,

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WORD COUNT CERTIFICATE

The undersigned counsel hereby verifies, in accordance with Ind. Appellate Rules 44 and 46, that except for those portions of the reply brief excluded from the word count, the foregoing *Reply Brief of Appellant Solarize Indiana, Inc.* contains 6,996 words as calculated by the word count function of the word processing software used to prepare the Reply Brief.

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CERTIFICATE OF SERVICE

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