STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF SOUTHERN INDIANA GAS AND ELECTRIC COMPANY D/B/A VECTREN ENERGY DELIVERY OF INDIANA, INC. FOR APPROVAL OF A TARIFF RATE FOR THE PROCUREMENT OF EXCESS DISTRIBUTED GENERATION PURSUANT TO IND. CODE § 8-1-40 ET SEQ.	))))))))	**CAUSE NO. 45378**

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR'S AND THE JOINT PARTIES' RESPONSIVE BRIEF

INTRODUCTION

Southern Indiana Gas and Electric Company d/b/a Vectren Energy Delivery of Indiana's ("Vectren" or the "Company") conclusions regarding the definition and calculation of "excess distributed generation" ("EDG") in its proposed order and supporting brief are incorrect. Vectren's language in the proposed order is conclusory and ignores contradictory testimony that undermines Vectren's position. The arguments presented in Vectren's supporting brief raise the same arguments that Citizens Action Coalition of Indiana, Environmental Law and Policy Center, Solar United Neighbors, Vote Solar (collectively, "Joint Intervenors"), the Indiana Office of Utility Consumer Counselor ("OUCC"), Solarize Indiana, and IndianaDG (collectively, "Joint Parties") have disproved in previous filings. Ultimately, Vectren's method to calculate EDG incorrectly applies the statutory requirements and should be rejected by the Commission.

Vectren's defense of its proposed EDG tariff rests on the fictitious description of its proposal as "instantaneous netting," a term that is both inaccurate and misleading. Vectren cannot point to anything that is actually "netted" in its "instantaneous netting" proposal. It is undisputed that "inflow" and "outflow" cannot occur simultaneously across a customer's meter (and therefore cannot be "netted" instantaneously). Under Vectren's proposed tariff, rather, every kWh of a

customer's inflow is billed at the retail rate and every kWh of outflow is credited at the EDG rate. This is commonly known as an "inflow/outflow" tariff, in which nothing is netted. Vectren's use of "instantaneous netting" is a terminological red herring designed to distract attention from the fact that "the difference" prescribed by the statute is not properly reflected in Vectren's tariff at all.

Nothing in Vectren's opening brief addresses this core failure of Vectren's proposal. The Indiana legislature could have drafted the EDG statute to implement an "inflow/outflow" billing regime like that proposed in Vectren's tariff, but it did not. Instead, Ind. Code § 8-1-40-5 plainly states that EDG is the "difference between" "electricity supplied by an electricity supplier to a customer that produces distributed generation" ("inflow"), and "electricity that is provided back to the electricity supplier by the customer" ("outflow"). Vectren's "inflow/outflow" proposal therefore violates the plain language of the statute and must be rejected.

The fact that the EDG statute does not explicitly designate a netting period does not mean that Vectren's "inflow/outflow" proposal can be approved as consistent with the plain language of the statute. The General Assembly did not adopt a pure "inflow/outflow" model like that proposed by Vectren. Instead, it modified the existing netting model. By failing to propose *any* netting period, Vectren's proposal violates the law on its face precisely because it is nothing more than an "inflow/outflow" model rather than conforming to the netting model modified by the legislature. The Commission cannot depart from the plain language of the statute to implement a novel billing model, like Vectren's proposed tariff, that would be contrary to the statutory language. The Commission's discretion to fill gaps where the law is silent does not authorize the Commission to depart from the statute's plain meaning where the legislature has spoken as it has here. Vectren's proposal is contrary to Ind. Code § 8-1-40-5 and must be rejected.

Vectren's various non-statutory policy arguments regarding the supposed (and unproven) "cross-subsidies" inherent in monthly netting provide no basis for the IURC to depart from the plain meaning of the statute. While Vectren may prefer an "inflow/outflow" regime for DG compensation, the Commission cannot rely on Vectren's policy arguments to excuse Vectren from complying with the plain language of the law. Vectren's policy arguments challenge the structure of the law itself, and are therefore not an appropriate basis upon which the Commission may rest a decision.

For all of the reasons described in the Joint Parties' testimony, proposed order, and legal briefs, the Commission should reject Vectren's proposed EDG tariff and require the Company to file a new proposal that conforms to the requirements of Indiana law and the Commission's final order in this case.

ARGUMENT[1]

I. Vectren's "Inflow/Outflow" Proposal Is Not Consistent with Ind. Code § 8-1-40-5.

Vectren's attempt to square its proposed "inflow/outflow" tariff with the requirements of Ind. Code § 8-1-40-5 rests on Vectren witness Matthew Rice's internally contradictory testimony that was thoroughly debunked on cross-examination. At page 2 of Vectren's Initial Brief, the Company cites Mr. Rice's rebuttal testimony that "[t]he net of the electricity supplied by Vectren South to the customer and the electricity supplied back to Vectren South is captured as 'Outflow' on the customer's meter." Vectren Br. at 2 (citing Pet'r's Ex. 3 at 6, lines 13-15). This testimony is demonstrably inaccurate. Witness Rice admitted on cross-examination that "Outflow" represents "electricity that is supplied back to Vectren by the customer," not the "net of the

[1] The OUCC joins this brief with respect to Section I below, and the relief requested to reject Vectren's tariff. It takes no position on other arguments presented by the other Joint Parties.

electricity" supplied by Vectren to customers and supplied back to Vectren by customers. Joint Parties' Initial Br. at 6 (citing Transcript, page A-25, lines 19-23). Therefore, despite Vectren including the term "excess distributed generation" in the tariff's definition of "outflow," Vectren's underlying methodology to determine EDG does not follow the statutory definition.

There can be no mistaking the importance or implications of Mr. Rice's cross-examination admissions. He was referred specifically to the diagram of "Inflow" and "Outflow" at page 8 of his pre-filed rebuttal testimony (Vectren Figure 1) and confirmed that Outflow represents electricity that is "supplied back to Vectren by the customer." Joint Parties' Initial Br. at 3-4. He confirmed that Vectren proposes to "credit DG customers at the proposed EDG rate *for every kilowatt hour of outflow* during a billing period" without regard to Inflow. Transcript, page A-25, line 15 – page A-26, line 7 (emphasis added). As confirmed by Mr. Rice, there is nothing "netted" in Vectren's erroneously designated "instantaneous netting" proposal. Vectren's argument that Outflow represents "the net of both components" of Ind. Code § 8-1-40-5 simply ignores the contradictory testimony of its own lead witness and should be disregarded. *See* Vectren Initial Br. at 2.

Additionally, Vectren attempts to confuse the issue by using the term "excess" in a way that is different from the statutory definition. Vectren misleadingly characterizes "outflow" as the "unused or 'excess' electricity" produced by a DG customer. Vectren Initial Br. at 2. Vectren uses the term in this instance to describe a situation where a DG customer produces more than it consumes, but this does not relate to the specific statutory definition of EDG, which calls for a calculation of the actual difference of the energy supplied to the customer by the utility, and supplied to the utility by the customer. Vectren's use of the term is inconsistent with the statutory definition, and is improperly applied in this case.

Vectren's approach of charging the retail rate for every kWh of Inflow and crediting customers at a different rate for every kWh of Outflow is commonly known as an "inflow/outflow" tariff. The problem for Vectren is that the Indiana legislature did not authorize an "inflow/outflow" tariff. Instead, the legislature required a modified netting tariff, with "excess distributed generation" (defined as the "difference between" customer and utility supplied energy) to be credited at a modified EDG rate instead of the retail rate. That is not what Vectren proposed here. Vectren's attempt to recharacterize its "inflow/outflow" tariff as an "instantaneous netting" approach does not change the essential nature of its billing proposal. Despite the misleading "instantaneous netting" nomenclature, Vectren's billing proposal does not "net" anything at all. Every kWh of Inflow is billed at the retail rate, and every kWh of Outflow is credited at the EDG rate. Vectren simply ignores the statutory language requiring Vectren to apply the EDG credit to the "difference between" what the utility supplies to the customer and what the customer supplies to the utility.

When determining whether a statute is clear, Indiana courts presume that "the legislature uses undefined terms in their common and ordinary meaning." *NIPSCO Indus. Grp. v. N. Indiana Pub. Serv. Co*., 100 N.E.3d 234, 242 (Ind. 2018), modified on reh'g (Sept. 25, 2018); *U.S. Steel Corp. v. N. Indiana Pub. Serv. Co.*, 951 N.E.2d 542, 552 (Ind. Ct. App. 2011) ("The language of the statute itself is the best evidence of legislative intent, and we must give all words their plain and ordinary meaning unless otherwise indicated by statute."). As explained in Joint Parties' Initial Brief, the "common and ordinary" meaning of the EDG statute requires a tariff that compares "the difference between" Inflow and Outflow when applying the EDG rate. Joint Parties' Initial Br. at 8-9. Nothing in any of Vectren's briefs or its testimony (viewed as a whole, instead of selectively)

weakens or rebuts the Joint Parties' argument that Vectren's definition of EDG conflicts with the plain language of the EDG statute.

When a statute is clear and unambiguous, the Commission cannot rely on non-statutory policy arguments to effectively "add new words to a statute which are not the expressed intent of the legislature." *City of Lawrence Utilities Service Board v. Curry*, 68 N.E.3d 581, 585 (Ind. 2017); *see also N.D.F. v. State*, 775 N.E.2d 1085, 1088 (Ind. 2002) ("[W]e will not read into the statute that which is not the expressed intent of the legislature."). Therefore, the Commission should disregard the long litany of non-statutory policy arguments advanced by Vectren to support its "inflow/outflow" tariff, including Mr. Joiner's policy arguments about the extent to which the EDG statute mirrors Vectren's various power production costs and Vectren's red herring argument about EDG customers using Vectren's system as a battery. *See* Vectren Initial Br. at 2-3. If the legislature had intended to implement an "inflow/outflow" regime, it would have been easy to do so, but it did not. IURC is a creature of statute and must follow the law as written, not as Vectren wishes it to be. *See ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1200 (Ind. 2016) ("[T]he job of this Court is to interpret, not legislate, the statutes before it.").

The Commission should also reject Vectren's argument that faithfully implementing the plain language of Ind. Code § 8-1-40-5 would result in "a double netting" of energy supplied by Vectren to the customer. *See* Vectren Initial Br. at 3. Vectren's "double netting" argument depends on the fiction that Vectren's so-called "instantaneous netting" approach actually "nets" the statutory components of EDG. But, as explained above, Vectren's proposed "inflow/outflow" tariff does *not* net the amount of energy supplied by Vectren against the energy supplied back to Vectren by its EDG customers. Vectren's "double netting" argument is therefore meritless.

In short, Vectren's EDG instantaneous netting proposal does not comply with the plain language of the statute, and it must be rejected.

II. Vectren's Attempts to Inject Ambiguity into Ind. Code §8-1-40-5 and Support its Interpretation with Policy Arguments Fail as a Matter of Statutory Construction and in Light of the Record.

Section II of Vectren's Brief consists exclusively of non-statutory policy arguments attacking so-called "subsidies" inherent in billing period netting. Vectren Initial Br. at pp. 5-9. These arguments are relevant, however, only if the Commission determines that Ind. Code §8-1-40-5 is ambiguous, which it is not. Even in the case of an ambiguity, Vectren's arguments fail as a matter of statutory interpretation when the language of Ind. Code ch. 8-1-40 is read as a whole as it must be. Moreover, even if Vectren's various policy arguments were relevant to the Commission's statutory interpretation, those arguments are predicated on conjectures about "cross-subsidies" and are speculative, unproven, and outweighed by the Joint Parties' more persuasive analysis of the small annual cost of DG customer credits and the system benefits DG can offer.

Vectren's Brief implies possible statutory ambiguity, stating: "Ind. Code § 8-1-40-5 may not require use of an instantaneous netting methodology, but it certainly does not specify the use of the same monthly netting methodology used for net metering." Vectren Initial Br. at 5. This argument does not save Vectren's proposal. The EDG statute's failure to explicitly designate a netting period does not somehow justify Vectren's proposal to implement "inflow/outflow" billing. The EDG statute clearly requires a utility proposal that nets the "difference between" electricity supplied to and received from their customers. Vectren's "inflow/outflow" proposal does not contain *any* proposed netting period. While the Commission may use its informed expertise and judgment to fill gaps in an ambiguous statute, the Commission is not free to depart

from the statute's plain language where the legislature has directly spoken. *See St. Vincent Hosp. & Health Care Center v. Steele*, 766 N.E.2d 699, 703-04 (Ind. 2002) ("Clear and unambiguous statutory meaning leaves no room for judicial construction.").

Furthermore, it is incumbent upon the Commission to adhere to an interpretation that can be harmonized with the statutory scheme as a whole. *See, e.g., State v. Magnuson*, 488 N.E.2d 743, 751 (Ind. Ct. App. 1986) (Department of Safety and Police Department statutes dealing with statistics gathering were harmonized by concluding that earlier statute imposing obligation to gather statistics was not impliedly repealed by later law dealing with same general subject); *County Council of Monroe County v. State ex rel. Monroe County Bd. of Pub. Welfare*, 402 N.E.2d 1285, 1288-91 (Ind. Ct. App. 1980) (agency powers harmonized under State Personnel Act, Welfare Act of 1936, and county council statutes). The Indiana Supreme Court has repeatedly held that the "implied repeal" of existing statutory or regulatory provisions is disfavored, and "will only occur if it is clear that the statutes are so inconsistent that it must be assumed the General Assembly did not intend that both remain in force." *Schrenker v. Clifford*, 270 Ind. 525, 528, 387 N.E.2d 59, 60–61 (1979) (citing *Schnee v. State*, 254 Ind. 661, 262 N.E.2d 186 (1970)).

This "clear statement" rule further supports the Joint Parties' position. Ind. Code § 8-1-40-21, with limited exceptions not pertinent here, unambiguously does not alter the underlying billing mechanics of the Commission's existing net metering rules.[2] Under those rules, there is no dispute that the measurement interval is a "billing period" interval. *See* 170 IAC 4-4.2-7(2) ("The investor-owned electric utility shall measure the difference between the amount of electricity delivered by the investor-owned electric utility to the net metering customer and the amount of electricity

[2] Specifically, Ind. Code § 8-1-40-21(b) allows the Commission to amend its rules in limited circumstances such as to update fees. As noted above, none of the exceptions are relevant to this case.

generated by the net metering customer and delivered to the investor-owned electric utility during the billing period"). Adoption of an "instantaneous interval" not based on the billing period would be a change that is inconsistent with both the Commission's rules and Ind. Code § 8-1-40-21. If the legislature had intended a change to the billing period interval, it could, and would, have said so expressly. It did not. Rather, it expressly *preserved* the Commission's rules, including the use of a billing period interval. In this instance, then, the lack of an express statement of a change in "netting interval" is not an invitation to a wholesale revision of billing practices and their replacement with an impossible "instantaneous netting" proposal. Indeed, the express preservation of the Commission's rules clearly evidences that the General Assembly did not intend a change from the extant "billing period" interval.

Further, as demonstrated in the Joint Parties' prior filings, not only do Vectren's arguments fail to overcome the plain language of the statute, its resort to policy arguments fails to support Vectren's own interpretation. As demonstrated in the Joint Parties prior filings, when the various parts of the statute are read in harmony with each other, as they must be, Vectren's policy arguments fail in the face of a record which illustrates they are not only predicated on unproven conjecture, but also unpersuasive.

Ultimately, Vectren's proposal for an "inflow/outflow" tariff is discordant with both the plain language of the EDG statute and the rules of statutory construction disfavoring "implied repeal" of existing law, and must be rejected in favor of an interpretation, like that offered by the Joint Parties, that harmonizes the statute as a whole.

CONCLUSION

As explained above, Vectren's proposed EDG tariff fails to properly apply Ind. Code § 8-1-40-5 by using components not stated in the statute and by failing to follow the plain, ordinary, and usual meaning of the statutory language. Vectren's attempts to inject ambiguity into Ind. Code § 8-1-40-5 and support its interpretation with policy arguments also fail as a matter of statutory construction and in light of the record. Therefore, Vectren's tariff is unlawful and must be rejected.

Respectfully submitted,

/s/ Jason Haas
T. Jason Haas, Atty. No. 34983-29
Indiana Office of Utility Consumer Counselor
115 West Washington Street, Suite 1500 South
Indianapolis, Indiana 46204
Phone: (317) 232-3315
thaas@oucc.in.gov
Attorney for OUCC

/s/ R. M. Glennon
Robert M. Glennon, Atty. No. 8321-49
Robert Glennon & Assoc., P.C.
3697 N. Co. Rd. 500 E.
Danville, IN 46122
Phone: (317) 852-2723
robertglennonlaw@gmail.com
Attorney for IndianaDG

/s/ Joseph P. Rompala
Joseph P. Rompala, Atty. No. 25078-49
LEWIS & KAPPES, P.C.
One American Square, Suite 2500
Indianapolis, Indiana 46282-0003
Phone: (317) 639-1210
Facsimile: (317) 639-4882
JRompala@Lewis-Kappes.com
Attorney for Solarize Indiana, Inc.

/s/ Jennifer A. Washburn
Jennifer A. Washburn, Atty. No. 30462-49
Citizens Action Coalition of Indiana, Inc.
1915 W. 18th Street, Suite C
Indianapolis, Indiana 46202
Phone: (317) 735-7764
Fax: (317) 290-3700
jwashburn@citact.org
Attorney for CAC, ELPC, SUN, and Vote Solar (collectively, "Joint Intervenors")

/s/ Bradley Klein
Bradley Klein, Atty. No. 5381-95-TA
Environmental Law & Policy Center
35 E. Wacker Drive, suite 1600
Chicago, Illinois 60601
Phone: (312) 795-3746
bklein@elpc.org
Attorney for ELPC and Vote Solar

/s/ Russell L. Ellis
Russell L. Ellis, Atty. No. 29240-49
6144 Glebe Drive
Indianapolis, IN 46237
Russell_ellis@abcglobal.net
Attorney for Solarize Indiana, Inc.