

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

JOINT PETITION OF INDIANA MICHIGAN )  
POWER COMPANY (I&M) AND AEP )  
GENERATING COMPANY (AEG) FOR CERTAIN )  
DETERMINATIONS WITH RESPECT TO THE )  
COMMISSION'S JURISDICTION OVER THE )  
RETURN OF OWNERSHIP OF ROCKPORT UNIT )  
2 AND FOR THE CREATION OF A SUBDOCKET )  
TO ADDRESS ASSOCIATED ACCOUNTING )  
AND RATEMAKING MATTERS, OR IN THE )  
ALTERNATIVE ISSUANCE OF A CERTIFICATE )  
OF PUBLIC CONVENIENCE AND NECESSITY. )

CAUSE NO. 45546

Joint IURC  
PETITIONER'S

EXHIBIT NO.

9-10-21

DATE

REPORTER

SUBMISSION OF DIRECT TESTIMONY OF TOBY L. THOMAS

Indiana Michigan Power Company (I&M) and AEP Generating Company, by  
counsel, hereby files the direct testimony and attachments of Toby L. Thomas.

Respectfully submitted,



Teresa Morton Nyhart (No. 14044-49)  
Jeffrey M. Peabody (No. 28000-53)  
BARNES & THORNBURG LLP  
11 S. Meridian Street  
Indianapolis, Indiana 46204  
Nyhart Phone: (317) 231-7716  
Peabody Phone: (317) 231-6465  
Fax: (317) 231-7433  
Nyhart Email: tnyhart@btlaw.com  
Peabody Email: jpeabody@btlaw.com

Attorneys for:  
INDIANA MICHIGAN POWER COMPANY  
and AEP GENERATING COMPANY

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing was served this 10th day of  
May, 2021, via email transmission to:

Randall Helmen  
Tiffany Murray  
Office of Utility Consumer Counselor  
115 West Washington Street, #1500S  
Indianapolis, Indiana 46204  
infomgt@oucc.in.gov  
rhelmen@oucc.in.gov  
timurray@oucc.in.gov



---

Jeffrey M. Peabody

Teresa Morton Nyhart (No. 14044-49)  
Jeffrey M. Peabody (No. 28000-53)  
BARNES & THORNBURG LLP  
11 South Meridian Street  
Indianapolis, Indiana 46204  
Nyhart Phone: (317) 231-7716  
Peabody Phone: (317) 231-6465

Attorneys for INDIANA MICHIGAN POWER COMPANY  
AND AEP GENERATING COMPANY

I&M Exhibit: \_\_\_\_\_

**INDIANA MICHIGAN POWER COMPANY**

**PRE-FILED VERIFIED DIRECT TESTIMONY**

**OF**

**TOBY L. THOMAS**

## **Table of Contents**

I.	Introduction of Witness .....	1
II.	Current Status of Rockport Unit 2 .....	5
III.	The Agreement .....	7
IV.	I&M and AEG's Planned Ownership of Rockport Unit 2 .....	11

**DIRECT TESTIMONY OF TOBY L. THOMAS  
ON BEHALF OF  
INDIANA MICHIGAN POWER COMPANY**

**I. Introduction of Witness**

**Q1. Please state your name and business address.**

My name is Toby L. Thomas and my business address is Indiana Michigan Power Center, P.O. Box 60, Fort Wayne, IN 46801.

**Q2. By whom are you employed and in what capacity?**

I am employed by Indiana Michigan Power Company (I&M or Company) as its President and Chief Operating Officer.

**Q3. Briefly describe your educational background and professional experience.**

I hold a Bachelor of Science Degree in Mechanical Engineering from the Rose Hulman Institute of Technology. I joined American Electric Power Company, Inc. (AEP) in 2001 as a project engineer involved in the development and optimization of competitive power generation and industrial steam generation projects across the United States. I have performed various roles of increasing responsibility including serving as the Managing Director for Kentucky Power, Gas Turbine and Wind Generation.

In 2013, I was named Vice-President Competitive Generation for AEP Generation Resources, where I was responsible for the safe, efficient, and environmentally compliant operation of AEP's competitive generating assets – *i.e.*, the AEP plants that are not part of a vertically integrated AEP operating company. I became President and Chief Operating Officer of I&M on January 1, 2017.

**Q4. What are your responsibilities as Chief Operating Officer?**

I am responsible for the safe, reliable, and efficient day-to-day operation of I&M, which is an operating company subsidiary of AEP. I am accountable and responsible for I&M's financial performance and the quality of the services we provide to our customers.

My responsibilities include I&M's community involvement and economic development, and ensuring compliance with federal regulatory and statutory rules, as well as laws of Indiana and Michigan, the states comprising the Company's electric service territory. Essentially, I am accountable for the Company's distribution, customer service, transmission, and generation functions to provide safe, adequate and reliable service to I&M's customers.

**Q5. Have you previously testified before any regulatory commissions?**

Yes. I provided testimony in I&M's two most recent rate cases before the Indiana Utility Regulatory Commission (IURC or Commission) docketed as Cause Nos. 45235 and 44967. I also provided testimony in Michigan Public Service Commission (MPSC) Case Nos. U-20359, U-18370 and U-18092. I also testified before the Public Utilities Commission of Ohio in Case Nos. 14-1693-EL-RDR et seq. on behalf of Ohio Power Company.

**Q6. What is the purpose of your testimony?**

My testimony supports I&M's and AEP Generating Company's (AEG; collectively Petitioners) request to be authorized to acquire the ownership interests in Unit 2 of the Rockport Generating Station (Rockport Unit 2) expeditiously, while deferring without prejudice the question of whether costs associated with reacquiring and operating Rockport Unit 2 after the end of the lease will be included in I&M's ongoing costs of serving retail customers in Indiana.

I will provide background information about Rockport Unit 2, including the sale and leaseback of the unit (the Lease) to and from certain financial institutions

(Equity Participants; collectively Owner Trust). I will also describe the key elements of the agreement under which I&M and AEG will reacquire ownership after the Lease ends in December 2022 (the Agreement or the Transaction).

My testimony, along with the testimonies of Tim Kerns and Franz Messner, will demonstrate that I&M has the requisite managerial, operational, and financial abilities to continue to safely and reliably operate Rockport Unit 2 primarily as a capacity resource until it retires no later than December 2028. I will also describe the benefits that led I&M and AEG to recognize that there is merit for them to exclusively control the operation of and investment in the unit.

Last, I will outline a proposed two-step process for expeditiously reviewing and granting the request for approval to own the resource, while preserving the ability of the Commission and all concerned to thoroughly review the question of whether and how ownership of Rockport Unit 2 would be reflected in I&M's retail cost of serving Indiana customers.

**Q7. Are you sponsoring any attachments?**

Yes. I am sponsoring the following Attachments:

- Attachment TLT-1, which is a copy of the Petition in this Cause. As the Petition has been filed separately it is not reproduced with my testimony but will be offered into evidence with my testimony at the hearing in this Cause.
- Attachment TLT-2 (Confidential), a Trust Interests Purchase Agreement (TIPA) that is representative of all of the Trust Interest Purchase

Agreements.<sup>1</sup> The TIPAs are the Agreements under which I&M and AEG will reacquire ownership of Rockport Unit 2 from the Owner Trust.

**Q8. Were the attachments that you sponsor prepared or assembled by you or under your direction?**

Yes.

**Q9. What are the companies requesting in this proceeding?**

As described in Attachment TLT-1, at this time, I&M and AEG are simply requesting the legal ability to reacquire ownership of Rockport Unit 2. The foundational act of obtaining the legal ability to reacquire the unit is a prerequisite to moving forward and closing the Transaction. This matter is time sensitive; therefore, Petitioners are seeking approval to complete this first step now, while deferring without prejudice to a second step the question of whether the costs of purchasing and operating Rockport Unit 2 after the end of the Lease will be approved for inclusion in I&M's Indiana jurisdictional cost of service.

Accordingly, Petitioners ask the Commission to determine in this proceeding whether I&M and AEG will be able to legally own Rockport Unit 2 again. To take the second step, which would only proceed upon an affirmative order in this proceeding, I&M will, as agreed in the Stipulation for an Agreed Upon Schedule, file a separate request with the Commission to issue a Certificate of Public Convenience and Necessity (CPCN) and determine whether and to what extent the costs of purchasing

---

<sup>1</sup> Petitioners entered into individual agreements with each of the Equity Participants that are identical but for the name of each Equity Participant and the purchase price attributable to that Equity Participant.



and operating Rockport Unit 2 after the end of the Lease will be included in I&M's Indiana jurisdictional cost of service.

## II. Current Status of Rockport Unit 2

### Q10. Please describe the Rockport Generating Station.

The Rockport Generating Station (Rockport Plant) is a coal-fired generating station located in Spencer County, Indiana that consists of two units. The nominal generating capacity of Rockport Unit 1 is 1320 MW and Rockport Unit 2 is 1300 MWs. The units were placed in service in 1984 and 1989, respectively, and have been efficient and reliable performers for I&M and its customers. Approximately 174 people are currently employed at the Rockport Plant.

### Q11. Please explain who controls the power generated by the Rockport Plant.

I&M and AEG are jointly responsible for the two Rockport units. Like I&M, AEG is a subsidiary of AEP that was found to be a public utility in Indiana in Cause No. 37602. Currently, AEG sells 70% of its 50% share of the Rockport Plant's capacity and energy to I&M under a Unit Power Agreement (UPA) and the remaining 30% to Kentucky Power Company (KPCo), an operating company affiliate of I&M. All told, I&M currently owns or purchases 85% of the capacity and energy of both units at the Rockport Plant, which amounts to 2227 MWs of the plant's nominal 2620 MWs. After the end of the Lease, I&M would own or purchase 100% of the capacity and energy of both units after reacquisition because the UPA between I&M and AEG will remain in effect and the agreement with KPCo will expire.

### Q12. Do I&M and AEG currently own Rockport Unit 2?

No. In 1989, I&M and AEG sold Rockport Unit 2 to the Owner Trust, a group of unaffiliated, non-utility investors, who in turn agreed to lease the unit back to I&M and AEG. I&M and AEG received approval on March 30, 1989 in Cause Nos. 38690 and

38691 of the sale and leaseback transaction for Rockport Unit 2 (the Lease). That year, I&M and AEG sold Rockport Unit 2 to the Owner Trust and leased Rockport Unit 2 back for 33 years. That said, as a practical matter, I&M has operated Rockport Unit 2 under the Lease for more than thirty years as if they owned the unit.

**Q13. Please generally describe the Lease.**

I&M and AEG lease the generating unit from the Owner Trust and are entitled to the output of the unit in consideration of annual Lease payments to the Owner Trust. During the term of the Lease, I&M and AEG are responsible for installing, owning and operating major environmental controls to assure that the unit complies with all regulations.

The Lease also provides for an early termination of the Lease in the event that Rockport Unit 2 is "economically obsolete." If the Lease is terminated early due to obsolescence, I&M is required by the terms of the Lease to pay the Owner Trust an amount referred to in the Lease as Termination Value, which is a calculable amount intended to essentially make the Owner Trust whole for the loss of the lease payments. For example, had the Lease been terminated as of January 1, 2020 due to becoming economically obsolete, the Termination Value owed by I&M and AEG to the Owner Trust would have been approximately \$716 million.

The Lease provides for the potential extension of the Lease and does not contain a buyout provision.

**Q14. Has the Lease been the subject of litigation between I&M, AEG and the Owner Trust?**

Yes. In 2013, the Owner Trust filed a lawsuit regarding the Lease in the United States District Court for the Southern District of Ohio, Eastern Division. The litigation involved the terms of the Lease and the requirement of the Third Joint Modification to Consent Decree that flue gas desulfurization systems (FGDs or "scrubbers") be installed and in operation on one unit of the Rockport Plant by December 31, 2025

and on the other unit by December 31, 2028. After I&M and AEG prevailed at the trial court level on summary motions regarding many of the contested issues, the Owner Trust dismissed the remaining claims with prejudice and filed an appeal of the trial court's ruling. Upon appeal, the Sixth Circuit reversed the trial court's ruling and remanded the matter for further proceedings. The parties requested and received a stay of the proceedings to facilitate confidential discussions.<sup>2</sup>

**Q15. When does the Lease end?**

The Lease will terminate on December 7, 2022 because I&M and AEG timely provided in November 2020 an irrevocable notice to the Owner Trust that the Lease would not be extended.

**III. The Agreement**

**Q16. How did I&M, AEG and the Owner Trust proceed after the notice was given?**

I&M, AEG and the Owner Trust began confidential discussions regarding the manner in which I&M would operate the unit after the end of the Lease on behalf of the Owner Trust, in accordance with a post-Lease operating agreement entered into at the time of the sale and leaseback transaction. The discussions included expected operational issues such as scheduling and dispatch protocols, bidding the unit into the PJM capacity markets, and establishing capital investment plans.

---

<sup>2</sup> The litigation was initially filed in New York and transferred to the Ohio court at its inception and has now been dismissed without prejudice pending the closing of the Transaction, which closing would make the litigation moot.

**Q17. What was the result of those discussions?**

Because the discussions are confidential, I am not able to go into detail about them. I can say that discussions were handled professionally, held in good faith and proceeded expeditiously. However, the subject matters are complicated and rife with potential disagreements. For example, a significant issue known publicly involves the need to comply with the Effluent Limitation Guideline regulations (ELG) established by the Environmental Protection Agency (EPA) "as soon as possible." (40 CFR §423.13(k)(1)(i))

As the discussions evolved, it became clear to I&M and AEG that operating the unit for the Owner Trust would create significant risks for I&M and its customers. Although the Lease itself did not contain a buyout provision, it became apparent to I&M and AEG that there would be significant advantages to I&M and AEG regaining exclusive control over the unit. Accordingly, I&M and AEG negotiated the Agreement, which will allow them to reacquire Rockport Unit 2 at the end of the Lease.

**Q18. Please summarize the agreement between I&M, AEG and the Owner Trust.**

Essentially, I&M and AEG have agreed to pay the Owner Trust a total of \$115.5 million to take over the interests of the Equity Participants in the Owner Trust at the closing of the transaction in December 2022 (Closing Date). I&M would then immediately extinguish the Owner Trust, which would return ownership of Rockport Unit 2 to I&M and AEG in the same form as they turned over ownership of the unit to the Owner Trust more than thirty years ago.

Under the Agreement, I&M and AEG would be able to commit immediately and unconditionally, without waiting until the Closing Date, that the unit would be able to comply with federal requirements under the ELG by retiring Rockport Unit 2 no later than December 2028. The ability to make that commitment now, without waiting for the Closing Date, will allow I&M and AEG to avoid investing more than \$50 million in an ELG compliance project. If the transaction does not close, I&M

will cooperate with the Owner Trust, if requested, to revisit the ELG compliance plan in a manner that could allow the Owner Trust to operate Rockport Unit 2 after December 2028.

I&M will also be able, prior to the Closing Date, to commit Rockport Unit 2 as a capacity resource to meet its obligations as a member of PJM Interconnection, LLC (PJM), a regional transmission organization (RTO), that will be in effect after the end of the Lease. If the transaction does not close, I&M will reimburse the Owner Trust for the value of the capacity that was foregone by the Owner Trust due to not participating in the PJM Reliability Pricing Model capacity market.

I&M will also be able to make capital investments in the unit before the Closing Date in a manner that recognizes I&M's intention to retire the unit no later than December 2028.

The Agreement also provides for the immediate dismissal without prejudice of the litigation between the Owner Trust and I&M. If the transaction closes, all claims that the Owner Trust may have had against I&M prior to the Closing Date will be released. If the transaction does not close, the Owner Trust will be permitted to reinstate the litigation.

The Agreement also provides that, until the Closing Date, the terms and conditions of the Lease and other sale-leaseback transaction documents (participation agreement, operating agreement and related documents) continue in full force and effect, including I&M and AEG's respective obligations with respect to the Lease payments and the operation and maintenance of the unit.

**Q19. Are there any conditions on being able to close the Transaction as of the Closing Date?**

Yes, but very few because the Agreement could only have been reached if it was clear to the parties that the intended outcome of the Agreement would be achieved and be certain as soon as possible. Limiting the number of conditions that could keep the Agreement from closing to those that are necessary and essential

1 reduces the risk that the Transaction will not be completed. Mitigating that risk  
2 guards against the parties having to regroup and take a different path to achieve  
3 their objectives and protect their interests within the time remaining before the  
4 Lease ends. Therefore, it is important for the parties to know as soon as  
5 reasonably possible if a condition to closing would be met to allow as much time  
6 as reasonably possible to take a different course.

7 Because the Closing Date would not occur for more than a year after the  
8 Agreement was executed, the Transaction is not required to close if there has been  
9 a change in law that prohibits the closing of the Agreement, or if there has been  
10 and Event of Loss at the unit, which essentially means that there has been a  
11 catastrophic loss of the unit. Also, it is a condition of closing that I&M and AEG  
12 receive all of the interests of the various Equity Participants so that they own 100%  
13 of the unit and that any liens against the Owner Trust have been released.

14 An important condition to closing for the purposes of this proceeding is that  
15 I&M must receive permission to reacquire Rockport Unit 2 by an order of the  
16 Commission issued on or before December 16, 2021. Similarly, I&M must have  
17 received authority from the Federal Energy Regulatory Commission (FERC) on or  
18 before December 16, 2021. It is important to note that the permission required  
19 from the Commission in order to close is simply the ability to own the unit; receiving  
20 approval to include the costs of owning and operating the unit in I&M's retail rates  
21 for electric service is not a condition for closing.

22 These closing conditions, known as Required Governmental Approvals, are  
23 necessary and essential because I&M and AEG would not and could not close on  
24 the transaction unless they know they are legally able to own the unit. Therefore,  
25 because time is of the essence, the Agreement balances the need to provide the  
26 commissions with time to consider the relief requested from them by I&M and AEG  
27 to the fullest extent possible with the need for the parties to know as soon as  
28 possible whether the Required Governmental Approvals closing conditions will be  
29 met.

Accordingly, the Agreement is subject to termination if the Required Governmental Approvals are not received on or before December 16, 2021 in a form that is not materially adverse to I&M, AEG or the Equity Participants. If the Agreement were terminated at the end of 2021, the Owner Trust, I&M and AEG would need to conclude negotiations on the complicated operational issues before the lease expires at the end of 2022.

#### IV. I&M and AEG's Planned Ownership of Rockport Unit 2

**Q20. Do I&M and AEG have the managerial, technical and financial abilities to own Rockport Unit 2 and operate it safely and reliably?**

Yes. I&M has been operating Rockport Unit 2 for more than thirty years, along with operating its twin unit, Rockport Unit 1, and has a proven track record of successfully operating the unit safely and reliably. The testimony of Tim Kerns further details the technical and operational acumen of I&M when it comes to operating Rockport Unit 2. In addition, I&M and AEG are financially capable of reacquiring the unit at the price set by the Agreement and operating it efficiently and effectively. The testimony of Franz Messner describes the financial ability of I&M and AEG to reacquire Rockport Unit 2. We have shown that we can operate Rockport Unit 2 effectively for decades and I am confident we have the ability to do so as the unit winds down its last years of operation.

**Q21. Are there benefits to I&M and AEG owning and controlling Rockport Unit 2 regardless of whether it is included in retail cost of service?**

Yes. Obtaining exclusive control of Rockport Unit 2 allows I&M and AEG to wind down the operation of the unit with certainty and without the risk associated with coordinating its operation with a third party, whose perspectives may be differently aligned and produce differing operating costs. More specifically, the Agreement allows I&M and AEG to avoid making a substantial investment to comply with ELG regulations, which investment could have increased the cost of serving I&M's customers.

Reacquiring Rockport Unit 2 will support the reliability of the grid as the region transitions to more renewable generation facilities. As more renewables are added to Indiana's generation mix, Rockport Unit 2 will be a local capacity resource to ensure reliable service when additional generation is needed. It is important to remember that I&M's control of Rockport Unit 2 also will ensure that both Rockport units will be retired no later than the end of 2028.

Last, but certainly not least, is the ability for I&M to assist with the transition of the community and its employees knowing it controls the unit. We announced the retirement of Rockport Unit 1 in 2019 and have been communicating with employees at the plant and with local community leaders about the plant's future. As with other coal-fueled plant retirements, we expect to provide a severance for employees not eligible for retirement and offer job search and retraining resources, as well as share information about job opportunities at other AEP locations. We have talked with local community leaders about our plans for the plant, and AEP's Economic Development team will help them access resources to encourage other development in the region.

**Q22. Please summarize how I&M and AEG are proposing to proceed in this matter.**

While the benefits of the Agreement bring value to I&M customers, I&M recognizes that the issue of whether and to what extent the costs of purchasing and operating



Rockport Unit 2 after the Lease ends should be included in I&M's Indiana jurisdictional cost of service is not as straightforward as I&M's ability to own and operate the unit. We respect that the Commission, customers, and other stakeholders will want time to review I&M's ratemaking and accounting proposals when made. We also appreciate that our current IRP process is in its initial stages and it will take time for Rockport Unit 2 to be modeled as a resource as part of that process. However, as I previously indicated, time is of the essence to know whether the inability to obtain the Required Governmental Approvals will prevent the Transaction from closing so that the counterparties can, if need be, plan expeditiously to carry out the post-Lease Operating Agreement.

Accordingly, the two-step process proposed by I&M and AEG would allow the threshold question of whether I&M and AEG can own the unit to be timely answered in the instant proceeding and the more complicated questions of ratemaking and accounting treatment for I&M to be preserved without prejudice until thoroughly reviewed in a subsequent CPCN proceeding. Proceeding in this manner will allow the Transaction to move forward, achieving the attendant benefits, while fully protecting customers from the risk that the costs of the Transaction would be reflected in I&M's rates without a full and fair opportunity to evaluate the costs and the benefits of the Agreement.

**Q23. Does a Commission decision to decline to exercise its jurisdiction in this matter serve the public interest?**

Yes. Declining jurisdiction would be promote efficiency and be beneficial to I&M, AEG, customers and the State because it will allow the Transaction to proceed in a timely manner while allowing the more complicated questions of ratemaking and accounting treatment for I&M to be preserved without prejudice until thoroughly reviewed in a subsequent CPCN proceeding. Put another way, the economic risk of the Transaction will remain with the Company until the Commission has a complete opportunity to consider I&M's proposals in a CPCN proceeding. This

approach preserves this capacity resource for the benefit of the State and the region pending the separate resolution of the accounting, ratemaking and associated issues specific to I&M and its retail customers.

**Q24. Does this conclude your pre-filed verified direct testimony?**

Yes, it does.

## VERIFICATION

I, Toby L. Thomas, President and Chief Operating Officer for Indiana Michigan Power Company, affirm under penalties of perjury that the foregoing representations are true and correct to the best of my knowledge, information, and belief.

Date: June 22, 2021

A handwritten signature in black ink, appearing to read "Toby L. Thomas", is written over a horizontal line.

Toby L. Thomas

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

JOINT PETITION OF INDIANA MICHIGAN )  
POWER COMPANY (I&M) AND AEP )  
GENERATING COMPANY (AEG) FOR )  
CERTAIN DETERMINATIONS WITH ) CAUSE NO. 45546  
RESPECT TO THE COMMISSION'S )  
JURISDICTION OVER THE RETURN OF )  
OWNERSHIP OF ROCKPORT UNIT 2. )

**VERIFIED JOINT PETITION**

Indiana Michigan Power Company ("I&M" or "Company") and AEP Generating Company ("AEG") (collectively "Petitioners"), hereby petition the Indiana Utility Regulatory Commission ("Commission") for: certain determinations on an expedited basis with respect to the Commission's jurisdiction over the return of the ownership of Unit 2 of the Rockport Generating Station ("Rockport Unit 2") to I&M and AEG. In support of this Petition, Petitioners further state as follows:

**Introduction and Background**

***I&M's Corporate Status and Operations***

1. I&M, a wholly-owned subsidiary of American Electric Power Company, Inc. ("AEP"), is a corporation organized and existing under the laws of the State of Indiana, with its principal offices at Indiana Michigan Power Center, Fort Wayne, Indiana.

2. I&M is engaged in, among other things, rendering electric service in the States of Indiana and Michigan. I&M owns and operates plant and equipment within the States of Indiana and Michigan that are in service and used and useful in the generation, transmission, distribution and furnishing of such service to the public. Among its plant and equipment is the Rockport Generating Station located in Spencer County, Indiana ("Rockport Plant"), in which I&M: (a) has a 50% undivided ownership interest in Unit 1 of the Rockport Plant ("Rockport Unit 1"); and (b) has a 50% leasehold interest in Rockport Unit 2. I&M has maintained and continues to maintain

its properties in an adequate state of operating condition.

3. I&M supplies electric service to approximately 470,000 retail customers in northern and east-central Indiana and 130,000 retail customers in southwestern Michigan, within a service area covering approximately 4,573 square miles. In Indiana, I&M provides retail electric service to the following counties: Adams, Allen, Blackford, DeKalb, Delaware, Elkhart, Grant, Hamilton, Henry, Howard, Huntington, Jay, LaPorte, Madison, Marshall, Miami, Noble, Randolph, St. Joseph, Steuben, Tipton, Wabash, Wells and Whitley. In addition, I&M serves customers at wholesale in the States of Indiana and Michigan. I&M's electric system is an integrated and interconnected entity that is operated within Indiana and Michigan as a single utility.

4. I&M renders electric service by means of electric production, transmission and distribution plant, as well as general property, equipment and related facilities, including office buildings, service buildings and other property, all of which is used and useful in the generation, purchase, transmission, distribution and furnishing of electric energy and capacity for the convenience of the public. In order to continue to properly serve the public located in its service area and to discharge its duties as public utility, I&M has and continues to make numerous additions, replacements and improvements to its electric utility systems.

5. I&M's property is classified in accordance with the Uniform System of Accounts as prescribed by the Federal Energy Regulatory Commission ("FERC") and adopted by this Commission.

#### ***AEG's Corporate Status and Operations***

6. AEG is a corporation organized and existing under the laws of the State of Ohio, having its principal executive office at 1 Riverside Plaza, Columbus, Ohio. AEG is duly admitted and qualified to transact business in the State of Indiana. AEG is a wholly-owned subsidiary of

AEP. AEG (a) has a 50% undivided ownership interest in Rockport Unit 1, and (b) has a 50% leasehold interest in Rockport Unit 2.

7. AEG sells all of its power from these facilities at wholesale to certain of its utility company affiliates under long-term contracts approved by the FERC. AEG makes no retail sales of power.

***Petitioners' "Public Utility" Status***

8. I&M and AEG are each a "public utility" under Ind. Code §§ 8-1-2-1 and 8-1-8.5-1 and an "energy utility" as defined in Ind. Code § 8-1-2.5-2. I&M is an "eligible business" as defined in Ind. Code § 8-1-8.8-6. I&M and AEG are each subject to the jurisdiction of this Commission in the manner and to the extent provided by the Public Service Commission Act, as amended, and other pertinent laws of the State of Indiana.

9. I&M and AEG are also subject to the jurisdiction of the FERC.

10. I&M's transmission system is under the functional control of PJM Interconnection, L.L.C. ("PJM"), a FERC-approved regional transmission organization ("RTO"), and is used for the provision of open access non-discriminatory transmission service pursuant to PJM's Open Access Transmission Tariff on file with the FERC. As a member of PJM, charges and credits are billed to AEP, and allocated to I&M, for functional operation of the transmission system, management of the PJM markets, including the assurance of a reliable system, and general administration of the RTO.

***Rockport Unit 2***

11. Rockport Unit 2 is 1300 MW coal fired unit that is one of two similar units at the Rockport Plant. Construction on Rockport Unit 2 began in 1979 and the unit was placed into

service in 1989. Since this time, Rockport Unit 2 has been part of I&M's generation resource mix used for the furnishing of public utility service.

12. As construction on Rockport Plant was underway, I&M entered into transactions to reduce the cost of financing and revenue requirement impact of Rockport Unit 2.

- a. First, I&M transferred 50% of its ownership in Rockport Unit 2 to AEG, an affiliate created in 1982 to facilitate and lessen the cost of financing generating units within the American Electric Power System in exchange for an ownership interest in said generating units. I&M and AEG entered into a Unit-Power Agreement ("UPA") which provides that AEG must make all of the power representing its 50% interest available to I&M in exchange for adequate compensation, which would be regulated by the FERC. Under this arrangement, I&M retained control and operation of both units of the Rockport Plant.
- b. Second, I&M and AEG each entered into a sale and leaseback transaction of their respective 50% interests in Rockport Unit 2 ("Lease"). Under the transaction, I&M and AEG sold their Undivided Interests in Rockport Unit 2 to an owner trust ("Owner Trust"), whose beneficiaries are unaffiliated, non-utility institutional equity investors ("Equity Participants" collectively with Owner Trust "Owner/Participants"). Simultaneous with its purchase of the Undivided Interests from I&M and AEG, the Owner Trust leased Rockport Unit 2 back to I&M and AEG for a term of 33 years for a stipulated level rent (with options to renew).

13. The Rockport Unit 2 Lease was presented to the Commission for approval by petition filed December 16, 1988. The Commission was asked to determine: 1) that the Equity Participants and Owner Trust are not "public utilities" or otherwise subject to regulation as public

utilities in Indiana as a result of their participation in the transaction; and 2) that the transaction did not involve the type of "lease" contemplated by Ind. Code § 8-1-8.5-2 and, consequently, no certificate of public convenience and necessity ("CPCN") was required under Ind. Code § 8-1-8.5-2 (also referred to herein as the "CPCN statute") before consummating it. *Indiana Michigan Power Company and AEG*, Cause No. 38690; Cause No. 38691 (IURC 3/30/89), 1989 WL 1734132.

14. The Commission concluded that "no certificate of public convenience and necessity [was] required to be issued to [I&M and AEG] under Ind. Code § 8-1-8.5-2, before consummating the proposed transactions". 1989 WL 1734132 at 3. The Commission "disclaim[ed] and decline[d] to exercise any jurisdiction to proceed with respect to them under the provisions of IC 8-1-8.5." *Id.*

15. The Commission's Order explained that the construction of Rockport Unit 2 was commenced in 1979, prior to the enactment of this statute. *Id.* The Commission concluded for that reason that the CPCN statute clearly did not apply to the construction by I&M and AEG of Rockport Unit 2. *Id.* The Commission explained that it saw no reason why the statute should apply to the lease portion of the sale and leaseback of Rockport Unit 2, especially when the operation, and I&M's and AEG's entitlement to the output of Rockport Unit 2, was unchanged by the transactions. The complete finding is as follows:

Applicability of IC 8-1-8.5. IC 8-1-8.5, enacted in 1983, requires a certificate of public convenience and necessity from this Commission before commencement by a public utility of the construction, purchase or lease of additional generating capacity. The construction of Rockport Unit No. 2 was commenced in 1979, prior to the enactment of IC 8-1-8.5. For that reason, IC 8-1-8.5 clearly does not apply to the construction by Petitioners of Rockport 2, and we see no reason why it should apply to the lease portion of the sale and leaseback of Rockport 2, especially when the operation, and Petitioners' entitlement to the output of Rockport 2, is unchanged by the transactions. The parties have stipulated, and we agree, and hereby confirm our earlier finding in our prehearing conference order, that under the



facts of this case IC 8-1-8.5 does not, and should not, apply to this transaction. See, Hoosier Energy Rural Electric Cooperative, supra. Accordingly, we find that no certificate of public convenience and necessity is required to be issued to Petitioners, under IC 8-1-8.5-2, before consummating the proposed transactions, and the Commission hereby disclaims and declines to exercise any jurisdiction to proceed with respect to them under the provisions of IC 8-1-8.5.

*Id.*

16. After discussing the benefits of the transaction, the Commission found “that the sale and leaseback transactions will benefit and be in the best interests of both Petitioners’ customers and investors and are consistent with sound financial management and policy.” *Id.* The Commission further found the Lease transaction should be approved. *Id.* The Commission ordered as follows:

1. Indiana Michigan Power Company and AEP Generating Company are hereby authorized to enter into one or more transactions pursuant to which they will undertake obligations involving the sale and the leasing back of their undivided ownership interests in Rockport Generating Unit No. 2 and to amortize any gains or losses and related income taxes associated with this transaction over the initial term of the lease of said Rockport Generating Unit No. 2.
2. The Commission disclaims and declines to exercise jurisdiction to regulate the Owner Trust and Equity Participants (or their shareholders or partners) as “public utilities” under IC 8-1-2.
3. The Commission disclaims and declines to exercise jurisdiction over this transaction under IC 8-1-8.5.

*Id.* at 4.

17. In accordance with the Commission’s approval, I&M and AEG entered into the 33 year Lease. The Lease term ends in December 2022. During the course of the Lease, Rockport Unit 2 has provided reliable, low cost capacity and energy for the benefit of I&M’s customers, while also complying cost effectively with a host of ongoing environmental regulatory compliance challenges.

**Return of Ownership to I&M and AEG**

18. I&M and AEG have entered into an agreement whereby I&M and AEG will resume ownership of Rockport Unit 2 at the end of the Lease term in December 2022 (the “Agreement” or the “Transaction”). The Agreement, which is confidential, is the subject of a separately filed Motion for Protective Order identified below. While the Agreement is complicated due to the nature of the transaction, essentially I&M and AEG will purchase the interests of each Equity Participant in the Owner Trust with the intent to immediately terminate the Owner Trust, leaving I&M and AEG each having a 50% ownership interest in Rockport Unit 2. This is the same ownership arrangement that existed at the time the Commission approved the Lease. The Agreement is conditioned upon receiving Required Governmental Consents (as that term is described in the Agreement) from the Commission and from the FERC by December 2021. The testimony of Mr. Thomas further explains the overall Transaction on behalf of Petitioners.

19. The FERC filed UPA between AEG and I&M will remain in place.

20. The return of ownership of Rockport Unit 2 to Petitioners creates no new I&M generating capacity. I&M will continue to control and operate Rockport Unit 2 as a capacity resource in PJM that will support the reliability and resiliency of electric service in the region. As discussed in the testimony of Mr. Kerns, I&M has the requisite technical and managerial expertise to own and operate the Unit. Mr. Messner testifies as to the financial viability of each Petitioner to enter into the Transaction.

21. The return of ownership of Rockport Unit 2 to Petitioners provides substantial benefits to customers and the State, including the following:

- a. maintains I&M’s control of both units at the Rockport Plant and allows the Company to achieve operating efficiencies at Rockport Plant.

- b. provides flexibility for I&M to operate Rockport Unit 2 as a capacity resource, which reduces operating costs as well as unit emissions.
- c. addresses reliability by ensuring I&M's PJM capacity requirement is met.
- d. eliminates the need for I&M to purchase capacity to satisfy a capacity shortfall that would otherwise exist during and after the PJM 2022/2023 Delivery Year.
- e. allows I&M to control the decisions regarding Rockport Plant compliance with the federal Effluent Limitation Guidelines ("ELG") for coal-fired power plants and enables the retirement of Unit 2 no later than December 31, 2028, the planned date of retirement for Rockport Unit 1.
- f. maintains, for the near term, an in-state generating resource, which in turn serves Indiana's interest in energy security, as well as in the stability and resilience of the transmission system.
- g. supports the provision of reliable and economic generating capacity during the ongoing development of emerging technologies and orderly transition to increased reliance on renewable energy and a more environmentally sustainable and diverse generation mix.
- h. allows I&M to assess and control the wind down of operations at the Rockport Plant consistent with the planned retirement of Rockport Unit 1 in 2028.
- i. allows I&M to control the demolition and re-use of the Rockport Plant site.
- j. is consistent with the 21<sup>st</sup> Century Energy Task Force Report to the Indiana General Assembly.

### **Relief Sought**

22. In accordance with Ind. Code § 8-1-2.5-5, Petitioners ask the Commission to decline to exercise its jurisdiction under the CPCN statute with respect to the return of Rockport Unit 2 ownership to Petitioners, or determine that Ind. Code § 8-1-8.5-2 does not apply to the return of Rockport Unit 2 ownership to Petitioners. At this time, Petitioners only request the ability to reacquire ownership of Rockport Unit 2 and do not request approval of the inclusion of the costs of purchasing and operating Rockport Unit 2 in I&M's Indiana jurisdictional cost of service.

23. This action recognizes that the unit's construction began in 1979 well before the enactment of the CPCN statute and the Commission has previously found that the CPCN statute did not apply to the construction of this Unit or to the subsequent Lease transaction. The operation

of Rockport Unit 2 and Petitioners' entitlement to its capacity and energy are unchanged by the Transaction. A Commission decision to decline to exercise or disclaim its jurisdiction under the circumstances here will allow Petitioners to move forward with the Agreement in a timely manner, which is an important element of the Agreement.

24. As to AEG and as discussed above, the Commission has previously disclaimed and declined to exercise its jurisdiction under the CPCN statute with respect to Rockport Unit 2. The Commission routinely declines to exercise jurisdiction over the construction and transfer of wholesale power generating facilities by AEG and similar entities, which do not serve Indiana retail electric customers.<sup>1</sup> As to I&M and as discussed above, the Commission has similarly previously disclaimed and declined to exercise jurisdiction over the construction and lease of Rockport Unit 2.

25. I&M recognizes that the Transaction has the potential to affect its retail customers if the costs of purchasing and operating Rockport Unit 2 would be included in I&M's Indiana jurisdictional cost of service. Because time is of the essence to proceed with the Transaction itself, Petitioners are seeking approval to complete the Transaction now, while deferring the review of whether the costs of purchasing and operating Rockport Unit 2 will be approved for inclusion in I&M's Indiana jurisdictional cost of service. Accordingly, and to support the expedited review of I&M's request, Petitioners ask the Commission to determine in this proceeding whether I&M and AEG are able to own Rockport Unit 2 again. To determine whether and to what extent the costs

---

<sup>1</sup> *E.g. AES Greenfield, LLC*, Cause No. 41361 1999 WL 232575, 192 P.U.R.4th 154 (IURC 3/11/1999); *Duke Energy Vermillion, LLC*, Cause No. 41388 1999 WL 35217153 (IURC 4/7/1999); *PSEG Lawrenceburg Energy Company*, Cause No. 41757, 2000 WL 33180485 (IURC 12/20/2000); *Sugar Creek Energy, L.L.C.*, Cause No. 41753, 2001 WL 401334 (2/23/2001); *PSEG Lawrenceburg Energy Company and AEP Generating Company*, Cause No. 43212, 2007 Ind. PUC LEXIS 123 (4/18/2007) and 2007 Ind. PUC LEXIS 236 (8/8/2007); *Fowler Rider IV Wind Farm, LLC*, Cause No. 44438, 2014 WL 1896297 (IURC 5/7/2014); *AEP Generating Company et al*, Cause No. 44868, 2017 WL 67107 (IURC 1/4/2017); *Fairbanks Solar Energy Center LLC*, Cause No. 45254 2019, WL 5820559 (10/29/2019).

of purchasing and operating Rockport Unit 2 after the end of the Lease will be included in I&M's Indiana jurisdictional cost of service, I&M will file a separate request with the Commission to issue a Certificate of Public Convenience and Necessity (CPCN), which would only proceed upon an affirmative order in this proceeding.

26. In this proceeding, the Commission is asked to address the question of whether it will decline to exercise or disclaim its Ind. Code § 8-1-8.5-2 jurisdiction under the circumstances presented here. Petitioners ask the Commission to make the determination regarding Ind. Code § 8-1-8.5-2 on an expedited basis and without addressing I&M-specific retail accounting and ratemaking issues. An expedited decision is necessary and appropriate because it will allow for the most efficient resolution of the transfer of ownership of Rockport Unit 2 back to Petitioners at the end of the Lease term. Additionally, the Commission's decision regarding Ind. Code § 8-1-8.5-2 in this proceeding will not preclude the Commission, the Indiana Office of Utility Consumer Counselor ("OUCC") or other parties from investigating the costs incurred by I&M as a result of the Transaction and determining whether and how those costs may be recovered through the ratemaking process in accordance with the separate CPCN process identified above. I&M recognizes that if it proceeds with the Transaction upon the conclusion of this proceeding, it is doing so without any assurance of future cost recovery.

27. Using the process outlined above, in this proceeding, the Commission would consider whether to issue a decision that would enable Petitioners to engage in the Transaction.

28. A final decision in this proceeding that allows Petitioners to enter into the Transaction will satisfy the negotiated state approval closing requirement in the Agreement.

**Applicable Law**

29. Petitioners consider the provisions of the Public Service Commission Act, as amended, may be applicable to the subject matter of this Petition, including Ind. Code §§ 8-1-8.5-2 and 8-1-2.5-5.

30. Ind. Code § 8-1-8.5-2 provides that a public utility may not begin the construction, purchase, or lease of any facility for the generation of electricity to be directly or indirectly used for the furnishing of public utility service, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction, purchase, or lease. As stated above, the CPCN statute was enacted in 1983, after construction of Rockport Unit 2 commenced in 1979. The Commission previously found this statute does not apply to Rockport Unit 2.

31. Ind. Code § 8-1-2.5-5 was enacted in 1995. This statutory provision allows the Commission to decline to exercise, in whole or in part, its jurisdiction over an energy utility. A decision by the Commission to decline to exercise Ind. Code § 8-1-8.5-2 is consistent with the Commission's 1989 decision to disclaim jurisdiction, appropriate given the Petitioners' request to return the ownership of Rockport Unit 2 to them without prejudice to a determination of whether the unit will be included in I&M's retail cost of service, and will serve the public interest.

32. The CPCN statute was enacted during a period of heavy construction in the electric industry, which included the abandonment of generation construction projects of other utilities. *See Citizens Action Coalition of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 485 N.E.2d 610 (Ind. 1985) (1981 cancellation of Bailly N-1) *cert. denied*, 476 U.S. 1137 (1986); *Citizens Action Coalition of Ind., Inc. v. Pub. Serv. Co. of Ind.*, 582 N.E.2d 330 (Ind. 1991) (1984 cancellation of Marble Hill), *reh'g denied*, 595 N.E.2d 255 (Ind. 1992). The CPCN statute created a process to review the

development of new generating capacity before the project was begun so as to provide assurance that the cost of the generating facility would be recoverable through rates. Because construction of Rockport Unit 2 began in 1979, this generating capacity already exists. Consequently, exercise of the CPCN statute with respect to this unit will not avoid its construction.

33. This approach will promote utility efficiency because it will allow the Transaction to proceed in a timely manner while preserving this capacity resource for the benefit of the state of Indiana and the region and preserving the accounting, ratemaking and associated issues specific to I&M and its retail customers for a separate CPCN proceeding.

#### **Procedural and Other Matters**

34. Petitioners request a final Commission order as soon as reasonably possible, but no later than December 15, 2021, so that Petitioners may comply with negotiated timeline for Commission approval set forth in the Agreement.

35. Petitioners are filing their case-in-chief contemporaneous with this Petition, including direct testimony and attachments of the following three witnesses:

- Toby L. Thomas, I&M President and Chief Operating Officer;
- Timothy C. Kerns, AEP Service Corporation (“AEPSC”) Vice President – Generating Assets for I&M and Kentucky Power Company; and
- Franz D. Messner, AEPSC Managing Director of Corporate Finance.

36. A motion for protective order and supporting affidavit are being filed contemporaneous with this Petition to protect certain confidential, proprietary, competitively sensitive and/or trade secret information included with Petitioners’ filing from public disclosure, including the confidential Agreement.

37. In accordance with 170 IAC 1-1.1-9(a)(8), Petitioners have worked on an agreed procedural schedule with the Indiana Office of Utility Consumer Counselor and certain other parties and have filed an agreed proposed schedule within 30 days of the filing of this Petition.

38. The names and addresses of Petitioners' duly authorized representatives, to whom all correspondence and communications concerning this Petition should be sent, are as follows:

Teresa Morton Nyhart (No. 14044-49)  
Jeffrey M. Peabody (No. 28000-53)  
BARNES & THORNBURG LLP  
11 South Meridian Street  
Indianapolis, Indiana 46204  
Nyhart Phone: (317) 231-7716  
Peabody Phone: (317) 231-6465  
Nyhart Email: tnyhart@btlaw.com  
Peabody Email: jeffrey.peabody@btlaw.com

With courtesy copy to:  
Jessica A. Cano  
Senior Counsel  
American Electric Power Service Corporation  
1 Riverside Plaza, 29th Floor  
Columbus, Ohio 43215  
Phone: 614-716-2921  
Fax: 614-716-2950  
Email: jacano@aeo.com

WHEREFORE, Petitioners respectfully request that the Commission make such investigation and hold such hearings as are necessary or advisable in this Cause, and thereafter make and enter an appropriate final order in this Cause on or before December 15, 2021:

- (i) declining to exercise or disclaiming jurisdiction under Ind. Code § 8-1-8.5-2 with respect to the return of Rockport Unit 2 ownership to I&M and AEG; and
- (ii) granting to Petitioners such other and further relief in the premises as may be appropriate and proper.



Dated this 22nd day of June, 2021.

Respectfully submitted,

INDIANA MICHIGAN POWER COMPANY

By: 

Toby L. Thomas,

I&M President and Chief Operating

Officer AEP GENERATING COMPANY

By: 

Paul Chodak III

AEG Vice President

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing was served this 22nd day of June, 2021 upon the following via electronic email, or First Class United States Mail, postage prepaid on:

Jeffrey M. Peabody Randall Helmen  
Tiffany Murray  
Office of Utility Consumer Counselor  
115 West Washington Street, #1500S  
Indianapolis, Indiana 46204  
infomgt@oucc.in.gov  
rhelmen@oucc.in.gov  
timurray@oucc.in.gov

Jennifer A. Washburn  
Citizens Action Coalition  
1915 West 18th Street, Suite C  
Indianapolis, Indiana 46202  
jwashburn@citact.org

*Courtesy Copy to:*  
Reagan Kurtz  
rkurtz@citact.org

Kathryn A. Watson  
Katz Korin Cunningham  
The Emelie Building  
334 North Senate Avenue  
Indianapolis, IN 46204  
kwatson@kcclegal.com

Joseph P. Rompala  
LEWIS & KAPPES, P.C.  
One American Square, Suite 2500  
Indianapolis, Indiana 46282-0003  
JRompala@Lewis-Kappes.com

*Courtesy copy to:*  
ATyler@lewis-kappes.com  
ETennant@lewis-kappes.com

With a courtesy copy to:  
Kristin Henry  
Sierra Club  
2101 Webster Street, Suite 1300  
San Francisco, CA 94115  
kristin.henry@sierraclub.org

J. Christopher Janak  
Nikki G. Shoultz  
Kristina Kern Wheeler  
BOSE MCKINNEY & EVANS LLP  
111 Monument Circle, Suite 2700  
Indianapolis, Indiana 46204  
cjanak@boselaw.com  
nshoultz@boselaw.com  
kwheeler@boselaw.com

Jeremy L. Fetty  
Liane K. Steffes  
PARR RICHEY  
251 N. Illinois Street, Suite 1800  
Indianapolis, IN 46204  
jfetty@parrlaw.com  
lsteffes@parrlaw.com

  
Jeffrey M. Peabody

Teresa Morton Nyhart (No. 14044-49)  
Jeffrey M. Peabody (No. 28000-53)  
BARNES & THORNBURG LLP  
11 South Meridian Street  
Indianapolis, Indiana 46204  
Nyhart Phone: (317) 231-7716  
Peabody Phone: (317) 231-6465

Attorneys for  
INDIANA MICHIGAN POWER COMPANY  
and AEP GENERATING COMPANY

**Attachment TLT-2 (Confidential)**

**[Confidential Attachment – Not Duplicated Herein]**