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STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION BY)
DEGS WIND I, LLC FOR CERTAIN)
DETERMINATIONS BY THE COMMISSION)
WITH RESPECT TO ITS JURISDICTION)
OVER PETITIONER'S ACTIVITES AS A)
GENERATOR OF ELECTRIC POWER)
PURSUANT TO IND. CODE § 8-1-2.5-5)

CAUSE NO. 43781

APPROVED: MAR 03 2010

BY THE COMMISSION:
David E. Ziegner, Commissioner
Aaron A. Schmoll, Administrative Law Judge

On September 10, 2009, DEGS Wind I, LLC ("Petitioner") filed its Petition with the Indiana Utility Regulatory Commission ("Commission") in this Cause for certain determinations, declinations of jurisdiction and approvals relating to its proposed construction of an approximate 100 megawatts ("MW"), phased, wind-power generating facility located in Newton County, Indiana ("Facility"), in accordance with Ind. Code § 8-1-2.5.

Pursuant to notice as provided by law, proof of which was incorporated into the record, an evidentiary hearing in this Cause was held in Room 224 of the National City Center, 101 West Washington Street, Indianapolis, Indiana, at 9:00 a.m. on January 13, 2010. At the hearing, the Petitioner presented its case in chief, consisting of the prefiled direct and rebuttal testimony and exhibits of Milton R. Howard and its Verified Response to the January 8, 2010 Docket Entry issued in this Cause. The Office of Utility Consumer Counselor ("OUCC") participated in the hearing and presented the prefiled testimony and exhibits of Ronald L. Keen. No other persons appeared or otherwise participated.

Based upon the evidence and being duly advised, the Commission now finds that:

- 1. Notice and Jurisdiction. Proper legal notice of the hearing in this case was given and published by the Commission as required by law. The Commission has jurisdiction over Petitioner and the subject matter of this case.
2. Petitioner's Characteristics. Petitioner is a limited liability company duly organized and existing under the laws of the State of Delaware. Petitioner's principal place of business is at 7000 N. Mopac Expressway, Suite 475, Austin, Texas 78731. Petitioner's sole member is Duke Energy Generation Services Holding Company, Inc. and its ultimate parent is Duke Energy Corporation ("Duke Energy"). Petitioner's expertise includes the development, construction and operation of wind power electric generating facilities.
3. Relief Requested. Petitioner has requested the Commission determine that the public interest allows it to decline to exercise its jurisdiction pursuant to Ind. Code § 8-1-2.5-5 over Petitioner with respect to the construction, ownership and operation of, and any other activity in connection with, the Facility. Petitioner will be a wholesale provider of electricity and will generate

electricity from wind, a renewable energy resource, for sale in the wholesale power market. Petitioner also requests approval to transfer its franchise, works or system and all rights, powers, privileges, duties and obligations granted and imposed in this Cause to its wholly-owned project company, Spartan Windpower, LLC (“Spartan Windpower”).

The Facility will generate electricity using wind turbines mounted on steel towers. The long-term plan is for Petitioner to generate up to approximately 185 MW of electricity. This Cause involves only the first phase of the 185 MW which is anticipated to generate approximately 100 MW of electricity and is located entirely in unincorporated Newton County, Indiana. The power output from the Facility will be sold exclusively in the wholesale electric market. Petitioner will self-certify the Facility as an exempt wholesale generator and apply for market-based rate authority under rules and regulations of the Federal Energy Regulatory Commission (“FERC”). Therefore, its wholesale rates for power will be subject to FERC regulation.

4. Conclusions and Order Upon Review of Facts and Issues. Consistent with prior determinations, if the Commission finds from the record evidence that Petitioner is a public utility for purposes of Indiana’s utility power plant construction act (Ind. Code § 8-1-8.5-1 *et seq.*; the “Power Plant Act”), then the Petitioner would be an “energy utility” as defined by Ind. Code § 8-1-2.5-2. The Commission may decline to exercise its jurisdiction pursuant to Ind. Code § 8-1-2.5-1 *et seq.*, including the Commission’s jurisdiction under Ind. Code § 8-1-8.5-1 *et seq.*, to issue certificates of public convenience and necessity for the construction of the Facility. In order for the Commission to decline to exercise jurisdiction over Petitioner pursuant to Ind. Code § 8-1-2.5 the Commission must assert jurisdiction over Petitioner.

The Power Plant Act defines “public utility” to mean: a “(1) public, municipally owned or cooperatively owned utility; or (2) a joint agency created under IC 8-1-2.2.” Ind. Code § 8-1-8.5-1. Petitioner is a limited liability company that will generate electricity, some of which will ultimately be consumed by Indiana residents. The Commission has previously asserted jurisdiction over investor-owned public utilities pursuant to Ind. Code § 8-1-8.5. *See, e.g., Indianapolis Power & Light Company*, Cause No. 43235 (IURC 06/12/2007). Additionally, Petitioner’s property “is used in a business that is public in nature and not one that is private.” *Foltz v. City of Indianapolis*, 130 N.E.2d 650, 659 (Ind. 1955). Accordingly, Petitioner’s business is “impressed with a public interest” and renders service “of a public character and of public consequence and concern”, which leads us to determine that Petitioner is a “public utility” within the meaning of § 8-1-8.5-1. *Id.* (quoting 73 C.J.S., Public Utilities, § 2, p. 991).

The Commission must also determine that Petitioner satisfies the definition of “public utility” found in Ind. Code § 8-1-2-1. The evidence establishes that Petitioner’s ownership, development, financing, construction and operation of the Facility is for the purpose of sale of the power generated by that plant in the wholesale market to public utilities, energy service providers, and power marketers within and without Indiana. The Commission has found in prior cases that a business that only generates electricity and then sells that electricity directly to public utilities is itself a public utility. *See e.g., Benton County Wind Farm, LLC*, Cause No. 43068 (IURC 11/20/2007). In *Benton County*, the Commission specifically found that it had jurisdiction over a wind energy generator with wholesale operations such as Petitioner. Consequently, for purposes of the ownership, development, financing, construction and operation of the Facility, we find that

Petitioner is a public utility within the meaning of Ind. Code § 8-1-2-1 and Ind. Code § 8-1-8.5 and an “energy utility” within the meaning of Ind. Code § 8-1-2.5-2.¹

While the Commission concludes that Petitioner will be a “public utility” as defined in the Public Service Commission Act and in the Power Plant Act, the Indiana Code authorizes the Commission to decline to exercise, in whole or in part, jurisdiction over an “energy utility” if certain conditions are satisfied. In particular, the Indiana Code provides that “the Commission may enter an order, after notice and hearing, that the public interest requires the Commission to commence an orderly process to decline to exercise, in whole or in part, its jurisdiction over ... the energy utility ...” Ind. Code § 8-1-2.5-5.

In determining whether the public interest will be served by declination of jurisdiction, the Commission shall consider the following:

- (1) Whether technological or operating conditions, competitive forces, or the extent of regulation by other state or federal regulatory bodies render the exercise, in whole or in part, of jurisdiction by the Commission unnecessary or wasteful.
- (2) Whether the Commission’s declining to exercise, in whole or in part, its jurisdiction will be beneficial for the energy utility, the energy utility’s customers, or the state.
- (3) Whether the Commission’s declining to exercise, in whole or in part, its jurisdiction will promote energy utility efficiency.
- (4) Whether the exercise of Commission jurisdiction inhibits an energy utility from competing with other providers of functionally similar energy services or equipment.

Ind. Code § 8-1-2.5-5

The evidence in this Cause demonstrates that Petitioner does not intend, nor does it request, authority to sell the electricity generated by the Facility to the general public or to any retail customer. Instead, the power will be generated solely for resale subject to the jurisdiction of FERC under the provisions of the Federal Power Act (“FPA”). Petitioner indicated that it will operate the Facility in a manner consistent with good utility practice. The Petitioner also indicated that it is not seeking authority to exercise certain of the rights, powers, or privileges of an Indiana public utility in the construction and operation of the Facility, including the power of eminent domain, and the exemption from zoning and land use regulation. Further, the costs of the Facility will not be recovered through a rate base/rate of return or other process typically associated with public utility rates.

The OUCC’s witness, Ronald L. Keen, testified in support of Petitioner’s construction of the Facility and request for relief. Mr. Keen recommended that the Commission’s order declining jurisdiction include various conditions consistent with prior Commission orders. As part of the Commission’s public interest analysis regarding any proposed declination of jurisdiction, the

¹ Indiana Code § 8-1-2.5-2 defines “energy utility” to mean, among other things, a public utility or municipally owned utility within the meaning of Ind. Code § 8-1-2-1 [.] Because we determined Petitioner to be a “public utility” under Ind. Code § 8-1-2-1, Petitioner is an “energy utility”.

Commission must evaluate facilities such as the Petitioner's based on a number of factors, including the following:

(a) **Location:** As part of its public interest determination, the Commission may consider whether or not the location of a proposed facility is compatible with the surrounding land uses. In determining compatibility, the Commission may evaluate and consider any evidence of compliance with local zoning and land use requirements. In deciding whether to decline jurisdiction, the Commission has the authority to consider whether the public interest will be served by the Facility being in its planned location.

In making such determination, the Commission must consider the potential for adverse effects on Indiana "electricity suppliers" (as that term is used in Ind. Code § 8-1-2.3), their customers, or a local community. Indiana statutes regarding surface and groundwater rights and obligations, including those establishing the authority of the Indiana Natural Resources Commission (Ind. Code § 14-25-7-15) do not limit the Commission's jurisdiction to make such determinations under the public interest standard of Ind. Code § 8-1-2.5 or the public convenience and necessity standard of Ind. Code § 8-18.5-5(b)(3). If a proposed new generating facility will significantly and negatively impact an electricity supplier, its consumers, or a local community, the Commission may refuse to decline jurisdiction under Ind. Code § 8-1-1.5 and Ind. Code § 8-1-8.5.

(1) **Local Zoning and Permitting Requirements.** Petitioner submitted evidence that Petitioner has complied or will comply with local zoning and land use requirements, has or will obtain, all local construction-related permits, and will not rely on the public utility exemption from local zoning regulation. Petitioner's evidence included a letter from the Newton County Board of Zoning Appeals (Exhibit MRH-7) stating that Board's unanimous approval of zoning relief for the Facility.

(2) **Land Use and Wind Resources.** Based on the evidence presented, it would appear that Petitioner, utilizing its experience in developing other wind projects throughout the United States, has determined that the wind resource at the project site is sufficient for the development of an economically viable project. The project will be located across parts of approximately 8,000 acres for which Petitioner has obtained land rights. A preliminary site map that reflects the approximate locations of these facilities was submitted in this Cause as Exhibit MRH-2.

(3) **Noise and Aesthetics.** Mr. Howard testified that Petitioner will comply with the zoning requirements for minimum setback distances between wind turbines in the project and existing residences and platted communities, Petitioner will minimize the project's visual impact on nearby residences. Petitioner will also comply with all county, state, and federal noise standards.

(4) **Water Use and Supply.** Mr. Howard testified that the project will not use water in any significant quantities, and it will have negligible or no impact on local water supplies. Insignificant quantities of water will be used during construction, reconstruction and removal of project facilities, primarily for dust control. After construction is completed, small quantities of water will also be used for the project's operations and maintenance control building, which will most likely be drawn from local wells. Therefore, the evidence presented demonstrates that area water use and supplies will not be adversely affected by the Facility.

(5) Transmission Interconnection. The Facility is expected to interconnect with Northern Indiana Public Service Company's ("NIPSCO") transmission system at the Thayer 138 kV substation. The Facility electrical system will consist of (i) a 34.5 kV collection system, which will collect energy generated by each wind turbine at approximately 13.8 kV which will be increased to 34.5 kV by step-up transformers located at or near each wind turbine, and deliver it via electric cables, which will be primarily, if not entirely underground, to (ii) a new substation created for the Facility, where the collection system voltage of 34.5 kV will be increased to 138 kV, for delivery to (iii) a the NIPSCO Thayer 138 kV substation.

From the Facility substation, approximately 9.2 miles of overhead 138 kV transmission line will transmit electricity to the NIPSCO Thayer 138 kV switchyard. The overhead route will run within the State Road 55 ("S.R. 55") right-of-way in accordance with a permit issued by the Indiana Department of Transportation ("INDOT") that Petitioner provided as Exhibit MRH-8. The Facility collection system will traverse public rights-of-way in accordance with permits issued by INDOT and a Road Use Agreement executed between Petitioner and the Board of Commissioners of Newton County (Exhibit MRH-11). The power output from the Facility will be sold exclusively in the wholesale electric market. Petitioner will self-certify the Facility as an exempt wholesale generator and apply for market-based rate authority under FERC rules and regulations. Therefore, its wholesale rates for power will be subject to FERC regulation.

Mr. Howard testified that Midwest Independent Transmission System Operator, Inc. ("MISO") conducted Interconnection System Impact Studies for the Petitioner's interconnection requests. NIPSCO's transmission system is part of the wholesale power grid controlled by MISO. Petitioner's queue position with MISO is G-967.

Mr. Howard testified that the Impact Studies associated with the interconnection requests to MISO indicate that the Project's interconnection with the NIPSCO transmission system will not negatively impact system performance. No network upgrades were identified in the system impact studies for inclusion in the Large Generator Interconnection Agreement ("LGIA").

Mr. Keen requested in his testimony that Petitioner inform both the Commission and the OUCC of any circumstances which warrant either a change in or a reevaluation of the findings in either the feasibility or impact studies. In his Verified Rebuttal Testimony, Mr. Howard agreed on behalf of Petitioner to notify the Commission within 30 days if there is a change in or reevaluation of the findings in either the feasibility study or the system impact study.

(6) Additional Permitting and Environmental Issues. Mr. Howard indicated in his testimony that the Petitioner has or will apply for and obtain all necessary federal, state and local permits needed for construction and operation of the Facility. According to Mr. Howard, the following state permits or specific requirements are applicable to the Petitioner's project: a permit required under Title 327 of the Indiana Administrative Code for the discharge of construction-related storm water ("Rule 5 permit"); a determination by INDOT that the project and its location will not have a substantial adverse effect on the safe and efficient use of navigable airspace and will not be a hazard to air navigation; and, additionally INDOT permits as needed to allow project electric lines and other facilities to cross state highways. Mr. Howard also testified that Petitioner will: obtain Determinations of No Hazard to Air Navigation from the Federal Aviation Administration for structures that exceed 200 feet in height; self-certify as an exempt wholesale

generator and apply for market-based rate authority under the FERC's rules and regulations; and prepare a federal spill prevention, control and countermeasure plan as necessary.

With respect to additional environmental and land use issues, Mr. Howard testified that Petitioner contracted for a fatal flaw analysis. That assessment was incorporated into his testimony as Exhibit MRH-5, and concluded that no environmental or other issues are foreseen that would delay or prevent the permitting and construction of the Project. Additionally, Petitioner contracted for an avian study that was incorporated into Mr. Howard's testimony as Exhibit MRH-4. That assessment concluded that the project location will not have a significant impact on avian habitat.

(7) Using the Public Right-of-Way. The S.R. 55 public right-of-way runs through Phase I and is the main roadway from the project area to the Thayer 138 kV substation. Accordingly, Petitioner is seeking the ability to use that right-of-way as a route for its transmission line. Petitioner has also proposed to use the public rights-of-way in Newton County for collection system routes, overhead transmission line road crossings, and to make intersection improvements. In past declination proceedings, public utilities seeing a declination of Commission jurisdiction have voluntarily agreed to waive an Indiana public utility's right to use the public right-of-way. Here, however, Petitioner desires to use the public right-of-way in a limited manner. Petitioner has applied for and received from INDOT a permit to locate its transmission line in the S.R. 55 right-of-way (Exhibit MRH-8).

The OUCC did not object to Petitioner's use of the public right-of-way. The OUCC's witness, Mr. Keen, testified that Petitioner should be granted a conditional and limited right to use public rights-of-way for the transmission of energy from the wind farm generation field to NIPSCO's 138 kV Thayer substation where the generation can be incorporated into the transmission grid for use by consumers.

Based upon the evidence presented, we find Petitioner's uncontested request for limited use of the public right-of-way to be reasonable, and the Petitioner should be granted a conditional and limited right to use public rights-of-way for the transmission of energy from the wind farm generation field to NIPSCO's 138 kV Thayer substation.

(b) Need: In determining the public interest, the Commission will determine if the development of additional generating capacity is necessary and serves the public interest. To demonstrate need, entities must provide evidence that a proposed facility will meet the demands of the market. A mere assertion that the wholesale market is competitive is insufficient to meet this standard. As set forth below, the Commission finds the evidence presented demonstrates sufficient need for the Facility and it will serve the public interest.

In the present proceeding, Mr. Howard testified that according to the most recent forecast of Indiana's future electricity requirements issued in December 2007 by the State Utility Forecasting Group at Purdue University for the Commission, Indiana Electricity Projections: *The 2007 Forecast* ("Report") the electricity that will be generated by Petitioner is very much needed. The Report projects future electricity requirements for the period 2006-2025. Over the first half of the forecast period, relying on the most likely scenario, nearly 5,500 megawatts of additional resources will be required by 2015. The same information projects that by 2010, Indiana will need an additional

2,050 megawatts in electric resources.² Mr. Howard also provided Exhibit MRH-12 which included a number of RFPs for renewable or wind energy that were issued by Indiana electric utilities.

Mr. Howard testified that he believes the public interest will be served in a number of important respects by the addition of the electric generating capacity represented by the project. First, the public needs electricity. Second, Petitioner's proposed wind farm represents an environmentally friendly means of generating electricity. Third, the public in Indiana will benefit from the efficiencies which flow from proximity to the source of generation as the high cost of transmitting power over long distances makes it generally advantageous for load to be located near its source. Fourth, landowners in Newton County will receive substantial economic benefits from the placement of wind farm facilities on their properties. Fifth, local taxing bodies will receive tax revenues as a result of the Facility. Finally, a number of temporary construction jobs and approximately 12 full-time operations and maintenance jobs will be created by the project.

(c) **Financing and Management.** To ensure that Indiana consumers are not adversely affected by the proposed development of generation plants in Indiana, developers must demonstrate to the Commission that the financial structure of a proposed project will not jeopardize retail electric supply. In assessing a developer's financing to ensure the viability of a proposed project, the Commission may consider the developer's ability to finance, construct, lease, own and operate other generating facilities in a commercially responsible manner. As necessary, the Commission may also consider the specific method proposed to finance a particular project.

Petitioner is a subsidiary of Duke Energy. Duke Energy is one of the largest energy producers in the world. Duke Energy's subsidiaries own and operate approximately 35,000 MW of electric generating capacity in the United States. Mr. Howard testified that Duke Energy will provide the Petitioner with all necessary financial, technical and managerial expertise to construct and operate the Facility and that the Petitioner will operate the project in a commercially reasonable manner in accordance with good utility practice. Mr. Howard also attached Duke Energy's annual report as Exhibit MRH-13. Based on the evidence presented, the Commission finds that Petitioner has the ability to finance, construct, and manage the Project.

(d) **Affiliate Transactions:** In addition to determining whether the public interest would be served if the Commission declines jurisdiction, the Commission also must consider what actions it must take to ensure that the public interest is served throughout the commercial life of the Project. Specifically, the Commission must determine the extent to which it must reserve its authority over the Petitioner's activities involving affiliate transactions and transfers of ownership. To ensure that the Commission's declination of jurisdiction over an "energy utility" is in the public interest, the Commission must be assured that adequate consumer protections are in place. Petitioner is an affiliate of Duke Energy Indiana, Inc. ("Duke Energy Indiana") pursuant to Ind. Code § 8-1-2-49. Mr. Howard testified that although both Duke Energy Indiana and DEGS are subsidiaries of Duke Energy, DEGS is independent of and not controlled by Duke Energy Indiana. Mr. Howard also testified that Petitioner's operations will not be subsidized by Duke Energy Indiana or its customers.

² At the time Mr. Howard filed his testimony, the forecast of Indiana's future electricity requirements issued in December 2009 was not yet publicly available. Therefore, Mr. Howard used *The 2007 Forecast* for his analysis.

Based on the evidence presented, we find that the declination of jurisdiction of Petitioner is in the public interest. Petitioner shall obtain prior Commission approval with respect to the sale of any electricity to Duke Energy Indiana, its affiliates, or to any other regulated Indiana retail electric utility. The Commission notes that it retains certain authority under Section 201 of the Federal Power Act to examine the Petitioner's books, accounts, memoranda, contracts, and records consistent with the limitations contained therein. 16 U.S.C. § 824 (2005).

(e) **Transfers of Ownership:** The Commission reserves its jurisdiction under Ind. Code § 8-1-2-83, and requires the Petitioner to obtain prior Commission approval of any transfer of Petitioner's franchise, works or system. Mr. Howard testified that Petitioner plans to transfer its rights, powers, privileges, duties and obligations granted and imposed in this Cause to Spartan Windpower, its wholly-owned subsidiary and project company. Petitioner requests that the Commission approve that transfer prior to its consummation. The transfer will consist of the Facility assets and construction and operating authority and other rights and obligations, including reporting obligations. Petitioner has also requested that Spartan Windpower succeed to Petitioner's declination of jurisdiction and agreed to the filing of a notice of intent to transfer ten (10) days prior to the transfer and a notice of consummation of transfer to be filed within 30 days of the date of transfer.

Mr. Howard testified that Spartan Windpower will have the same technical, financial, and managerial capacity as Petitioner. Mr. Howard added that like Petitioner, Spartan Windpower will be wholly-owned by Duke Energy Generation Services, Inc. Mr. Howard testified that Spartan Windpower will abide by the terms and conditions of the Order issued to Petitioner, including reporting obligations, affiliated interest restrictions, and other Commission-ordered conditions. The OUCC had no objection to the approval of this transfer prior to its consummation.

Based on the evidence presented, the Petitioner's request to transfer its rights, powers, privileges, duties and obligations granted under this Order to Spartan Windpower is approved. Petitioner has demonstrated that Spartan Windpower has the requisite technical, financial, and managerial capabilities to own and operate the Facility. Petitioner shall file a notice of intent to transfer ten (10) days prior to the transfer and a notice of consummation of transfer within 30 days of the date of transfer. Upon consummation of the transfer, Spartan Windpower will succeed to the declination of jurisdiction and assume all obligations and reporting requirements set forth in this Order.

Additionally, consistent with prior Commission orders involving wind farms, Petitioner shall not be required to seek prior approval, but shall provide written notice to the Commission and the OUCC, of any transfers of ownership of Facility assets or ownership interests in the Petitioner involving: (1) the grant of a security interest to a bank or other lender or collateral agent, administrative agent or other security representative, or a trustee on behalf of bondholders in connection with any financing or refinancing (including any lease financing); (2) a debtor in possession; or (3) a foreclosure (or deed in lieu of foreclosure) on the property owned by Petitioner or ownership interests in Petitioner.

However, should Spartan Windpower not acquire the Project for any reason, Petitioner must obtain Commission approval under Ind. Code § 8-1-2-83 prior to transferring the assets to some other entity. Additionally, another third-party owner and operator may acquire the Project and succeed to Petitioner's declination of jurisdiction provided: (1) the Commission determines that the

successor has the necessary technical, financial and managerial capability to own and operate the facility; and (2) the successor satisfies the same terms and conditions imposed on Petitioner as set forth in this Order.

5. **Financial Assurance.** The Newton County zoning ordinance presented in this Cause demonstrates that the Petitioner is required to outline the anticipated means and cost of removing a wind energy conversion system (“WECS”) at the end of its serviceable life or upon becoming a discontinued or abandoned use to ensure that the WECS is properly decommissioned. The decommissioning plan must include a contractor cost estimate for demolition and removal of the WECS facility. Removal includes all equipment and facilities to no less than a depth of four feet below ground.

Additionally, the decommissioning plan must include an independent financial instrument in an amount equal to the demolition and removal cost estimate. This financial instrument must be submitted to the county and be in the form of a bond, letter of credit, or other acceptable security. Petitioner shall provide the Commission with notice when such financial instrument has been established, including the form and amount, or in the event that Petitioner is no longer required to comply with all or part of the financial assurance requirements in the zoning ordinance. We find that the financial assurance requirements set forth in the zoning ordinance are sufficient to satisfy this requirement.

6. **Reporting Requirements.** In addition to the foregoing requirements, it shall be a condition of this Order and our continued declination of jurisdiction over Petitioner (and Spartan Windpower after the transfer) that Annual Reports are filed with the Commission as provided in Ind. Code § 8-1-2-49, and provide such other information as the Commission may from time to time request. These reporting requirements are intended to ensure that the Commission obtains reliable, up-to-date information in a timely manner necessary to carry out its statutory obligations regarding the Commission’s State Utility Forecasting Group and the OUCC. A responsible officer of Petitioner shall verify all reports. The Petitioner shall provide two (2) paper copies and one (1) electronic copy to the Secretary of the Commission and to the OUCC, within the timeframes prescribed herein.

The following reports (“Reporting Requirements”) shall be prepared and filed by Petitioner.

(a) **Initial Report.** Petitioner’s initial quarterly report due within 30 days after this Order shall provide, to the extent such information is known and available, the following:

- (1) Project ownership and name(s) of the Facility;
- (2) Name, title, address, and phone number(s) for primary contact person(s) for the Facility;
- (3) Number and location of wind turbines deployed;
- (4) Anticipated total output of Facility;
- (5) Manufacturer, model number and operational characteristics of turbines;
- (6) Connecting utility(s);
- (7) Copy of any Interconnection System Impact Studies prepared by the MISO;
- (8) Expected in-service (commercial operation) date;
- (9) An estimate of the engineering/construction timeline and critical milestones for the Facility;

- (10) The status of the LGIA with the MISO, and
- (11) The information listed under (b) hereof, to the extent such information is available.

(b) **Subsequent Reports.** Petitioner's subsequent reports shall be filed within 30 days of the end of each calendar quarter until the quarter that occurs after commercial operation is achieved and that immediately precedes the Annual Report filing date. Thereafter, subsequent reports should be filed as an addendum to Petitioner's Annual Report.

- (1) Any changes of the information provided in the Initial Report;
- (2) Any reports of Interconnection System Impact Studies not previously submitted to the Commission;
- (3) Copy of the LGIA as filed with FERC;
- (4) Notice of the establishment of an independent financial instrument, including its form and amount;
- (5) Achievement of construction milestones described in the LGIA and such events as the procurement of major equipment, the receipt of major permits material to the construction and operation of the Facility, construction start-up, initial energization and commercial operation; and
- (6) When commercial operation is achieved, the nameplate capacity, term and identity of a purchaser for any contracts then existing for utility sales, contingency plans (if any) detailing response plans to emergency conditions as required by state or local units of government, the interconnecting transmission owner and/or the MISO, and the Facility's certified (or accredited) dependable capacity rating.

(c) **Additional Requirements.** In the event that Petitioner intends to materially increase or decrease or otherwise materially change the Facility's capacity or operation, the owner must obtain the Commission's prior approval.³ Petitioner shall notify the Commission in the event that it modifies or suspends the project under the terms of the LGIA and does not reinstitute work within three (3) years following commencement of such suspension. If the Commission determines that the Petitioner has (a) failed to enter into an agreement pursuant to the MISO generator interconnection procedures; (b) suspended the project under the terms of the LGIA and has not reinstated work within three (3) years following commencement of such suspension; or c) has otherwise suspended its efforts to complete the project within three (3) years of this Order, the Commission may, following notice to the Petitioner, proceed to issue an Order terminating the declination of jurisdiction set forth herein. Finally, Petitioner shall file a notice of intent to transfer ten (10) days prior to the transfer from Petitioner to Spartan Windpower, and Spartan Windpower shall file a notice of consummation of transfer within 30 days of the date of transfer.

7. **Conclusion.** Pursuant to the provisions set forth in Ind. Code § 8-1-2.5-5, the Commission finds that declining to exercise its jurisdiction over Petitioner and the Facility will facilitate the immediate construction of the proposed Project and add needed generation capacity in Indiana. This should be beneficial for those public utilities that may indirectly have access to the

³ A material change includes the following: an increase or decrease of greater than five (5) MW in the Facility's capacity; changes in operating entities (other than the transfer to Spartan Windpower); transfers of assets (other than the transfer to Spartan Windpower); and changes identified in case law as a material change.

power produced, and to the State of Indiana. We further conclude that the Commission's declining to exercise jurisdiction over Petitioner will promote energy utility efficiency. Moreover, Petitioner has demonstrated that it and Spartan Windpower have the technical, financial and managerial capability to construct and operate the proposed Facility. It has also shown that the wholesale market for electricity in Indiana will benefit from the addition of the generating capacity and therefore that its market entry is reasonable.

Accordingly, based on the above findings and the additional requirements contained in this Order, the Commission believes that a declination of jurisdiction over Petitioner and Spartan Windpower as energy utilities, except over the areas discussed above as to which we are reserving our jurisdiction, is in the public interest. Petitioner is not granted authority to offer its power for sale to the general public. Therefore, any revenue that it derives from the sale of electricity for resale by the purchaser is not subject to the public utility fee.

If the Commission determines that the Petitioner either (1) has failed to commence construction of the Facility within the timeframe provided under this Order; (2) is no longer diligently pursuing the commencement of construction of the Facility; or (3) has not completed construction of the Facility under the terms of the LGIA, then the Commission may, following notice to the Petitioner, proceed to issue an Order terminating the declination of jurisdiction set forth herein. The Petitioner agrees to file with the Commission, and the OUCC, status reports on the Facility after commencement of construction through commercial operation and, prior to commercial operation of the Facility, will satisfy the reporting requirements outlined in the above findings. The Petitioner shall also file with the Commission any annual report required to be filed with FERC, and provide the Commission such other information as the Commission may from time to time require from other Indiana public utilities.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. Petitioner is hereby determined to be a "public utility" within the meaning of Ind. Code § 8-1-8.5-1 and Ind. Code § 8-1-2-1 and an "energy utility" within the meaning of Ind. Code § 8-1-2.5-2.
2. The Facility is hereby determined to be a "utility" within the meaning of Ind. Code § 8-1-2-1.
3. The Commission declines to exercise its jurisdiction over Petitioner and its construction, operation and financing of the Facility, except as specifically stated within this Order.
4. Petitioner shall not exercise an Indiana public utility's rights, powers, and privileges of eminent domain and of exemption from local zoning and land use ordinances in the operation and construction of the Facility. Petitioner retains the rights, powers and privileges of a public utility to use the public right-of-way as set forth in Finding Paragraph 4(a)(7).
5. Petitioner shall not sell at retail in the State of Indiana any of the electricity generated by the Facility without further order of the Commission. The gross revenues generated by sales for

resale of the electricity generated by the Facility are hereby adjudged to be exempt from the public utility fee prescribed by Ind. Code § 8-1-6-1, *et seq.*

6. Petitioner shall comply fully with the terms of this Order and submit to the Commission all information required by the terms of this Order.

7. Petitioner is authorized to transfer all of its franchise, works, or system related to the Facility and the privileges, construction, operating and financing authority and reporting obligations to the extent related to the Facility to Spartan Windpower, consistent with Finding Paragraph 4(e).

8. Spartan Windpower, LLC, shall succeed to the declination of jurisdiction granted to Petitioner upon transfer and shall fully comply with the terms of this Order and submit to the Commission all information required by the terms of this Order.

9. This Order shall be effective on and after the date of its approval.

ATTERHOLT, GOLC, LANDIS, AND ZIEGNER CONCUR; HARDY ABSENT:

APPROVED: MAR 03 2010

**I hereby certify that the above is a true
and correct copy of the Order as approved.**



Brenda A. Howe
Secretary to the Commission