

**IN THE
INDIANA SUPREME COURT**

Court of Appeals Case No. 21A-EX-821

INDIANA OFFICE OF UTILITY)	Appeal from the Indiana Utility
CONSUMER COUNSELOR, et al.,	)	Regulatory Commission
)	
Appellants (Statutory Party and In-	)	No. 45378
tervenors Below),)	
	)	Hon. James F. Huston, Chairman,
v.	)	Hon. David Ober,
	)	Hon. Sarah E. Freeman,
SOUTHERN INDIANA GAS AND ELEC-	)	Hon. Stefanie N. Krevda,
TRIC COMPANY and INDIANA UTILITY	)	Hon. David E. Ziegner,
REGULATORY COMMISSION,	)	Commissioners
)	
Appellees (Petitioner and Adminis-	)	Hon. Carol Sparks Drake,
trative Agency Below).	)	Senior Administrative Law Judge

**BRIEF OF *AMICUS CURIAE* INDIANA ENERGY ASSOCIATION
IN SUPPORT OF TRANSFER**

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BRIEF STATEMENT OF THE INTEREST OF AMICUS CURIAE

The Indiana Energy Association, Inc. is an association of companies regulated by the Indiana Utility Regulatory Commission that provide electricity or natural gas to approximately four million Hoosiers. This brief is filed in support of the interests of IEA's five electric members: Duke Energy Indiana, AES Indiana, Indiana Michigan Power, Northern Indiana Public Service Co., and Vectren (now a CenterPoint Energy company).

This case concerns how utilities may or must compensate owners of solar panels for electricity that they deliver to the grid. That issue affects every Indiana investor-owned electricity provider—and by extension, their customers—and therefore implicates IEA's core interests. Moreover, the issue arises under Indiana's Distributed Generation Statute, and IEA was active in the legislative process leading to that statute.

IEA therefore has a strong interest in the Commission's order approving Petitioner Vectren's proposal for compensating solar-panel electricity. Because the Commission was correct and Vectren's Rider was appropriate, the Court of Appeals' reversal was mistaken, and IEA supports transfer and affirmance.

STATEMENT OF THE CASE

I. Rooftop Solar Panels Generate Unpredictable “Extra” Electricity That Is Difficult To Put To Use.

Buildings with small-scale equipment for generating electricity, such as solar panels, have become a frequent sight in recent years. Much of the electricity from such “distributed generation equipment” is used in the same buildings where it is generated.¹ But when the equipment generates more electricity than its owner needs at the time, what should be done with the surplus? This case involves Indiana’s response to that question.

Buildings with solar panels typically are still connected to the electrical grid, to receive electricity at times when the panels are not generating enough. So when the panels are generating *too much* electricity, it often is possible to feed the energy back onto the grid. But that serves little purpose. The amount of extra power generated by rooftop solar panels is too small and unpredictable (due to weather and other factors) to reduce the amount of power that energy companies must plan to generate and buy at wholesale on any given day. (*See* Pet. Ex.4 at 3.) As a result, even when excess rooftop-solar electricity is delivered to the grid, it “does not reduce power plant, distribution, or transmission system costs.” (*See* Comm’n Order at 38.)

¹ Although there are other types of distributed generation equipment (such as wind turbines), solar panels are the most prominent. So this brief sometimes uses “solar panels” and “distributed generation equipment” interchangeably.

II. The Old “Net Metering Rule” Required Regular Electric Customers To Subsidize Generous Payments To Solar-Panel Owners.

Despite this reality, Indiana law requires electric companies to “buy” the electricity that solar-panel owners deliver back onto the grid. The Commission adopted the first such rule in 2004, and the Legislature replaced that rule with a statute in 2017.

In 2004, as rooftop solar panels became more common, the IURC promulgated its “Net Metering Rule,” 170 I.A.C. 4-4.2-1 *et seq.* For electric customers with solar panels, the Net Metering Rule directed the electric company to bill the customer for only “the difference between the amount of electricity delivered by the ... utility to the ... customer and the amount of electricity generated by the ... customer and delivered to the ... utility during [each] billing period.” In other words, the customer had to pay for electricity only to the extent she received more *from* the grid in a given month than she delivered *to* the grid during that same month. In a month when the customer’s electricity deliveries were greater than her receipts, the excess deliveries were “banked” as a credit against future months when her receipts might exceed deliveries.

This was very generous to solar-panel owners—a generosity that came at the expense of regular electric customers. Although excess solar-panel electricity does not reduce utilities’ costs (as described above), the Net Metering Rule still required not only that they “buy” this excess electricity, but that they do so at artificially high prices. Utilities normally buy electricity at wholesale, and then sell it to customers at

a higher retail rate, which accounts not just for the wholesale price but also the utility's other costs. Under the Net Metering Rule, however, utilities were required to compensate solar-panel owners for their deliveries to the grid by providing an equal amount of free retail electricity *from* the grid. This effectively required utilities to pay for these deliveries not at the wholesale rate they pay for other electricity, but at the higher retail rate.

When the Commission promulgated the Net Metering Rule in 2004, there were two arguable policy reasons for that generosity. The first was the technical limitations of metering technology. As the text of the Net Metering Rule recognized, monthly netting was “in accordance with normal metering practices” in 2004. At that time, most electric meters could not separately track electricity inflow and outflow between a building and the grid; instead, meters simply ran “forward” when electricity was flowing from the grid to the building, and “backward” if the flow was reversed and electricity ran from the building to the grid. As a result, monthly meter readings revealed only the total difference between the amounts of electricity a customer received from the grid and delivered to the grid over the month. Since that monthly net number was often the only one available, the Net Metering Rule used it to determine what the customer would pay.

The second policy justification for the Net Metering Rule was subsidizing the initial cost of buying and installing solar panels. As the Commission recognized below, the primary reason for installing solar panels has always been to generate one's own electricity, without having to pay a utility. (Order at 39.) But in 2004, the cost of

buying and installing solar panels was quite high—more than triple the current cost.² Allowing solar-panel owners to “sell” their excess electricity—especially at above-market rates—helped defray those expenses. But this mechanism had an obvious and important limit: because it defrayed installation expenses only after-the-fact and over a considerable time, it helped only customers who had the financial resources to cover that initial cost.

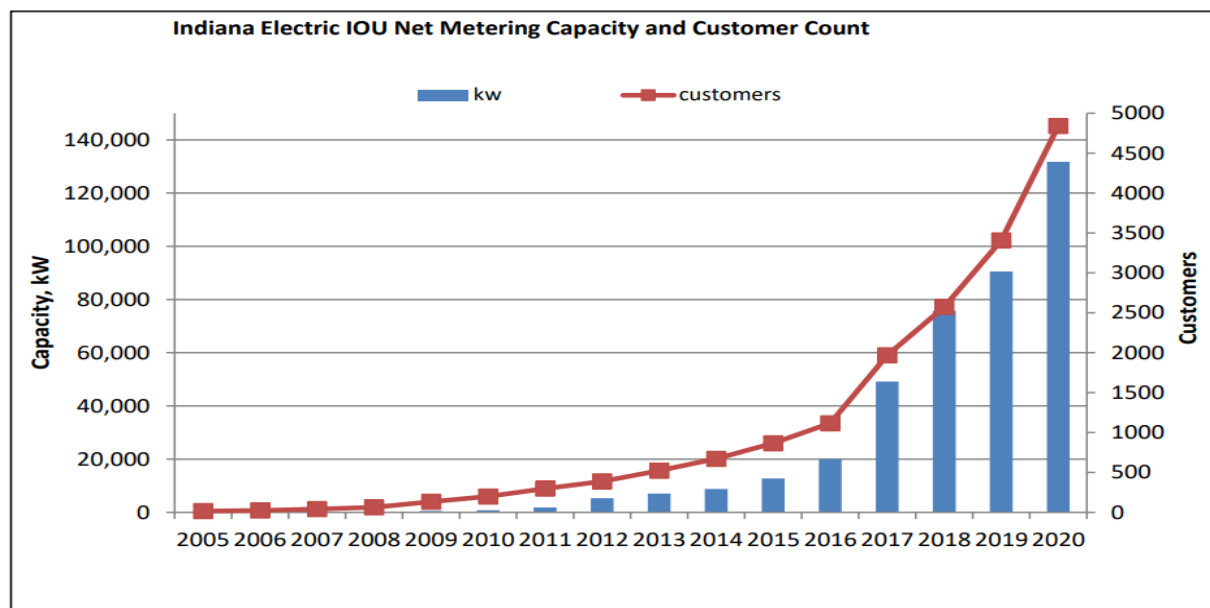
And of course, these above-market purchases from solar-panel owners required higher electricity rates for other customers—including, disproportionately, those who couldn’t pay the up-front cost of solar panels. As the Commission put it in this case: “non-[distributed generation] customers ... pay for the electricity consumed by the DG customers when they take electricity from Petitioner at no cost at a different time later in the month.” (Order at 38.)

III. Technical Advances Overtook The Net Metering Rule.

These generous subsidies worked. Solar panels and other distributed-generation equipment proliferated in Indiana:³

² See Solar Energy Industries Association, *Solar Industry Research Data*, available at <https://www.seia.org/solar-industry-research-data>.

³ Indiana Utility Regulatory Commission. *2020 Year-End Net Metering Report* (March 2021) at 2, available at <https://www.in.gov/iurc/files/2020-Year-End-Net-Metering-Required-Reporting-Summary.pdf>.



In recent years, however, three important technological developments have lessened the need for the subsidy. First, the cost of installing rooftop solar panels has fallen dramatically, decreasing the need for financial incentives—and shifting the subsidy’s cost further onto those with the fewest resources. Second, new “smart metering” technology has proliferated that can separately track a solar-panel owner’s electricity receipts and deliveries over any time period—rather than measuring just the monthly net of the two, as the old meters did. And third, as the Commission noted below, “[b]atteries for home solar systems” have become “readily available in today’s market” (Order at 39)—allowing electricity from rooftop solar panels to be stored for use onsite when the sun is not shining, rather than immediately fed back onto the grid.

IV. The Legislature Responds With The Distributed Generation Statute.

Against this backdrop, in 2017 the General Assembly replaced the Net Metering Rule by enacting Public Law No. 264-2017, §6, 2017 Ind. Acts 3739, 3743–51

(codified at Ind. Code §8-1-40-1 *et seq.*), which is known as the “Distributed Generation Statute.” This statute applies to solar panels installed after it was enacted. For those panels, the statute reduces—but does not eliminate—the subsidy that utilities must provide by paying for electricity delivered onto the grid.

The Distributed Generation Statute is different from the old Net Metering Rule in at least two important ways. First, the statute provides that if a solar-panel owner delivers more electricity to the grid than he receives from the grid over the relevant time period, he no longer may “bank” the excess as a credit to offset his future receipts. Instead, utilities must pay the customer for this excess electricity at 125% of their average wholesale rate—that is, less than the full retail price of electricity, but still a 25% premium over what the utility pays other electricity providers. Ind. Code §8-1-40-5. Specifically, a utility must pay 125%-of-wholesale for

the difference between:

- (1) the electricity that is supplied by an electricity supplier to a customer ...; and
- (2) the electricity that is supplied back to the electricity supplier by the customer.

Id. §8-1-40-17. The statute provides that other customers must pay for these purchases through the utility’s “fuel adjustment” charges. *Id.* §8-1-40-15.

Second, while the Net Metering Rule required that a solar-panel owner’s electricity receipts and deliveries be netted over each monthly billing period, the new Distributed Generation Statute is mum as to what time period should be used for calculating that “difference” between the two. As the Commission put it, “the statute is silent regarding the frequency with which a utility must calculate” the difference

between deliveries and receipts. (Order at 38.) The Court of Appeals acknowledged this: “Although Indiana Code 8-1-40-5 prescribes the calculation of a ‘difference’ between supplied inflow and supplied outflow, the Distributed Generation Statutes do not prescribe a particular period.” (Op. ¶16.)

Thus, the dispute in this case is whether this statutory silence gives the Commission discretion to approve appropriate netting periods on a case-by-case basis (as the Commission concluded), or whether it requires the Commission to continue following the old monthly-netting mandate (as the Court of Appeals held). (Op. ¶22.)

V. Different Netting Periods Will Result In Very Different Utility Bills.

This dispute is very important to determining a customer’s or the utility’s overall bill. As just described, the Distributed Generation Statute allows the utility to pay 125%-of-wholesale for only the “difference” between the customer’s electricity delivered and electricity received. Thus, to the extent a solar-panel owner draws electricity from the grid during the time period over which this “difference” is calculated, the statute allows her to offset that retail electricity use one-for-one with excess electricity deliveries from that same time period—effectively being compensated for those deliveries at the higher retail rate, just as under the Net Metering scheme.

And since a solar-panel owner’s electricity deliveries and receipts vary over time, using a longer period to calculate the “difference” between the two allows a greater opportunity for deliveries from one moment to offset receipts from another moment. Imagine, for example, a customer who delivers 100 kWh of electricity to the grid on one day, and *receives* 100 kWh *from* the grid the next day. If the time period

for calculating the “difference” between deliveries and receipts is long enough to include both days, then the “difference” over those two days is zero—the utility has compensated for the delivered electricity by providing an equal amount of free retail electricity. By contrast, if the time period for calculating the “difference” between electricity delivered and received is short enough *not* to encompass both days, then that one-for-one cancelling does not occur: the utility owes the customer wholesale-plus-25% for the deliveries, and the customer owes the utility the (higher) retail rate for his receipts.

In the aggregate, therefore, using a shorter or longer netting period will shift large sums of money between solar-panel owners and utilities—and by extension, the utilities’ other customers, especially the neediest ones.

VI. The Commission Recognized That The Distributed Generation Statute Allows A Range Of Netting Periods, But The Court Of Appeals Reversed, Mandating Monthly Netting.

In this proceeding, the Commission approved a request by a utility (Vectren) to use a short netting period through an “instantaneous netting” mechanism. In the Commission’s words, “instantaneous netting” involves measuring “the difference between the two [statutory] components of Section 5”—electricity delivered and electricity received—“occurring at that instant” or “at any given moment in time.” (Order at 36-37.) At any given instant, electricity can flow in only one direction—either from the grid into a building, or from the building onto the grid. Therefore, netting a solar-panel owner’s deliveries and receipts one instant at a time means there is never anything to offset—Vectren will compensate all the electricity delivered at a rate of

wholesale-plus-25%, and customers will pay for all the electricity they receive from the grid at the retail rate.

The Commission approved this proposal. It concluded that, because the Distributed Generation Statute is silent as to netting period, it authorizes the Commission “to exercise its expertise and discretion in determining the reasonableness of a utility’s proposed netting period for EDG,” including a shorter-than-monthly period. (Order at 38.) The Commission noted that using a lengthy netting period would come close to duplicating the old Net Metering Rule, and neuter the Distributed Generation Statute. It found it appropriate for Vectren to use an instantaneous netting period.

But the Court of Appeals reversed. The court believed that instantaneous netting involves “a comparison of supply” *to* a solar-panel owner “and electrical generation” *by* the solar-panel owner at any given instant. (Op. ¶13.) The court noted, however, that not all of that electrical generation “is supplied to Vectren”; much of it instead is used on-site to “meet[] the ... customer’s own needs.” (*Id.*) Thus, the court explained, considering the total electricity a customer generates at any given moment will determine only “whether [the] electrical energy is inflow or outflow” from or to the grid at that moment. (*Id.* ¶23.) Since the statute requires comparing inflow and outflow, not just determining which is occurring, the Court of Appeals concluded that the “process denominated as instantaneous netting[] does not satisfy the statutory criteria.” (*Id.*)

The Court of Appeals then went further and held that the statute does not just prohibit instantaneous netting, but also *mandates* the same monthly netting period

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that the old Net Metering Rule used. The court acknowledged that, “[i]n enacting ... the Distributed Generation Statutes, our Legislature clearly expressed its intent to end ... the net tariff in place.” (Op. ¶22.) Despite that, said the court, “there is no clearly expressed intent to end every ... vestige of net metering.” (*Id.*) Since there was no “new regulation to determine the period” for netting, the court held without further explanation that the Commission must continue to follow “the monthly billing period previously selected by our Legislature.” (*Id.*)

SUMMARY OF ARGUMENT

This case warrants transfer for two independent reasons. First, how Indiana utilities must pay for solar-power distribution affects the electric bills of millions of Hoosiers, and therefore is a question of “great public importance that has not been, but should be, decided by [this] Court.” Ind. App. R. 57(H)(4). Second, by offering no deference at all to an agency’s assessment of a technical issue within its expertise, “[t]he Court of Appeals has so significantly departed from accepted law or practice”—in a case of statewide import, no less—“as to warrant the exercise of Supreme Court jurisdiction.” Ind. App. R. 57(H)(6). The statute plainly gives the Commission discretion to determine an appropriate netting period, and the Commission’s approval of instantaneous netting was entirely reasonable.

ARGUMENT

I. This Case Is Of Great Public Importance.

Transfer is warranted, firstly, because this case affects the electricity rates paid by countless Hoosiers. As explained above, it costs utilities money to supply electricity *to* solar-panel owners, and accepting electricity *from* them provides utilities little value in return. Thus, the more solar-panel generation a utility must compensate with free retail electricity (rather than at the lower 125%-of-wholesale rate), the more it is forced to charge its other paying customers for their own electricity usage. Because the Court of Appeals' ruling requires a monthly netting period rather than any shorter period, it mandates a relatively high subsidy to solar-panel owners—and higher electricity bills for citizens who can't afford (or otherwise don't have) solar panels.

And while this case directly involved one utility (Vectren), the Court of Appeals purported to interpret the statute as a general matter. Thus, unless other utilities can distinguish their situations, the ruling below will require higher electricity bills for millions of Hoosiers who do not own solar panels or similar equipment. Indeed, all four of IEA's other electrical-utility members have proposals for shorter-than-monthly netting periods before either the Commission or the Court of Appeals.⁴ Along

⁴ *Office of Util. Cons. Counselor v. N. Indiana Pub. Serv. Co.*, No. 22A-EX-115 (Ind. Ct. App. filed Jan. 14, 2022); *Office of Util. Cons. Counselor v. Indiana Michigan Power Co.*, No. 22A-EX-389 (Ind. Ct. App. filed Feb. 22, 2022); *Office of Util. Cons. Counselor v. Indianapolis Power & Light Co.*, No. 22A-EX-378 (Ind. Ct. App. filed Feb. 22, 2022); *Petition of Duke Energy Indiana, LLC*, No. 45508 (Ind. Util. Reg. Comm'n filed Mar. 1, 2021).

with Vectren, these utilities collectively provide electricity to nearly 2.5 million Indiana customers.⁵ If transfer is not granted, the Court of Appeals’ decision here will doubtless be invoked in all those proceedings.

That statewide impact warrants this Court’s review.

II. The Court Of Appeals’ Inattention To The Commission’s Technical Expertise Warrants This Court’s Correction.

Transfer is warranted, additionally, because the Court of Appeals departed from settled law when it gave not the slightest deference to the Commission’s conclusions. We acknowledge that there is disagreement over the rule, previously articulated by this Court, that “[a]n interpretation of a statute by an administrative agency charged with the duty of enforcing the statute” is conclusive as long as “the agency’s interpretation is reasonable.” *Moriarity v. Indiana Dep’t of Nat. Res.*, 113 N.E.3d 614, 619 (Ind. 2019). But even under a far more modest understanding of agency deference, there are two ways in which the Court of Appeals’ failure to defer to the Commission was clearly wrong.

First, the court rejected out of hand the Commission’s highly-technical *factual* conclusions about precisely how instantaneous netting works. After lengthy discussion, the Commission concluded factually that “instantaneous netting” involves measuring “the difference between” electricity delivered and electricity received “occurring at that instant.” (Order at 36.) Although these findings were squarely within the Commission’s expertise and not at all within the Court of Appeals’, the court did

⁵ Indiana Office of Energy Development, *Investor-Owned Utilities*, available at <https://www.in.gov/oed/indianas-energy-landscape/electricity/investor-owned-utilities/>.

not defer to it. Instead, it engaged in its own highly-technical discussion and disagreed with the Commission, concluding that the “process denominated as instantaneous netting” results only in a “determination of whether an electrical energy is inflow or outflow,” not a calculation of the “*difference* between inflow and outflow.” (Op. ¶23 (emphasis added).)

Whatever deference a court may owe to an agency’s interpretation of a statute, the Court of Appeals plainly should have given at least some respect to the Commission’s expert answer to a question of science and engineering like this one. If refusals to defer like this one become widespread, they will cripple agencies’ ability to use their expert competencies in the service of the public.

Second, the Court of Appeals improperly treated the statute’s silence on the required netting period as an invitation not to case-by-case agency decisionmaking, but to one-size-fits-all judicial lawmaking. In this regard, three key points are undisputed: (1) the Net Metering Rule previously required that netting occur monthly; (2) the Legislature replaced that rule with a statutory scheme that does not specify a netting period, and (3) as a general matter, the statute leaves it in the Commission’s hands to approve tariff proposals from utilities. Short of an express delegation of authority to the agency, it is hard to imagine how the Legislature could more clearly indicate that it wanted the Commission—as the Commission concluded here—“to exercise its expertise and discretion in determining the reasonableness of a utility’s proposed netting period.” (Order at 38.)

But the Court of Appeals did not even *consider* whether the statute might authorize this kind of flexible agency decisionmaking. The court acknowledged that the Legislature had ended the Net Metering Rule without specifying a netting period, but it nevertheless declared—with virtually no explanation—that the Commission still must follow “the monthly billing period previously selected by our Legislature.” (Op. ¶22.) That was doubly mistaken: for one thing, the previous Net Metering Rule was *not* “selected by our Legislature” but promulgated by the Commission itself; and for another thing, *both* the Legislature *and* the Commission have repudiated the previous monthly-netting mandate—the Legislature by replacing the Net Metering Rule, and the Commission by approving less-than-monthly netting.

So in this context too, the Court of Appeals’ approach simply cannot be right, *regardless* of whether or when the courts must defer to an agency’s statutory interpretation. Instead, the court’s serious error is in its refusal even to consider the Legislature’s ability to call for case-by-case agency decisionmaking rather than a rigid judge-made rule.

III. The Court Of Appeals’ Decision Requires Correction.

Adding to the need for review is that the Court of Appeals’ decision is wrong on the merits: the statute allows the Commission to approve instantaneous netting, and its doing so comports with both the statutory purpose and sound policy.

A. The Statute Allows Instantaneous Netting, And Certainly Does Not Require Monthly Netting.

On its face, the statute places no limit on what netting period must be used. The Court of Appeals seems to have tried to wring such a limit out of the statutory

requirement for calculating the “difference” between the amounts of electricity a solar-panel owner supplies to and receives from the grid. Because a customer cannot deliver and receive electricity at the same instant, the court seems to have suggested that it is impossible to calculate the “difference” between the two (as the statute requires) on an instantaneous basis. That is a *non sequitur*. The fact that electricity flows in one direction at a time does mean that, at any given moment, either deliveries or receipts will be zero. But that obviously does *not* make it impossible or illogical to calculate the “difference” between the two at that moment: the difference between any number and zero is simply that number. The fact that the “difference” calculation is simply done as part of instantaneous netting is hardly a basis for finding that the Commission cannot *allow* it.

Moreover, even if this reasoning showed that the statute required a longer-than-instantaneous netting period, that would not remotely require the *monthly* netting that the Court of Appeals mandated. If the “difference” between electricity deliveries and receipts had to be calculated over some non-instantaneous period, why could it not be calculated weekly, daily, hourly, or even each minute or second? Nothing in the statute would even arguably prevent that.

B. Instantaneous Netting Comports With The Statutory Purpose And Sound Policy.

Not only does the statute authorize the Commission to approve instantaneous netting, but it was entirely reasonable for the Commission to do so.

There has been no dispute that the Legislature, in enacting the Distributed Generation Statute, sought to reduce but not eliminate the Net Metering Rule’s subsidies from non-solar-panel owners to solar-panel owners. The Commission’s approval of instantaneous netting furthers that statutory purpose, while the Court of Appeals’ monthly-netting mandate frustrates it. As the Commission explained, monthly netting (as mandated by the Court of Appeals) would result in precious little change and “would, essentially, be a continuation of net metering.” (Order at 36.) For instance, the Commission noted that, among one group of exemplar customers chosen by the parties opposed to instantaneous netting, most “would be billed for zero consumption most months of the year under a monthly netting paradigm, although energy was provided by Vectren South to [them] throughout the year.” (*Id.* at 37.) By contrast, instantaneous netting gives full effect to the statutory 125%-of-wholesale pricing mechanism—preserving the subsidy while reducing it from the previous regime, just as the Legislature intended.

Moreover, the Commission’s authorization of instantaneous netting yields sound policy results that the Court of Appeals’ holding does not. As the Commission noted, whole-building battery systems are now “readily available” to solar-panel owners. (Order at 39.) By storing electricity for use when a customer’s generation capacity is low, these systems can permanently reduce the customer’s need for electricity from the grid. But as the Commission explained (*id.*), there is no economic reason for a solar-panel owner to invest in a battery if she is compensated at the same retail rates for simply dumping the extra electricity back onto the grid—as she often would be

under the Court of Appeals' monthly netting period. By contrast, because instantaneous netting compensates output at a more realistic (but still generous) rate of wholesale-plus-25%, it incentivizes solar customers to store their power and put it to real use.

CONCLUSION

The Court should grant transfer and affirm the Commission.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify under penalties of perjury that this brief contains no more than 4,200 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 14, 2021, the foregoing was filed and served electronically via the Indiana E-Filing System upon the following people:

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