

MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Indiana Office of Utility
Consumer Counselor, Citizens
Action Coalition of Indiana, Inc.,
Vote Solar, Environmental Law
& Policy Center, Solarize
Indiana, Inc., Solar United
Neighbors, Indiana Distributed
Energy Alliance,

Appellants,

v.

Southern Indiana Gas and
Electric Company, Indiana
Utility Regulatory Commission,

Appellees.

Bailey, Judge.

January 28, 2022

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

Appeal from the Indiana Utility
Regulatory Commission

The Honorable James F. Huston,
Chairman

The Honorable David L. Ober,
Commissioner

The Honorable Sarah E.
Freeman, Commissioner

The Honorable Stefanie N.
Krevda, Commissioner

The Honorable David E. Ziegner,
Commissioner

The Honorable Carol Sparks
Drake, Senior Administrative
Law Judge

Cause No.
45378

Case Summary

[1] Effective July 1, 2017, the Indiana Legislature enacted the Distributed Generation Statutes, Ind. Code ch. 8-1-40, governing public electric utility purchases of excess distributed generation (“EDG”) from incoming distributed generation (“DG”) customers.¹ The new legislation set forth an acquisition price formula but did not by its terms reference or replace an existing regulation regarding the time interval for EDG calculation. The solution of Southern Indiana Gas and Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc., a CenterPoint Energy Company (hereinafter, “Vectren”), to both interval and base of calculation is a process it termed “instantaneous netting.”² The Indiana Utility Regulatory Commission (“the Commission”) approved a tariff rate rider (“Rider EDG”) incorporating this process. The Indiana Office of Utility Consumer Counselor, Citizens Action Coalition of Indiana, Inc., Vote Solar, Environmental Law & Policy Center, Solarize Indiana, and Solar United Neighbors (collectively, “Appellants”) now appeal. Concluding that the Rider EDG basis for the calculation of EDG credits is inconsistent with Indiana Code Section 8-1-40-5, we reverse.

Facts and Procedural History

¹ Distributed generation is typically produced from solar panels.

² (Tr. Vol. II, pg. 31.)

[2] Vectren serves retail electricity customers in Evansville, Indiana, and the surrounding area. Some of Vectren’s customers produce, typically through the use of solar panels, “distributed generation,” which is

electricity produced by a generator or other device that is located on the customer’s premises; owned by the customer; sized at a nameplate capacity of the lesser of: not more than one megawatt or the customer’s average annual consumption of electricity on the premises; and interconnected and operated in parallel with the electricity supplier’s facilities[.]”³ Ind. Code § 8-1-40-3. When the customer produces excess distributed generation, or EDG, “an electricity supplier shall procure the [EDG] at a rate approved by the commission” and these amounts credited to a customer “shall be recognized in the electricity supplier’s fuel adjustment proceedings.”

I.C. § 8-1-40-15.⁴

[3] EDG customers before July 1, 2017, were subject to a “net metering tariff.” *See* I.C. § 8-1-40-7.⁵ The Indiana Legislature enacted the Distributed Generation

³ The term does not include electricity produced by “a net metering facility (as defined in 170 IAC 4-4.2-1(k)) operating under a net metering tariff.” I.C. § 8-1-40-3(b)(2).

⁴ As a corollary, an electricity supplier is allowed to recover energy delivery costs from a distributed generation customer. Indiana Code Section 8-1-40-19(b) provides: “The commission may approve a request for cost recovery submitted by an electricity supplier under subsection (a) if the commission finds that the request: (1) is reasonable; and (2) does not result in a double recovery of energy delivery costs from customers that produce distributed generation.”

⁵ A “net metering tariff” is “a tariff that an electricity supplier offers for net metering under 170 IAC 4-4.2 [which] is in effect on January 1, 2017.” I.C. § 8-1-40-7. The Distributed Generation Statutes included grandfathering provisions for certain DG customers. Section 8-1-40-10 provides in relevant part:

[A] net metering tariff of an electricity supplier must remain available to the electricity supplier's customers until the earlier of the following:

(1) January 1 of the first calendar year after the calendar year in which the aggregate amount of net metering facility nameplate capacity under the electricity supplier's net metering tariff equals at least one and one-half percent (1.5%) of the most recent summer peak load of the electricity supplier.

(2) July 1, 2022.

Before July 1, 2022, if an electricity supplier reasonably anticipates, at any point in a calendar year, that the aggregate amount of net metering facility nameplate capacity under the electricity supplier's net metering tariff will equal at least one and one-half percent (1.5%) of the most recent summer peak load of the electricity supplier, the electricity supplier shall, in accordance with section 16 of this chapter, petition the commission for approval of a rate for the procurement of excess distributed generation.

Section 8-1-40-11 provides:

(a) Except as provided in sections 12 and 21(b) of this chapter, before July 1, 2047:

(1) an electricity supplier may not seek to change the terms and conditions of the electricity supplier's net metering tariff; and

(2) the commission may not approve changes to an electricity supplier's net metering tariff.

(b) Except as provided in sections 13 and 14 of this chapter, after June 30, 2022:

(1) an electricity supplier may not make a net metering tariff available to customers; and

(2) the terms and conditions of a net metering tariff offered by an electricity supplier before July 1, 2022, expire and are unenforceable.

Statutes, effective July 1, 2017, and directed that the Commission “shall approve a rate to be credited to participating customers by the electricity supplier for [EDG] if the commission finds that the rate requested by the electricity supplier was accurately calculated and equals the product of: (1) the average marginal price of electricity paid by the electricity supplier during the most recent calendar year, multiplied by (2) one and twenty-five hundredths.” I.C. § 8-1-40-17. EDG is defined in Indiana Code Section 8-1-40-5 as: “the difference between: (1) the electricity that is supplied by an electricity supplier to a customer that produces distributed generation; and (2) the electricity that is supplied back to the electricity supplier by the customer.”

[4] Customer credit is provided in accordance with Indiana Code Section 8-1-40-18:

An electricity supplier shall compensate a customer from whom the electricity supplier procures [EDG] (at the rate approved by

Indiana Code Section 8-1-40-13 provides that a customer participating in an electricity supplier’s net metering tariff on the date on which the electricity supplier’s net metering tariff terminates under section 10(1) or 10(2) (including a successor in interest who so chooses) will continue to be served under the terms and conditions of the net metering tariff until removal or replacement of the net metering facility or July 1, 2032, whichever occurs earlier.

Indiana Code Section 8-1-40-14 provides that a customer who had installed a net metering facility before January 1, 2018, will continue to be served under the terms and conditions of the net metering tariff until removal or replacement of the net metering facility or July 1, 2047, whichever occurs first.

the commission under section 17 of this chapter) through a credit on the customer's monthly bill. Any excess credit shall be carried forward and applied against future charges to the customer for as long as the customer receives retail electric service from the electricity supplier at the premises.

[5] Vectren timely filed, on May 8, 2020, a petition seeking Commission approval of Rider EDG. Vectren pre-filed direct testimony setting forth its contentions: in the sunset of the net metering tariff, the Indiana Legislature intended to completely replace – as to new customers – net metering regulations; the Legislature eliminated EDG credit at a retail rate and thus reduced subsidies to EDG producing customers at the expense of other customers; retaining a comparison of inflow and outflow on a monthly billing basis to calculate credit would essentially allow EDG customers to continue to bank credit at a retail rate contrary to legislative intent; Vectren would credit an amount equal to market wholesale cost plus 25% for EDG; and Vectren could fulfill its obligation to determine the EDG base by using its smart meters to “instantaneously net” competing energies meeting “behind the [DG customer] meter.” (Tr. Vol. II, pg. 31.)

[6] Various petitions to intervene were granted, and pre-filed testimony was submitted on behalf of the intervenors. On September 17, 2020, the intervenors filed a motion for summary judgment, together with a supporting brief. They contended that “instantaneous netting” did not calculate the “difference” in outflow and inflow “supplied,” as required by Indiana Code Section 8-1-40-5. On October 15, 2020, the Presiding Officers of the Commission denied the

motion for summary judgment, observing that summary judgment was atypical in Commission proceedings and concluding that the intervenors had not demonstrated their entitlement to judgment as a matter of law.

[7] On November 17, 2020, the Commission conducted a public hearing and provided the opportunity for cross-examination of witnesses upon the pre-filed testimony. The intervenors challenged Rider EDG on various grounds. On April 7, 2021, the Commission issued its order. Relevant to this appeal, the Commission found “Vectren South’s meters register at any given moment in time the difference between: (1) the electricity that is supplied by an electricity supplier to a customer that produces DG; and (2) the electricity that is supplied back to the electricity supplier by the customer and that instantaneous netting is permissible under Section 5 [of the Distributed Generation Statutes].”
Appealed Order at 37. The Commission “conceptualized” electricity supplied by Vectren and a customer’s distributed generation “meet[ing] at the meter as opposing forces, with the stronger force determining the direction of the flow.”
(*Id.* at 36.)

[8] In response to policy arguments, the Commission stated:

We do not believe the General Assembly enacted the Distributed Generation Statutes to sunset net metering and replace it with a construct that achieves a similar outcome. Our conclusion is buttressed by the legislature having capped the amount of net metering capacity on electricity suppliers’ systems but placing no comparable cap on EDG.

(*Id.* at 37.) Ultimately, the Commission approved Vectren’s petition, subject to some modifications not at issue here. This appeal ensued.

Discussion and Decision

Standard of Review

- [9] Appellants do not disagree with the factual findings of the Commission or challenge the rate of EDG credit in Rider EDG. Rather, appellants argue that Rider EDG rests upon an EDG calculation that is not in accordance with Indiana Code Section 8-1-40-5. This presents a question of law.
- [10] Ordinarily, we review an agency’s legal conclusions de novo. *Moriarity v. Ind. Dep’t of Nat. Res.*, 113 N.E.3d 614, 619 (Ind. 2019). Although we are not bound by an agency’s conclusions, an interpretation of a statute by an agency charged with the duty of enforcing it “is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.” *Id.* (quoting *Chrysler Grp., LLC v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 960 N.E.2d 118, 123 (Ind. 2012)). “In fact, ‘if the agency’s interpretation is reasonable, we stop our analysis and need not move forward with any other proposed interpretation.’” *Id.* (quoting *Jay Classroom Teachers Ass’n v. Jay Sch. Corp.*, 55 N.E.3d 813, 816 (Ind. 2016)).
- [11] “Our first task when interpreting a statute is to give its words their plain meaning and consider the structure of the statute as a whole.” *ESPN, Inc. v. Univ. of Notre Dame Police Dep’t*, 62 N.E.3d 1192, 1195 (Ind. 2016). Often, this is

the only step necessary to resolve an issue of statutory interpretation. *Shell Oil Co. v. Meyer*, 705 N.E.2d 962, 972 (Ind. 1998). Ultimately, our goal is to determine, give effect to, and implement the legislature’s intent. *219 Kenwood Holdings, LLC v. Props. 2006, LLC*, 19 N.E.3d 342, 343 (Ind. Ct. App. 2014).

[12] Indiana Code Section 8-1-40-5, at the crux of this appeal, determines that which is EDG:

As used in this chapter, “[EDG] means the difference between:

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

The parties agree that subsection (1) describes what is commonly referred to in the electrical industry as “inflow” and that subsection (2) describes what is commonly referred to as “outflow.” Appellants ask that we accord the words “difference between” and “supplied” their common and ordinary meaning. In the context of a mathematical calculation, the “difference” between two values is “the degree or amount by which things differ in quantity or measure.”

Webster’s Third New Int’l Dictionary 629 (2002). “Supply” in the context of goods is “to satisfy a need or desire for, provide or furnish with.” *Id.* at 2297.

[13] The Commission was persuaded by Vectren’s argument that treating outflow as EDG is statutorily compliant because Vectren meters can compare competing

forces meeting behind the meter and “net” those forces to determine whether there is inflow or outflow. In approving Rider EDG, the Commission observed: “[the] difference between supply and generation is determined at the meter.” Commission’s Brief at 13. But the comparison of supply and electrical generation (some of which meets the DG customer’s own needs and some of which is supplied to Vectren) is not the inflow/outflow comparison prescribed in Indiana Code Section 8-1-40-5. As such, we cannot conclude at the outset that the Commission interpretation is reasonable so as to preclude our moving forward with our review. *Moriarity*, 113 N.E.3d at 619.

Analysis

- [14] A DG customer will typically have some daily time – likely after sunset – when energy needs are not being met without inflow from the electrical supplier. When a statutory scheme provides for EDG credits to offset retail purchases, it is beneficial to the DG customer to have a longer period in which to compare supplied inflow with supplied outflow in calculating EDG and beneficial to the utility (and ultimately, non-DG customers) to have a shorter comparison period for offset.
- [15] Under the net metering tariff, the offset period was equivalent to the billing period, pursuant to 170 IAC 4-4.2-7:

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 generated by the net metering customer and

delivered to the investor-owned electric utility during the billing period, in accordance with normal metering practices.

This regulation also provided for credits to be carried forward into the next billing cycle. Credits could be rolled over indefinitely.

[16] Under the Distributed Generation Statutes, the electrical supplier credits EDG at wholesale plus 25% and the customer is charged for inflow at retail cost. 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 time period. Absent specific legislative adoption or endorsement of 170 IAC 4-4.2-7 as applicable to calculations made under the Distributed Generation Statutes, Vectren proposed that it would calculate the statutory “difference” at any given moment. Thus, the proposed comparison period deviated as far as possible from that in place.

[17] Vectren’s Director of Indiana Electrical Regulatory Rates, Matthew Rice (“Rice”), offered uncontroverted testimony as to how Vectren’s Advanced Metering Infrastructure (“AMI”) operates. Vectren “propose[d] to charge DG customers their normal retail rate for every [kilowatt] hour of inflow during the billing period.” (Tr. Vol. II, pg. 29.) Vectren also “proposed to credit DG customers at the proposed EDG rate for every [kilowatt] hour of outflow.” (*Id.* at 30.) Rice described the dynamics of instantaneous netting. A meter “registers inflow or outflow or nothing.” (*Id.*) The AMI device could not record both inflow and outflow simultaneously, because electrical energy flows one direction, and “when there’s inflow, there’s zero outflow” and “when

there's outflow, there's zero inflow.” (*Id.*) The process denominated as “instantaneous netting” refers to “the consumption and production of energy being balanced behind the meter at any given instant.” (*Id.* at 31.) Rice clarified: “The result is either an inflow of power or an outflow of power to the system.” (*Id.*) He acknowledged that energy “produced behind the meter” is “not necessarily supplied back to Vectren and “what the customer uses behind the meter” is “not necessarily supplied by Vectren. (*Id.* at 35-36.)

[18] During his rebuttal testimony, Rice explained that the meter registered as outflow the net of two components. But the components involved in his scenario are competing energies behind the meter, and the dominant force is subject to one allocation. Reconciliation of competing energies in order to determine which direction energy will flow is not a measure of energy “supplied” from or to the electrical supplier. It is a predicate step. Neither component can be energy “supplied” when it is yet to be determined which direction energy will flow. Indiana Code Section 8-1-40-5 requires calculation of the “difference” between inflow “supplied” and outflow “supplied.” And, in particular, the supply chain is between the utility and the customer.

[19] Vectren only proposes to measure inflow and outflow separately and compensate only for outflow. The interjection of “behind the meter competing forces” as a comparison value is outside the two values delineated by Indiana Code Section 8-1-40-5. Second, because credit is tied only to outflow, the purported result of comparing competing forces “behind the meter” is simply ignored in a determination of credit if those forces result in inflow. This

construction would render one portion of Indiana Code Section 8-1-40-5 superfluous.

[20] The Commission deviated from the comparison of inflow and outflow to arrive at EDG:

it is useful to conceptualize the difference at each instant of time, where the electricity supplied by the supplier and the customer's distributed generation meet at the meter as opposing forces, with the stronger force determining the direction of the flow. If the customer needs less electricity than its distributed generation is supplying, the statute terms the excess or difference between what is being supplied at that instant by Vectren South and what is flowing from behind the customer's meter as EDG.

Appealed Order at 36. What a DG customer produces can be for his own needs or excess for the electrical grid. His production is not within the statutory definition until it is "supplied back to the electricity supplier." I.C. § 8-1-40-5.

[21] The parties and amicus have argued at some length about policy considerations, such as favoring one class of customers at the expense of others. But we reject any suggestion that the Commission could change a definition or supply a statutory term based upon policy considerations or exercise of discretion. The Commission is a creature of statute. *See* I.C. § 8-1-1-2. As an administrative agency, the Commission "derives its power and authority solely from statute, and unless a grant of power and authority can be found in the statute it must be concluded that there is none." *Indiana Bell Tel. Co. v. Indiana Util. Regul. Comm'n*, 715 N.E.2d 351, 360 n.3 (Ind. 1999) (citations omitted).

[22] In enacting the provisions of the Distributed Generation Statutes, our Legislature clearly expressed its intent to end, for future customers, the net tariff in place. *See* Indiana Code Section 8-1-40-11(b)(2) (“[with limited exceptions] the terms and conditions of a net metering tariff offered by an electricity supplier before July 1, 2022, expire and are unenforceable.”) But there is no clearly expressed intent to end every definitional and procedural vestige of net metering. Absent enactment of a new regulation to determine the period to which credit calculation will apply, we defer to the monthly billing period previously selected by our Legislature.

Conclusion

[23] The determination of whether an electrical energy is inflow or outflow (accomplished in a process denominated as instantaneous netting) does not satisfy the statutory criteria that the difference between inflow and outflow be determined to calculate EDG. Because the calculation of EDG in Rider EDG assigns a monetary credit solely to outflow, it is contrary to law. We reverse the adoption of Rider EDG as to the particular provision based upon instantaneous netting, and remand for further proceedings.

[24] Reversed and remanded.

Mathias, J., and Altice, J., concur.