

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION BY )  
HEADWATERS WIND FARM LLC FOR CERTAIN ) CAUSE NO. 44358  
DETERMINATIONS BY THE COMMISSION WITH )  
RESPECT TO ITS JURISDICTION OVER )  
PETITIONER'S ACTIVITIES AS A GENERATOR OF ) APPROVED:  
ELECTRIC POWER )

SEP 19 2013

ORDER OF THE COMMISSION

**Presiding Officers:**  
**Kari A. E. Bennett, Commissioner**  
**Marya E. Jones, Administrative Law Judge**

On June 28, 2013, Headwaters Wind Farm LLC ("Petitioner") filed its Verified 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 approximately 200 megawatt ("MW") wind-power generating facility located in Randolph County, Indiana ("Facility" or "Project"), in accordance with Ind. Code ch. 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 PNC Center, 101 West Washington Street, Indianapolis, Indiana, at 9:30 a.m. on August 30, 2013. At the hearing, the Petitioner presented its case-in-chief, consisting of the prefiled direct testimony and exhibits of Bill Whitlock, Executive Vice President, Eastern Region for EDP Renewables North America LLC ("EDPR"). The Office of Utility Consumer Counselor ("OUCC") participated in the hearing and presented the prefiled testimony and exhibits of Ronald L. Keen, Senior Analyst in the Resource Planning and Communications Division. No other persons appeared or otherwise participated.

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

1. **Notice and Jurisdiction.** Due, legal, and timely notice of the hearing in this case was given and published by the Commission as required by law. As discussed further below, Petitioner intends to engage in activity that would qualify it as a "public utility" under Ind. Code § 8-1-2-1 and as an "energy utility" under Ind. Code § 8-1-2.5-1. Therefore, the Commission has jurisdiction over Petitioner and the subject matter of this Cause.
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 808 Travis Street, Suite 700, Houston, Texas 77002. Petitioner is a subsidiary of EDPR. EDPR is a limited liability company existing under the laws of the State of Delaware and a wholly owned direct subsidiary of EDP Renováveis, SA ("EDP Renováveis"). EDP

Renováveis is a subsidiary of Energias de Portugal, S.A. (“EDP SA”), a large investor-owned utility based in Portugal. EDPR’s expertise includes the development, construction and operation of wind power electric generating facilities in the United States.

**3. Relief Requested.** Petitioner requests the Commission determine that the public interest allows it to decline to exercise its jurisdiction over Petitioner pursuant to Ind. Code § 8-1-2.5-5 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.

The Facility will generate electricity using wind turbines mounted on steel towers. The Facility is anticipated to generate approximately 200 MW of electricity and is located entirely in unincorporated Randolph 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. Commission Discussion and Findings Upon Review of Facts and Issues.** Consistent with prior determinations, if the Commission finds from the record of evidence that Petitioner is a public utility for purposes Ind. Code ch. 8-1-8.5 (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 ch. 8-1-2.5, including the Commission’s jurisdiction under Ind. Code ch. 8-1-8.5, to issue certificates of public convenience and necessity for the construction of the Facility. However, in order for the Commission to decline to exercise jurisdiction over Petitioner pursuant to Ind. Code ch. 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 may ultimately be consumed by Indiana residents. The Commission has previously asserted jurisdiction over investor-owned public utilities pursuant to Ind. Code ch. 8-1-8.5. *See, e.g., Indianapolis Power & Light Company*, Cause No. 43235, 2007 Ind. PUC LEXIS 175 (IURC June 13, 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 Ind. Code § 8-1-8.5-1. *Id.*

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 selling the power generated by the plant in the wholesale market to public utilities, energy service providers, and power marketers within and outside of Indiana. The Commission has found in

prior cases that a business that 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, 2006 Ind. PUC LEXIS 364, at \*5-6 (IURC Dec. 6, 2006). 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 ch. 8-1-8.5 and an “energy utility” within the meaning of Ind. Code § 8-1-2.5-2.<sup>1</sup>

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, Indiana law 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 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(a).

In determining whether the public interest will be served, 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(b).

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 rights, powers, or privileges of an

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<sup>1</sup> Ind. 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.”

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 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 ch. 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 ch. 8-1-2.5 or the public convenience and necessity standard of Ind. Code § 8-1-8.5-5(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 chs. 8-1-2.5 and 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 witness, Bill Whitlock, testified that the Project is located in Randolph County. The Randolph County zoning ordinance will govern the development of the Project, which is a permitted use in the zoning districts for which it is proposed. Mr. Whitlock testified that Randolph County has a specific project design, setback and noise standard with which the Project will comply. Petitioner also intends to enter into a road use agreement with Randolph County.

(2) **Land Use and Wind Resources.** Based on the evidence presented, Petitioner, utilizing its experience in developing numerous 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. In addition, the landowners on whose land the Project wind turbines will be located have consented or will consent to the

locations of the wind turbines on their land. A preliminary site map that reflects the approximate locations of these facilities was submitted in this Cause as Petitioner's Exhibit BW-1.

(3) **Noise and Aesthetics.** Mr. Whitlock testified that Petitioner will comply with all local zoning requirements, including those for minimum setback distances between wind turbines in the Project and existing residences and platted communities, so as to minimize the Project's visual and audio impact on nearby residences. Mr. Whitlock further testified that sound and aesthetic impacts of the Project will be comparable to other utility scale wind farms in the State of Indiana. He also testified that wind turbine technology is constantly improving, resulting in machines that are both quieter and more efficient, and the Facility will use machines from this latest generation of wind turbines that have been designed with both sound and aesthetic concerns in mind. Petitioner will also comply with all county, state, and federal noise standards.

(4) **Water Use and Supply.** Mr. Whitlock 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 and concrete mixing. 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 Project is expected to interconnect with Indiana-Michigan Power Company's ("I&M") 345 kV DeSoto-Tanner's Creek transmission line. The Project's electrical system will consist of (i) a 34.5 kV collection system, which will collect energy generated by each wind turbine, and deliver it via 34.5 kV power collection lines, which will be located substantially underground, to (ii) a collector substation where the collection system voltage of 34.5 kV will be increased to the expected transmission voltage of 345 kV, for delivery to (iii) an overhead 345 kV transmission line up to 11 miles in length that will transmit electricity to the point of interconnection with I&M's DeSoto-Tanner's Creek 345 kV line. An interconnection switchyard will be constructed at that location to transfer the power to the existing grid.

Mr. Whitlock testified that an impact study has been completed, which is contained in Petitioner's Exhibit BW-10. 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.

(6) **Additional Permitting and Environmental Issues.** Mr. Whitlock 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. Whitlock, the Petitioner has communicated and met with the U.S. Fish and Wildlife Service ("USFWS") concerning the Project and the presence of the Indiana bat in the project area. Mr. Whitlock testified that Petitioner is analyzing issues associated with obtaining an

Incidental Take Permit, as well as issues related to the issuance of a Technical Assistance Letter from the USFWS.

Mr. Whitlock testified certain state permits or specific requirements are applicable to the Petitioner's Project. A permit is required under Title 327 of the Indiana Administrative Code for the discharge of construction-related storm water ("Rule 5 permit"). The Indiana Department of Transportation ("INDOT") requires a permit as needed to allow Project electric lines and other facilities to cross state highways. He also testified Petitioner will seek a determination from INDOT that the Project and its location will not have a substantial adverse impact on the safe and efficient use of the navigable air space and will not be a hazard to air navigation. Mr. Whitlock further 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; 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.

(7) **Using the Public Right-of-Way.** The Petitioner seeks to retain the limited right to use public rights-of-way for collection and transmission purposes. Mr. Whitlock testified limited retention of the use of the public rights-of-way will allow the Petitioner to place certain of its collector lines in the public right-of-way and will also clarify issues surrounding use of public rights-of-way for road crossings. Mr. Whitlock testified further that Randolph County is aware of Petitioner's intended use of the public rights-of-way and will enter into a road use agreement with Petitioner that grants Petitioner the right to use the public rights-of-way for installation of above or below ground transmission or electrical wires in certain areas subject to the approval of the County Engineer.

In past declination proceedings, public utilities seeking a declination of Commission jurisdiction have been permitted limited use the public right-of-way. In those cases the Petitioner has set forth with specificity the rights-of-way to be used. However, in this Cause, Petitioner desires to retain the rights, powers and privileges of an Indiana public utility to cross the public rights-of-way at certain points to be determined as the Project develops. In response to a Docket Entry seeking more specificity on the Petitioner's intended use of the public rights-of-way in the project area, Petitioner explained the current plans require use of the public rights-of-way where the Project transmission line and collection lines cross the public right-of-way and the where access roads cross the public right-of-way to connect roads within the Project area. Petitioner stated the crossings will be on highways, specifically Indiana State Road 1 and United States Highways 27 and 36. Petitioner went on to explain that numerous county roads will also be involved and that the affected highways and roads are depicted on Petitioner's Exhibit BW-1.

In its response, Petitioner further explained because the final turbine locations have not yet been determined and because the private easements planned for the Project transmission line have not all been acquired, Petitioner needs the flexibility to use the public rights-of-way should a design change require such use. Petitioner further clarified if design changes necessitate use of the public right-of-way, such use would most likely be along county roads in the project area. Petitioner noted granting the use of public right-of-way within the project area is consistent with

the authority granted by the Commission in previous wind cases. Mr. Keen testified the OUCC concurs with Petitioner's request for limited use of public rights-of-way.

Based upon the evidence presented, we find Petitioner's request for limited use of the public right-of-way for the Facility's transmission line and collection lines to be reasonable, and Petitioner shall retain the right to cross the public right-of-way, specifically State Road 1 and United States Highways 27 and 36, as depicted in Petitioner's Exhibit BW-1; provided, however, if design changes necessitate the use of different public rights-of-way, including the anticipated use of county roads, Petitioner shall make a Compliance filing under this Cause thirty (30) days prior to expected initial use that sets forth the final chosen rights-of-way Petitioner seeks to use.

(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 that the evidence presented demonstrates sufficient need for the Facility and that it will serve the public interest.

In the present proceeding, Mr. Whitlock testified that according to the most recent forecast of Indiana's future electricity requirements issued in September 2011 by the State Utility Forecasting Group at Purdue University for the Commission, *Indiana Electricity Projections: The 2011 Forecast* ("Report"), the electricity that will be generated by the Petitioner is very much needed. Table 3-4 of the Report, submitted as Petitioner's Exhibit BW-11, projects future electricity requirements for the period 2009-2029. Over the first half of the forecast period, relying on the most likely scenario, nearly 2,600 MW of additional resources will be required by 2020. The same table projects that by 2029, Indiana will need 6,420 MW of additional resources.

Mr. Whitlock 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 generation to be located near load. Fourth, landowners in Randolph 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, up to 300 construction jobs and approximately 10 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.

Mr. Whitlock testified that EDPR and its direct parent EDP Renováveis 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. EDPR's experience includes developing, owning and operating more than 3,800 MW of wind generation spread across 29 projects in 11 states. Mr. Whitlock also sponsored EDP Renováveis' annual report as Petitioner's Exhibit BW-12. Based on the evidence presented, the Commission finds that Petitioner has the ability to finance, construct, and manage the Project.

## 5. Reservation of Certain Jurisdiction.

(a) 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.

Based on the evidence presented, we find that presently Petitioner is not intending to sell power to any affiliates. Petitioner shall obtain prior Commission approval with respect to the sale of any electricity to any affiliated, regulated Indiana retail 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).

(b) Transfers of Ownership. The Commission reserves its jurisdiction under Indiana Code § 8-1-2-83, and requires the Petitioner to obtain prior Commission approval of any transfer of Petitioner's franchise, works or system.

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. Additionally, a third-party owner and operator may 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.

6. Financial Assurance. Mr. Whitlock testified that Petitioner must have a decommissioning plan as required by the relevant Randolph County ordinance. The

decommissioning plan must include an independent financial instrument in an amount equal to the demolition and removal cost estimate. The decommissioning instrument is intended primarily to cover the cost of removing project infrastructure, of restoring the leased premises to their pre-construction condition, and of removing the foundation pedestals to a depth of 48 inches. Petitioner shall provide the Commission with notice when such financial instrument has been established, including the form and amount. We find that the financial assurance requirements are sufficient to satisfy this requirement.

7. **Reporting Requirements.** In addition to the foregoing requirements, it shall be a condition of this Order and our continued declination of jurisdiction over Petitioner that Petitioner file Annual Reports 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 responsibilities. 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 PJM;
- (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 Interconnection Service Agreement (“ISA”) with PJM, and
- (11) The information listed under (b) below, 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 ISA 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 Appendix B of the ISA 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 PJM, 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.<sup>2</sup> Petitioner shall notify the Commission in the event that it modifies or suspends the Project under the terms of the ISA 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 PJM ISO generator interconnection procedures; (b) suspended the Project under the terms of the ISA 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.

**8. 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 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 has 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 as an energy utility, except over the areas discussed above as to which we are reserving our jurisdiction, is in the public interest. While the Commission is not declining jurisdiction for a

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<sup>2</sup> A material change includes the following: an increase or decrease of greater than three (3) MW in the Facility's capacity; changes in operating entities; transfers of assets; and changes identified in case law as a material change.

particular term of years, the Commission does not intend to reassert jurisdiction absent circumstances affecting 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 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 ISA, 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 and the OUCC any annual report required to be filed by 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, land use requirements, land use ordinances and construction-related permits in the operation and construction of the Facility. Petitioner retains the rights, powers and privileges of a public utility to cross the public rights-of-way, specifically State Road 1 and United States Highways 27 and 36 and certain county roads, as depicted in Petitioner’s Exhibit BW-1; provided, however, if circumstances necessitate the use of different public rights-of-way, Petitioner shall make a Compliance filing under this Cause thirty (30) days prior to expected initial use that sets forth the final chosen right-of-way Petitioner seeks to use.

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 ch. 8-1-6.

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

**ATTERHOLT, MAYS AND ZIEGNER CONCUR; BENNETT AND LANDIS ABSENT:**

**APPROVED:      SEP 19 2013**

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

  
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**Brenda A. Howe**  
**Secretary to the Commission**