

ORIGINAL

Commissioner	Yes	No	Not Participating
Huston	✓		
Freeman	✓		
Krevda	✓		
Ober	✓		
Ziegner	✓		

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION BY HARDY)
HILLS SOLAR ENERGY LLC FOR CERTAIN)
DETERMINATIONS BY THE COMMISSION) CAUSE NO. 45490
WITH RESPECT TO ITS JURISDICTION OVER)
PETITIONER'S ACTIVITIES AS A GENERATOR) APPROVED: JUN 23 2021
OF ELECTRIC POWER)

ORDER OF THE COMMISSION

Presiding Officers:

James F. Huston, Chairman

Brad J. Pope, Administrative Law Judge

On February 5, 2021, Hardy Hills Solar Energy LLC ("Petitioner") filed its Petition with the Indiana Utility Regulatory Commission ("Commission") for certain determinations, declinations of jurisdiction, and approvals relating to its proposed construction of a solar electric generation facility ("Facility") in accordance with Ind. Code ch. 8-1-2.5. The Facility will include up to approximately 195 megawatts ("MW") of nameplate capacity (alternating current ("AC")), a project substation, and an electric generation transmission line owned and operated by Petitioner, located entirely in Clinton County, Indiana. Also on February 5, 2021, Petitioner filed the direct testimony and attachments of Katya Samoteskul, Manager, Renewable Development for Invenergy LLC in support of the Petition.

On March 22, 2021, the Indiana Office of Utility Consumer Counselor ("OUCC") filed a Notice of Intent Not to File Testimony.

On April 30, 2021, Petitioner filed Petitioner's Exhibit No. 2, consisting of a stipulated exhibit with the OUCC.

The Commission set this matter for an Evidentiary Hearing to be held on May 5, 2021, at 1:30 p.m. in Room 222 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana. On April 30, 2021, a docket entry was issued advising that due to the ongoing COVID-19 pandemic, the hearing would be conducted via WebEx video conferencing. Petitioner and the OUCC appeared and participated in the hearing at which the testimony and exhibits of Petitioner were admitted into the record without objection.

Based upon the applicable law and evidence presented, the Commission now finds:

1. **Notice and Jurisdiction.** Notice of the hearing in this Cause was given and published by the Commission as required by law. As discussed 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 § 8-1-2.5-2. The Commission may decline to exercise, in whole or in part, its jurisdiction over an energy utility pursuant to Ind. Code § 8-1-2.5-5. Therefore, the Commission has jurisdiction over Petitioner and the subject matter of this Cause.

2. **Petitioner's Characteristics.** Petitioner is a limited liability company organized and existing under the laws of the State of Delaware and authorized to do business in the State of Indiana. Petitioner's principal place of business is at One South Wacker Drive, Suite 1800, Chicago, Illinois. Petitioner is a wholly owned subsidiary of Hardy Hills Solar Energy Holdings LLC, which is a wholly owned subsidiary of Invenergy Solar Development North America LLC ("ISDNA"), which in turn is a wholly owned subsidiary of Invenergy Renewables LLC ("Invenergy Renewables"). Petitioner, Hardy Hills Solar Energy Holdings LLC, ISDNA, and Invenergy Renewables are affiliates of Invenergy LLC ("Invenergy"). Invenergy is an Illinois limited liability company specializing in the development of large-scale renewable and other clean energy generation and storage facilities worldwide.

3. **Relief Requested.** As summarized above and further discussed below, Petitioner requests that the Commission decline to exercise its jurisdiction over Petitioner pursuant to Ind. Code § 8-1-2.5-5 as it pertains to the construction, ownership, operation, and any other activity in connection with the Facility. Petitioner will generate electricity from solar energy, a renewable energy resource, for sale in the wholesale power market.

4. **Petitioner's Evidence.** Petitioner witness Katya Samoteskul stated that the Facility will be located across parts of approximately 1,780 acres in Clinton County, Indiana near the Town of Kilmore and will consist of approximately 581,594 solar panels. She explained that the Facility will have the capability to generate up to a nameplate capacity of approximately 195 MWac and will have a Net Capacity Factor of approximately 23%. She testified that the Facility is expected to achieve a commercial operation date by May 31, 2023.

Ms. Samoteskul explained that Petitioner's upstream parent company, Hardy Hills Solar Energy Holdings LLC, will initially own 100% of the membership interests in Petitioner. Upon the satisfaction of certain conditions pursuant to a membership interest purchase, project development, and construction management agreement, Hardy Hills Solar Energy Holdings LLC will transfer 100% of its membership interests to AES Indiana Devco Holdings 1, LLC, a wholly owned subsidiary of Indianapolis Power & Light Company ("IPL"). The transfer is projected to be during September 2021 (the "MIPA Transaction"). At that point, neither Hardy Hills Solar Energy Holdings LLC nor any other Invenergy affiliate will hold a direct or indirect ownership interest in Petitioner. Ms. Samoteskul testified that pursuant to the MIPA Transaction, IPL will enter into a Capacity Agreement and Contract for Differences ("CFD") with Petitioner. Under this transaction structure, Petitioner will sell its energy to the Midcontinent Independent System Operator ("MISO"), and the energy output of the Facility will be settled at a fixed price pursuant to the CFD.¹

Ms. Samoteskul explained that the Facility would generate electricity via solar panels located within the solar field. She stated that the solar field would include mounted photovoltaic ("PV") modules and Power Conversion Stations ("PCS") configured in array blocks. Each PCS would contain an inverter, a medium voltage transformer, and electrical and communication equipment to power and communicate with the tracker units. All electrical equipment would be housed in protective enclosures on concrete pads, precast vaults, or posts. She testified that the collection system would transport the electricity from each array block to an onsite collector substation via underground 34.5 kV cabling. The electricity would then be stepped up to 230 kV, and the Facility would interconnect

¹ The terms and conditions of the MIPA Transaction and CFD are described in Petitioner's testimony in Cause No. 45493.

to Duke Energy Indiana's ("Duke") 230 kV transmission system via a 230 kV transmission line between New London and Frankfort, which runs through the Facility site.

Ms. Samoteskul testified that the Duke transmission system is within the footprint of MISO and that the Facility's queue position with MISO is J1063. She stated that MISO published a draft Phase II System Impact Study for the Facility in August 2020, which was attached to her testimony. She testified that the completed Phase II System Impact Study was expected in February 2021 and the completed Phase III System Impact Study was expected by June 2021. She explained that the system impact study shows how the Facility will interconnect with the wholesale transmission grid and that the final studies are expected to show the Facility's interconnection with Duke's transmission system will not negatively impact system performance. Ms. Samoteskul testified that the Generator Interconnection Agreement ("GIA") is expected to be completed by November 2021 and noted that Petitioner agrees to provide the final interconnection studies and fully executed GIA as part of the post-Order reporting requirements.

Ms. Samoteskul testified that Petitioner has applied or would apply for and obtain all necessary federal, state, and local permits needed for construction and operation of the Facility. She explained Petitioner is performing several environmental and cultural resource studies to evaluate the appropriateness of the Facility site. She testified that Petitioner contracted with Energy Renewal Partners, LLC ("ERP") to perform a Tier 1-2 Site Characterization Study ("SCS") of the Facility site and surrounding area. The SCS was attached to Ms. Samoteskul's testimony as Petitioner's Attachment KS-2. She testified ERP performed a Habitat Assessment of the Facility area to evaluate the environmental setting and classify habitats within the Facility area, and subsequently evaluate whether onsite habitats are suitable or unsuitable for state or federally endangered, threatened, or protected species. The Habitat Assessment was attached as Petitioner's Attachment KS-3. ERP also performed a Cultural Resources Desktop Review to provide a preliminary review of desktop sources pertaining to cultural and historic resources with the potential to be located within the Facility site or be impacted by the Facility. The Cultural Resources Desktop Review was attached as Petitioner's Attachment KS-4. Ms. Samoteskul testified that Petitioner contracted with Westwood Professional Services ("Westwood") to perform a Phase I Environmental Site Assessment ("ESA") in accordance with ASTM 18 Standard E 1527-13 and 40 C.F.R. § 312 Subp. C. The ESA was attached as Petitioner's Attachment KS-5. She testified that Westwood also prepared a Drainage Plan on behalf of Petitioner and that the Clinton County Drainage Board ("Drainage Board") approved the Drainage Plan in June 2020. The Drainage Plan and the Drainage Board's approval were attached as Petitioner's Attachment KS-6 and Attachment KS-7.

Ms. Samoteskul testified that Petitioner has complied or would comply with local zoning and land use requirements. She explained that Clinton County has an ordinance governing the development of solar generation facilities. In accordance with the ordinance, Petitioner received approval in February 2020 from the Clinton County Area Plan Commission ("Plan Commission") and in April 2020 from the Board of Commissioners for Clinton County for re-zoning of the Facility area to a Solar Overlay District. She explained that following creation of the Solar Overlay District, Petitioner is required to seek approval from the Plan Commission of the Facility's Development Plan and that the Plan Commission approved the Development Plan on December 10, 2020. The Plan Commission's approval of the Development Plan was included as Petitioner's Attachment KS-9. She testified that the Facility requires an Improvement Location Permit and that such permit is required prior to commencement of construction of the Facility. She testified that the Facility is required by the Clinton County solar ordinance to have a decommissioning plan and that Petitioner will be

required to provide decommissioning security. The decommissioning plan must be approved by the Plan Commission prior to receiving Improvement Location Permits and the start of construction. She testified that a decommissioning agreement for the Facility has been entered into with the County Commissioners and Plan Commission.

Ms. Samoteskul testified that Petitioner may need to obtain the following Indiana permits and determinations: (1) a permit under Title 327 of the Indiana Administrative Code for the discharge of construction-related storm water, also known as a Rule 5 Permit; (2) Indiana Department of Transportation (“INDOT”) permits to allow the Facility’s electric lines and other equipment to cross state highways and for driveways, road exits, and similar infrastructure; and (3) appropriate permits from IDNR and the Indiana Department of Environmental Management (“IDEM”), to the extent necessary, if isolated wetlands and floodways are impacted by the Facility.

Ms. Samoteskul testified that Petitioner may be required by federal law to: (1) self-certify as an exempt wholesale generator and apply for market-based rate authority under FERC’s rules and regulations; (2) develop and implement a federal spill prevention, control, and countermeasure plan; and (3) obtain a Nationwide Permit from the U.S. Army Corps of Engineers (“USACE”) for impacts to wetlands or other waters of the United States.

Ms. Samoteskul testified the Facility would not use water in any significant quantities, and it would have negligible or no impact on local water supplies. Water would be used during construction and removal of project facilities primarily for dust control. After construction is completed, water may be used for panel washing, if necessary.

Ms. Samoteskul testified that Petitioner seeks to retain the right to use the public right-of-way within the Facility site to place collector lines and transmission lines in the public right-of-way. Additionally, retention of this right would clarify issues surrounding use of the public right-of-way for road crossings.

Ms. Samoteskul testified that she believes the public interest will be served in several important respects by the addition of the Facility’s electric generating capacity. She testified the public needs electricity as demonstrated by the fact that Petitioner has already secured an off-taker (IPL) to purchase 100% of the electricity generated by the Facility pursuant to the MIPA Transaction. She testified that solar energy helps reduce the negative effects of electricity generation on the environment by being a source of clean power. She noted that solar generation facilities do not release any pollutants, such as SO₂, NO_x, mercury, or CO₂. She testified the public in Indiana also may benefit from the efficiencies that flow from proximity to the source of generation; that is, because of the high cost of transmitting power over long distances, it is generally advantageous for load not to be located too far from its source. She testified that landowners in the area of the Facility will receive economic benefits from the placement of solar generation facilities on their properties, and local taxing bodies would receive new tax revenues. She explained that the Facility would provide additional economic benefit by creating up to 200 temporary construction jobs. She stated solar energy would diversify the region’s and Indiana’s electricity generation portfolio, protecting against volatile price spikes and risks from relying too heavily on just a few sources of generation.

Ms. Samoteskul testified regarding the Facility’s ownership and operation. She testified Petitioner’s indirect parent company Invenergy Renewables has substantial experience financing, owning, and operating renewable energy assets worldwide. Invenergy Renewables portfolio of

renewable energy projects in operation or in development currently includes 106 wind and 41 solar projects in the United States that represent more than 21,700 MW of aggregate capacity. She concluded that Petitioner will develop the Facility in a commercially reasonable manner and in accordance with good utility practice.

Ms. Samoteskul testified that Petitioner has the ability to finance the Facility. She testified Invenenergy has successfully financed over 25,200 MW of renewable and other clean energy generation and storage facilities worldwide, including 3,944 MW of solar projects, representing more than \$39 billion in capital investment. She testified that Petitioner will have all the necessary financial, technical, and managerial expertise to construct and operate the Facility.

Ms. Samoteskul testified regarding the requirements of Ind. Code § 8-1-2.5-5. She testified that technological or operating conditions, competitive forces, or the extent of regulation by other state or federal regulatory bodies render the Commission's exercise of jurisdiction over Petitioner unnecessary or wasteful. She explained that Petitioner is already subject to the requirements of Clinton County, the rules and regulations of FERC, and other federal, state, and local agencies and that the requirements of those governmental entities adequately protect the public interest regarding the future operation and wholesale transactions involving the Facility. In addition, competitive forces in the wholesale power markets serve as an adequate check on these activities, particularly on the wholesale power price. She explained that MISO is responsible for the safe and reliable operation and planning, including generation interconnection planning, of the electric transmission systems under their functional control, which includes the Duke transmission system to which the Facility will interconnect. She also stated that regulation of these matters would be unnecessary and wasteful of the Commission's resources, and burdensome for Petitioner.

Ms. Samoteskul testified that a declination of jurisdiction by the Commission, in whole or in part, would be beneficial for Petitioner, Petitioner's customers, and Indiana, and would promote the efficiency of Petitioner. She explained Petitioner would benefit from the ability to devote its efforts and resources to complying fully with the requirements of the federal, local, and other state regulatory agencies with jurisdiction over its operations, as well as the requirements of MISO, which would promote the efficiency of Petitioner's ongoing development and operation of the Facility. She testified that Indiana would benefit from the generation of electric power from solar power generally, and this Facility specifically. She testified that the exercise of jurisdiction by the Commission would encumber Petitioner with duplicative requirements that are unnecessary in view of other regulatory requirements. Moreover, because the Commission maintains oversight over the proposed MIPA Transaction with IPL, the Commission can ensure the public interest is served by such transaction.

Ms. Samoteskul testified that the exercise of Commission jurisdiction would inhibit Petitioner in competing with other providers of functionally similar energy services or equipment. She testified that should the Commission exercise jurisdiction over Petitioner, the Commission would be placing Petitioner at a disadvantage with respect to other independent power producers such as wind projects over whom the Commission has declined to exercise jurisdiction. She added that such regulation would expose Petitioner to the risk of regulatory lag and hinder the quick implementation of business decisions in a highly competitive market, which would create a significant competitive disadvantage for Petitioner. In addition, the Commission's exercise of jurisdiction may compel Petitioner publicly to disclose proprietary information to its disadvantage. Ms. Samoteskul testified that prior to the completion of the MIPA Transaction, it is important for competitive purposes that Petitioner not be burdened with regulatory oversight that its competitors do not experience. Without a declination of

jurisdiction order from the Commission, delays related to the procurement of component parts and Petitioner's ability to achieve milestones established by the GIA may also arise due to the regulatory uncertainty caused by an Indiana solar project not receiving a declination order.

5. Commission Discussion and Findings. If the Commission finds that Petitioner is a public utility for the purposes of Indiana's Utility Power Plant Construction Act, Ind. Code ch. 8-1-8.5 (the "Power Plant Act"), then Petitioner would be considered an "energy utility" as defined by Ind. Code § 8-1-2.5-2. The Commission may decline to exercise jurisdiction over Petitioner pursuant to Ind. Code ch. 8-1-2.5, including its jurisdiction under the Power Plant Act, to issue certificates of public convenience and necessity for the construction of the Facility. For the Commission to decline to exercise jurisdiction over Petitioner pursuant to Ind. Code ch. 8-1-2.5, the Commission must first assert jurisdiction over Petitioner.

The Power Plant Act in Ind. Code § 8-1-8.5-1(a) defines "public utility" to mean a: (1) public, municipally owned, or cooperatively owned utility; or (2) joint agency created under Ind. Code ch. 8-1-2.2. 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 Co.*, Cause No. 43235 (IURC June 13, 2007). In addition, Petitioner's property "is used in a business that is public in nature and not one that is private." *See Foltz v. City of Indianapolis*, 130 N.E.2d 650, 659 (Ind. 1955) ("Foltz"). Petitioner's business is "impressed with a public interest" and would render service "of a public character and of public consequence and concern" as also considered in *Foltz. 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 sale of the power generated by that 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 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 Dec. 6, 2006) ("Benton County"). In *Benton County*, the Commission specifically found that it had jurisdiction over a wind energy generator with wholesale operations such as Petitioner. Consequently, based upon our application of the statutes and precedents discussed herein to the facts and circumstances in this case, we find that Petitioner is a "public utility" within the meaning of Ind. Code § 8-1-2-1 and Ind. Code § 8-1-8.5-1 and is an "energy utility" within the meaning of Ind. Code § 8-1-2.5-2 for purposes of the ownership, development, financing, construction, and operation of the Facility.²

When the Commission concludes that Petitioner is 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

² 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 have determined that Petitioner is a "public utility" under Ind. Code § 8-1-2-1, Petitioner is also an "energy utility."

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 by a declination of jurisdiction, the Commission will 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 would be generated solely for resale subject to the jurisdiction of FERC under the provisions of the Federal Power Act, 16 U.S.C. § 824 *et seq.* Petitioner has indicated that it would operate the Facility in a manner consistent with good utility practice. Further, the costs of the Facility would not be recovered through a rate base/rate of return or other process typically associated with public utility rates.

The evidence presented demonstrates that further Commission regulation of the Facility: (1) would be duplicative of other regulatory bodies; (2) could complicate and cause inefficiencies in Petitioner’s development and operation of the Facility; (3) could impede Petitioner’s ability to compete with other wholesale solar providers; and (4) would be an unnecessary use of the Commission’s resources. Consequently, we find Petitioner’s request that the Commission decline to exercise its jurisdiction over the Facility is in the public interest and is granted. In so finding, we also considered other factors the Commission has typically considered in prior declination of jurisdiction proceedings.

A. Location. As part of its analysis, the Commission may consider whether the location of a proposed facility is compatible with the surrounding land uses by evaluating and considering 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 would be served by the Facility being in its planned location. In making such a determination, the Commission must consider the potential for adverse effects on Indiana “electricity suppliers” as that term is used in Ind. Code § 8-1-2.3-2(b), their customers, or local communities. 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 would 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. Based on the factors described below, the Commission finds that the Facility's proposed location is compatible with the surrounding land uses and the Facility would not significantly and negatively impact an electricity supplier, its consumers, or a local community.

i. Local Zoning and Permitting Requirements. Petitioner submitted evidence that it has complied or would comply with local zoning and land use requirements, has or would obtain all construction, grading, and wastewater permits, and would not rely on the public utility exemption from local zoning regulation. Ms. Samoteskul testified that in accordance with Clinton County's ordinance governing the development of solar generation facilities, Petitioner received approval in February 2020 from the Plan Commission and in April 2020 from the Board of Commissioners for Clinton County for re-zoning of the Facility area to a Solar Overlay District. She explained that following creation of the Solar Overlay District, Petitioner is required to seek approval from the Plan Commission of the Facility's Development Plan and that the Plan Commission approved Petitioner's Development Plan on December 10, 2020. She testified the Facility requires an Improvement Location Permit and that such permit is required prior to commencement of construction of the Facility. Ms. Samoteskul testified that a decommissioning agreement for the Facility has been entered into with the County Commissioners and Plan Commission, which is a requirement prior to receiving Improvement Location Permits or starting construction.

ii. Land Use and Solar Resources. Ms. Samoteskul testified that Petitioner is an affiliate of Invenergy Renewables, which has extensive experience with owning and operating large-scale renewable projects in the United States. Based on the evidence presented, it appears that Petitioner, utilizing its experience in developing other solar projects throughout the United States, has determined that the solar resource at the Facility site is sufficient for the development of an economically viable project. A preliminary site map reflecting the approximate locations of these facilities was submitted as Petitioner Exhibit No. 1, Attachment KS-1.

iii. Water Use and Supply. Ms. Samoteskul testified that the Facility would not have significant water use and would have negligible or no impact on local water supplies. Water would be used during construction and removal of project facilities, primarily for dust control. After construction is completed, water may be used for panel washing, if necessary. Therefore, the evidence presented demonstrates that area water use and supplies would not be adversely affected by the Facility.

iv. Transmission Interconnection. Ms. Samoteskul testified regarding the Facility's interconnection with the Duke transmission system. She testified that the Duke transmission system is within the footprint of MISO and that the Facility's queue position with MISO is J1063. She stated that MISO published a draft Phase II System Impact Study for the Facility in August 2020, which was attached to her testimony as Attachment KS-10. She explained that the completed Phase II System Impact Study was expected in February 2021, and the completed Phase III System Impact Study was expected by June 2021. She testified that the system impact study shows how the Facility will interconnect with the wholesale transmission grid and that the final studies are expected to show the Facility's interconnection with Duke's transmission system will not negatively impact system performance. Ms. Samoteskul testified that the GIA is expected to be completed by November 2021.

v. Additional Permitting and Environmental Issues. To the extent required by state law, Petitioner may need to obtain the following permits and determinations: (1) a permit under Title 327 of the Indiana Administrative Code for the discharge of construction-related storm water, also known as a Rule 5 Permit; (2) INDOT permits to allow the Facility's electric lines and other equipment to cross state highways and for driveways, road exits, and similar infrastructure; and (3) appropriate permits from IDNR and IDEM, to the extent necessary, if isolated wetlands and floodways are impacted by the Facility.

Petitioner may also be required by federal law to do the following: (1) self-certify as an exempt wholesale generator and apply for market-based rate authority under FERC's rules and regulations; (2) develop and implement a federal spill prevention, control, and countermeasure plan; (3) and obtain a Nationwide Permit from the USACE for impacts to wetlands or surface water features.

Petitioner has performed several environmental and site studies, including a Site Characterization Study, Habitat Assessment, Cultural Resources Desktop Review, and Phase 1 ESA. She stated that the Clinton County Drainage Board approved Petitioner's Drainage Plan in June 2020.

vi. Using the Public Right-of-Way. Ms. Samoteskul testified that Petitioner seeks to retain the right to use the public right-of-way within the Facility site. She explained that retention of the use of the public right-of-way would allow Petitioner to place collector lines and transmission lines in the public right-of-way and would clarify issues surrounding use of the public right-of-way for road crossings. Based upon the evidence presented, we find Petitioner's request for limited use of the public right-of-way to be reasonable.

B. Need. In determining whether to decline to exercise jurisdiction, the Commission has also previously considered whether the development of additional generating capacity will serve the public interest. The Commission finds that the evidence presented by Petitioner demonstrates a reasonable expectation of need for the Facility and finds that its construction will serve the public interest. The public interest would be served in several ways through the addition of the electric generating capacity represented by the Facility. The Facility will be an environmentally friendly source of new electric generating capacity, will not require the transmission of power over long distances, will generate economic benefits for landowners around the Facility, and will provide new tax revenues for local taxing bodies. The Facility will also provide additional economic benefit by creating up to 200 temporary construction jobs.

Based on the evidence presented, we find Petitioner's proposed development of additional generating capacity through the Facility is reasonable and will serve the public interest.

C. Financing and Management. To ensure that Indiana consumers are not adversely affected by the proposed development of generation plants in Indiana, developers have provided evidence showing the financial structure of a proposed project would 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.

Ms. Samoteskul testified that Petitioner will have all the necessary financial, technical, and managerial expertise to construct and operate the Facility. She testified Petitioner's indirect parent

company Invenergy Renewables has substantial experience financing, owning, and operating renewable energy assets worldwide. Invenergy Renewables portfolio of renewable energy projects in operation or in development currently includes 106 wind and 41 solar projects in the United States that represent more than 21,700 MW of aggregate capacity. She testified Petitioner will develop the Facility in a commercially reasonable manner and in accordance with good utility practice.

Based on the evidence presented, the Commission finds that Petitioner has the ability to finance, construct, and manage the Facility.

D. Transfers of Ownership. The Commission reserves its jurisdiction under Ind. Code § 8-1-2-83 and requires Petitioner to obtain prior Commission approval of any transfer of assets owned by Petitioner. Petitioner, however, shall not be required to seek prior Commission approval of any transfers of ownership of Facility assets or ownership interests in Petitioner involving: (1) the grant of a security interest, mortgage, deed of trust or other encumbrance 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), or any investor, guarantor, equipment supplier or financing entity; (2) Petitioner or an affiliate becoming a debtor in possession; (3) a foreclosure (or deed in lieu of foreclosure) on the property owned by Petitioner; or (4) a transfer of all or a part of the ownership of Hardy Hills Solar or its assets to an affiliate of 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.

E. Affiliate Transactions. In addition to determining whether the public interest would be served if the Commission declines jurisdiction, the Commission must consider what actions it shall take to ensure that the public interest is served throughout the commercial life of the Facility. Specifically, the Commission must determine the extent to which it must reserve its authority over 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, should an "energy utility" subsequently become an affiliate, as defined in Ind. Code § 8-1-2-49, of any regulated Indiana retail utility.

Initially, Petitioner's upstream parent company, Hardy Hills Solar Energy Holdings LLC, will initially own 100% of the membership interests in Petitioner. Upon the satisfaction of certain conditions pursuant to a membership interest purchase, project development and construction management agreement, Hardy Hills Solar Energy Holdings LLC will transfer 100% of its membership interests to AES Indiana Devco Holdings 1, LLC ("Purchaser"), a wholly owned subsidiary of IPL. While the transfer to Purchaser is unrelated to our reservation of jurisdiction under Ind. Code § 8-1-2-83, Ms. Samoteskul testified that Petitioner proposes to file a notice in this Cause within five business days after the consummation of the transfer of the membership interests of Petitioner to Purchaser to satisfy the notice requirements related to the affiliation of Petitioner with a retail electric utility providing service in Indiana. We find Petitioner shall file and serve on all parties of record such a notice within five business days of its affiliation with a retail electric utility that provides service in Indiana, which includes the proposed transaction with IPL and all future affiliations involving this reservation of jurisdiction.

Separate from this declination of jurisdiction proceeding, IPL has filed a petition with the Commission for approval of the MIPA Transaction and other associated approvals in Cause No. 45493. The Commission notes that it retains certain authority under Section 201 of the Federal Power Act to examine Petitioner's books, accounts, memoranda, contracts, and records consistent with the limitations contained therein. 16 U.S.C. § 824 (2005).

6. **Financial Assurance.** Ms. Samoteskul testified that Petitioner is required by the applicable county ordinance to provide a decommissioning plan, which must include a contractor estimate for removal of the Facility. A form of security for decommissioning the Facility will be established in the event of abandonment, financial failure, and/or bankruptcy. She testified that detail regarding the type and amount of the security and method for calculating it will be specified in the decommissioning plan approved by Clinton County.

7. **Reporting Requirements.** Petitioner agreed to the same reporting requirements that have been established for other renewable generation facilities in Indiana. In addition to the foregoing requirements, as a condition of this Order and our continued declination of jurisdiction, Petitioner must file Annual Reports with the Commission as provided in Ind. Code § 8-1-2-49, and provide any other information requested by the Commission. 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. A responsible officer of Petitioner shall verify all reports, and Petitioner shall file the reports under this Cause within the timeframes prescribed.

The following reports shall be prepared and filed by Petitioner:

A. **Initial Report.** Petitioner's initial quarterly report, due within 30 days after the date of this Order, shall provide the following information, to the extent it is known and available:

- (1) Facility 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 solar panels deployed;
- (4) Anticipated total output of Facility;
- (5) Manufacturer, model number, and operational characteristics of panels;
- (6) Connecting utility(s);
- (7) Copy of any Interconnection System Impact Studies prepared by 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 GIA with MISO; and
- (11) The information listed below in the Subsequent Reports section to the extent such information is available.

B. **Subsequent Reports.** Petitioner agrees to file subsequent reports 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 of April 30th of each year. Thereafter, Petitioner will file reports on an annual basis in this Cause. Subsequent reports should include the following information:

- (1) Any changes to 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 GIA 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 GIA 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 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 provide the Commission with at least 30 days' notice prior to the change, and any party wishing to protest such change must file an objection under this Cause within 10 days of the notification of project modification.³ Petitioner shall notify the Commission when it modifies or suspends the Facility under the terms of the GIA and does not reinstitute work within three years following commencement of such suspension. If the Commission determines that Petitioner: (1) has failed to enter into an agreement pursuant to MISO generator interconnection procedures; (2) has suspended the Facility under the terms of the GIA and has not reinstated work within three years following commencement of such suspension; or (3) has otherwise suspended its efforts to complete the Facility within three years of this Order, the Commission may, following notice to Petitioner, issue an Order terminating its declination of jurisdiction.

8. Conclusion. Consistent with Ind. Code § 8-1-2.5-5, the Commission finds that declining to exercise its jurisdiction over Petitioner will facilitate the immediate construction of the proposed Facility and add 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 as provided under Ind. Code § 8-1-2.5-5(b)(2). We further find that declining to exercise our jurisdiction over Petitioner will promote energy utility efficiency under Ind. Code § 8-1-2.5-5(b)(3). In addition, Petitioner has demonstrated it has the technical, financial, and managerial capabilities to construct and operate the proposed Facility and has also shown that the wholesale market for electricity in Indiana will benefit from the addition of the Facility's generating capacity, and, therefore, its market entry is reasonable. As a result, although all the permits and approvals over which other governmental bodies, agencies, or third parties have authority and oversight have not yet been issued, the Commission finds the evidence is sufficient to decline to exercise our jurisdiction, as set forth herein, at this juncture based on Ind. Code § 8-1-2.5-5(b).

³ A material change includes the following: increase or decrease of greater than five MW in the Facility's nameplate capacity; a change in operating entities; a transfer of ownership or assets, other than the activities identified in this Order and the contemplated transaction with IPL; and any change identified in case law as a material change.

Accordingly, based on these findings and the additional requirements contained in this Order, the Commission believes that a declination of jurisdiction over Petitioner as an energy utility, except in the areas in which we reserve jurisdiction that are identified above, is in the public interest. While the Commission is not declining jurisdiction for a 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 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 GIA, then the Commission may, following notice to Petitioner, proceed to issue an Order terminating the declination of jurisdiction set forth herein. Through the quarterly status reports required by this Order, Petitioner shall notify the Commission and the OUCC when construction begins and when commercial operation of the Facility begins. Petitioner will satisfy the reporting requirements outlined above before commercial operation of the Facility begins. Petitioner shall also file with the Commission any Annual Report required to be filed with FERC and provide the Commission such other information as we 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 a “public utility” within the meaning of Ind. Code §§ 8-1-8.5-1 and 8-1-2-1 and an “energy utility” within the meaning of Ind. Code § 8-1-2.5-2.
2. The Facility is 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 shall retain the right to a limited use of the public right-of-way within the Facility area as described above.
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 adjudged to be exempt from the public utility fee prescribed by Ind. Code ch. 8-1-6.
6. Based on the ownership structure described above, Petitioner shall file a notice in this Cause within five (5) business days after the consummation of the transfer of the membership interests in Petitioner to Purchaser and serve notice on all parties of record.
7. Petitioner shall comply fully with the terms of this Order and submit to the Commission all information required by the terms of this Order.

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

HUSTON, FREEMAN, KREVDA, OBER, AND ZIEGNER CONCUR:

APPROVED: JUN 23 2021

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

Dana Kosco Digitally signed by Dana
Kosco
Date: 2021.06.23 10:16:51
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**Dana Kosco
Secretary of the Commission**