6. Commission Discussion and Findings

GenCo presents to this Commission a novel request for establishment of a largely unregulated affiliate of the regulated NIPSCO electric utility that would be the first-of-its-kind in the nation. Although we have previously granted relief to other Indiana utilities wanting to be able to meet the large power demands of potential new customers such as data centers, *see, e.g.*, Final Order in Cause No. 46097 for Indiana Michigan Power Company, none has proposed to set up a separate affiliate to do so. To grant a declination of our jurisdiction over that affiliate to the broad extent GenCo requests, we must undertake a careful analysis of the implications both for NIPSCO's captive customer base that would not receive power from GenCo, and for the public interest more generally.

We begin with a discussion of the regulatory "bargain" or regulatory "compact" which creates a *quid pro quo* and serves as the foundation of utility regulation in Indiana. NIPSCO is provided a monopoly service area in which retail consumers cannot choose to obtain their electric service from another provider. In turn, NIPSCO must plan for and serve all power customers within its monopoly service territory. Within this framework, it is this Commission's essential role to exercise our regulatory oversight in a manner designed to ensure that the public is provided reasonable and adequate utility service at reasonable rates and, in exchange, utilities are ensured cost recovery and an opportunity to earn a reasonable return on investment. *Indiana Gas Co., Inc. v. Off. Util. Cons. Counselor,* 575 N.E.2d 1044, 1046 (Ind. Ct. App. 1991). Regardless of whether GenCo receives its requested relief in this Cause, NIPSCO remains obligated to serve megaload customers in its service territory as part of its regulatory bargain. *Id.*, *see also* I.C. § 8-1-2.3-1. However, this Commission as well as Indiana's legislature have recognized that there can be unique challenges associated with serving megaload customers that require our careful consideration.

A. Standard of Review under the Alternative Utility Regulatory Act. Petitioner filed a request for declination of certain statutory elements of the Commission's jurisdiction under the Alternative Utility Regulation ("AUR") Act, I.C. ch. 8-1-2.5. Section 6(a) of the AUR Act authorizes the Commission to adopt alternative regulatory procedures, establish rates and charges that are in the public interest, and enhance or maintain the value of the utility's energy services or properties. As a threshold matter, in order for the Commission to decline to exercise jurisdiction over Petitioner pursuant to the AUR Act, the Commission must have jurisdiction over GenCo as a public utility.

Petitioner's evidence demonstrates that it is a limited liability corporation that intends to provide regulated electric utility services to purchase, construct, own, and operate generation and transmission facilities and related assets to serve NIPSCO and perhaps other utility customers in the wholesale market, but not retail customers. We find, therefore, that Petitioner is a public utility within the meaning of I.C. § 8-1-2-1 and is an "energy utility" within the meaning of I.C. § 8-1-2.5-2. As an energy utility, in accordance with the provisions of I.C. § 8-1-2.5-4, Petitioner may request that the Commission decline to exercise its jurisdiction, in whole or in part, over Petitioner. It is Petitioner's burden to prove that such declination is in the public interest.

In its Verified Petition, GenCo invokes the factors enumerated in I.C. § 8-1-2.5-5(b) which GenCo asserts support its request that the Commission decline to exercise its jurisdiction:

> (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.

Much of the testimony presented by the Petitioner in this Cause discusses the benefits to be derived from reducing NIPSCO's risks associated with procuring generation for megaload customers. The evidence does not, however, lead us to conclude that the public interest will be served by declining to exercise our regulatory authority over GenCo.

In addition, although not mandated to do so when determining if the public interest is served, we also approach our duty keeping in mind the substance and declaration of Ind. Code § 8-1-2.5-l. *See Citizens Action Coalition of Ind, Inc.* v. *Ind Statewide Assoc. of Rural Elec. Coops. Inc.,* 693 N.E.2d 1324,1330 (Ind. Ct. App. 1998). Thus, we consider the extent to which the request furthers the provision of safe, adequate, efficient, and economical retail energy service and whether the request will provide state-of-the-art energy services at economical and reasonable costs. *See* Ind. Code § 8-1-2.5-1(1) and (4).

1. <u>The impact of technological or operating conditions, competitive forces, or the extent of regulation by other state or federal regulatory bodies. I.C. § 8-1-2.5-5(b)(1)</u>. The first factor we must consider is 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. With respect to the first factor subject to our consideration, Mr. Parisi makes a conclusory statement that any regulation beyond what Petitioner proposes will be "unnecessary and wasteful" and then testifies that the GenCo structure "supports NIPSCO's service to highly sophisticated megaload customers, competitive forces will demand reliable service at competitive prices . . ." (Pet. Ex. 1, p. 32). We find that the record does not support this conclusion.

a. <u>The Impact of Technological or Operating Conditions</u>. While GenCo claims that the Commission's exercise of jurisdiction is unnecessary and wasteful, GenCo has not provided adequate information or details about its technological or operating conditions. (*See, e.g.,* Pet. Ex. 1 at 34; Rev. Joint Ex. 1, Settlement Agreement Ex. A, Rev. Pet. Attach. A).

Declination of jurisdiction petitions typically involve specific facilities or projects with identified locations and technologies. *See, e.g.,* Cause No. 46004 (June 19, 2024); Cause No. 46029 (June 29, 2024); Cause No. 46061 (Sept. 24, 2024; Cause No. 45891 (Oct. 18, 2023); Cause No. 44478 (Feb. 11, 2015); Cause No. 43758 (Nov. 24, 2009). Here, GenCo requests a declination of jurisdiction over future and indefinite projects under 49 statutory provisions. (Rev. Joint Ex. 1, Settlement Agreement Ex. A, Rev. Pet. Attach. A). GenCo has not disclosed the types of technologies it may employ to meet the electricity demands of megaload customers. GenCo's request lacks the specificity and details required to evaluate the technological conditions of GenCo's request and the Settlement.

Additionally, the Commission regularly reviews information about the Petitioner's intended operations and evaluates the sponsor's experience in developing, constructing, and operating energy projects. Cause No. 46004 (June 19, 2024) at 6; Cause No. 45891 (Oct. 18, 2023) at 5, 6. In other recent examples, the Commission described the sponsor's project development experience and noted that the Petitioner had promised to operate the project in a manner consistent with good utility practice. Cause No. 46061 (Sept. 24, 2024) at 6; Cause No. 46061 (Sept. 24, 2024) at 6. Yet here, GenCo states that it has no assets, does not know how it will be staffed, and has not provided adequate information about its approach to project procurement, project construction, or project operation. GenCo Response to CAC DR 3-009(a); GenCo Response to OUCC DR 1-016 (CAC Ex. 1, Attachment TT-2).

The Commission also regularly considers how the generation construction projects will be financed. Cause No. 45604 (Dec. 22, 2021) at 8-9. But, here, GenCo has not disclosed information about how it will finance future generation projects. GenCo has stated that its "financing structure is still being determined" (GenCo Response to IG DR 2-007 (CAC Ex. 1, Attachment TT-2)) and that "[d]ecisions regarding financing of [] GenCo's facilities will be made in the future." (GenCo Response to CAC DR 1-002 (CAC Ex. 1, Attachment TT-2)). GenCo has also declined to rule in or rule out the prospect of forming a joint venture with an independent entity. GenCo Response to CAC DR 3-001 (CAC Ex. 1, Attachment TT-2). GenCo has declined to offer any projection of its capital structure, stating similarly that "[d]ecisions regarding [] GenCo's capital structure will be made in the future." GenCo Response to CAC DR 1-004 (CAC Ex. 1, Attachment TT-2).

GenCo's application also fails in its inadequate "ringfencing" proposal between GenCo, NIPSCO, and NiSource. GenCo admits that "the assets used to serve megaload customers" should "be 'ringfenced' from the assets owned and operated by NIPSCO to serve its current retail customers." (Pet. Ex. 1 at 13). The Settlement contemplates that GenCo will develop and propose affiliate guidelines later. (Pet. Ex. 1-S-R at 38; Settlement Agreement A.4.i.). However, the Commission finds that without clear affiliate guidelines, it cannot evaluate GenCo's operating conditions or whether the Settlement is in the public interest.

In light of this evidence, the Commission finds that the technological or operating conditions do not render the Commission's jurisdiction unnecessary or wasteful.

b. <u>The Impact of Competitive Forces</u>. In other declination of jurisdiction cases, we have looked to competitive forces in wholesale power markets and the need for an entity to attempt to compete in said markets without regulatory impediment. *See*, *e.g.,* Cause No. 46004 (June 19, 2024). GenCo has identified no such need. Indeed, not only did GenCo present no substantive evidence of NIPSCO's inability to compete for the business of new large-load customers absent the requested broad declination of our jurisdiction, but the non-settling parties have raised a serious and credible concern that granting such declination would diminish and even thwart competition to serve such customers. We further note that GenCo has stated that it would sell power competitively into wholesale markets only if it has "excess" power generation not used by the needs of NIPSCO data center customers. NIPSCO Response to CAC DR 3-004 ("NIPSCO's intention is to utilize NIPSCO GenCo to serve the energy and capacity requirements associated with NIPSCO's megaload customers") (CAC Ex. 1, Attachment TT-2). Thus, the broader wholesale market will receive no benefit from having an additional competitive entrant.

On rebuttal, Mr. Parisi testified that exercising the Commission's jurisdiction "will inhibit NIPSCO's ability to attract megaload customers to Indiana due to competition with other providers of retail service." (Pet. Ex. 1-R, p. 39). This is a misstatement of law and fact, because there is no retail competition for electric service in Indiana. Pursuant to I.C. ch. 8-1-2.3 *et seq*. Indiana law declares this traditional retail monopoly structure to be "in the public interest" and that structure cannot be altered by the AUR. I.C. § 8-1-2.5-11 ("Nothing in this chapter affects the continuing applicability of I.C. 8-1-2-87, I.C. 8-1-2-87.5, I.C. 8-1-2.3, or I.C. 8-1-3."). The Service Area Act is a cornerstone of Indiana's retail electric utility service framework. Just as any other residential or business customer, it is the megaload customer's choice regarding if and where to locate, but there is no customer choice of retail electric service provider in Indiana once that decision is made.

LaPorte County witness Michael O'Connell offered testimony in response to Mr. Parisi's rebuttal testimony that stated that "NIPSCO's proposed use of special contracts – rather than a publicly available, Commission-approved tariff – introduces substantial risk of bias, cross subsidization, and non-transparent cost allocation." We take special note of the exhibit Mr. O'Connell attached to his testimony citing to a recent paper published by the Harvard Environmental & Energy Law Program titled *Extracting Profits from the Public: How Utility Ratepayers are paying for Big Tech's Power*. (LaPorte Ex. 2, Att. A). Specifically, the paper recommended that state utility commissions such as ours adopt more rigorous standards for evaluating special contracts and advocates for the development of standard tariffs for megaload and data center customers (similar to what we authorized in Cause No. 46097). In terms of properly regulating competitive forces, we find compelling that portion of the Harvard report that notes that "unlike a one-off special contract that provides each data center with unique terms and conditions, a tariff ensures that all data centers pay under the same terms and that the impact of new customers is addressed by considering the full picture of the utility's costs and revenue. This holistic and uniform approach ends the race-to-the-bottom competition that incentivizes utilities to attract customers by offering hidden discounts paid for by other ratepayers." (LaPorte Ex. 2 at 9).

While we are not prepared to adopt in this Cause a tariff requirement for service to all megaload customers, we find that GenCo and the Settling Parties have not demonstrated any impediments to NIPSCO's ability to fairly compete for a new megaload customer to locate in NIPSCO's monopoly service territory which would justify the alternative regulatory structure they ask us to adopt for GenCo.

c. <u>The Extent of Regulation by Other State or Federal Regulatory Bodies</u>.

i. <u>Regulation by State or Federal Regulatory Bodies</u>. GenCo has not cited regulations by other state bodies that would render the Commission's exercise of jurisdiction unnecessary or wasteful. In the Petition, GenCo briefly mentions that it intends to seek approval from the Federal Energy Regulatory Commission ("FERC") for participation in the wholesale market (Petition at ¶ 3), later clarifying that this refers to authorization to engage in market-based wholesale power transactions under 18 C.F.R. Part 35, Subpart H. GenCo Response to CAC DR 2-002(c) (CAC Ex. 1, Attachment TT-2). The Settlement explicitly states that GenCo is not prohibited "from participating in the wholesale market using existing, non-committed capacity or energy, subject to such regulatory approvals as may be required." (Settlement A.2.a.i.) FERC review of such transactions would not obviate the need for the Indiana Commission's jurisdiction over GenCo's decisions to construct or acquire new generation, which is the primary topic at issue here. The Commission's jurisdiction would also maintain ongoing visibility into GenCo's operations, which is necessary and prudent to preserve. There is no evidence of other relevant state or federal regulation of the procurement of supply-side generation for megaload customers. Thus, we find that the extent of regulation by other state or federal regulatory bodies does not render the Commission's jurisdiction unnecessary or wasteful.

ii. <u>Regulation by Local Government related to Eminent Domain</u>. GenCo's proposal effectively requests that GenCo be established as a public utility separate from NIPSCO, limited in its operations to only wholesale generation. This is potentially concerning as the Commission could be granting extraordinary powers typically reserved for a public utility, such as the powers of Eminent Domain under Ind. Code § 32-24-1-1, *et. seq.*, without Commission oversight. This is normally not a concern regarding a requested declination of an entity whose property interest is confined to the four corners of its creation – i.e., the generation facility it proposes to construct and operate. GenCo would be given unprecedented broad powers as it seeks potential new customers and investigates the construction of new electric generating units to serve these customers throughout its service territory. In typical recent declination proceedings, the Commission specifically stated that while the entity is a "public utility" within the meaning of Ind. Code §§ 8-1-8.5-1 and 8-1-2-1, the entity "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" proposed project, and that the entity "shall retain the right to limited use of the public right-of-way within the Project area." *See*, *e.g.*, Cause No. 46177, *In re Royerton Solar, LLC*, Order at 10, Ordering Paragraphs 1, 4 (Ind. Util. Reg. Comm'n, May 7, 2025); Cause No. 46104, *In re Duff Solar Park LLC*, Order at 10, Ordering Paragraphs 1, 4 (Ind. Util. Reg. Comm'n, Nov. 20, 2024).

Importantly, if the Commission does not have jurisdiction over the facility, then the appropriate local regulatory bodies do have authority to regulate the facility, such that the facility does not have the ability to place itself outside any regulatory oversight. If GenCo receives its request for the Commission to decline jurisdiction while GenCo still retains eminent domain authority, then GenCo could do exactly this and not follow any or all local regulations. It also creates a disadvantage for other entities seeking declination by allowing GenCo to retain this authority while having previously eliminated it for these other entities. We must be consistent with our previous declination orders and find that GenCo shall not exercise an Indiana public utility's rights, powers, and privileges of eminent domain and exemption from local zoning, land use requirements, land use ordinances, and construction-related permits in the operation and construction of any facility GenCo intends to construct.

Again, we find that the extent of regulation by other state or federal regulatory bodies does not render the Commission's jurisdiction unnecessary or wasteful.

2. <u>The extent to which declination of jurisdiction will be beneficial for the energy utility, the utility's customers, or the state</u>, <u>I.C. § 8-1-2.5-5(b)(2)</u>. The second factor we must consider is whether our declination of jurisdiction, in whole or in part, will be beneficial for the energy utility, the energy utility's customers, or the state. Mr. Parisi's direct testimony contains multiple blanket assertions that avoiding the Commission's jurisdiction will be beneficial to GenCo, and GenCo's customer (NIPSCO), and the State of Indiana, with limited explanations. (Pet. Ex. 1, pp. 32, and Att. A therein at pp. 1-15). We find, however, the support for these assertions, at least regarding NIPSCO's captive customers whose power consumption comes from sources other than GenCo, to be either absent or unavailing.

Indeed, while the Commission will maintain oversight of special contracts, the risk of cost shifting persists "due to the complexity and subjectivity of assessing the utility's costs of serving a single consumer, and political pressure on public utility commissions to approve contracts," as the Harvard paper notes. (LaPorte Ex. 2, Att. A, p. 23).

a. <u>Benefit for the energy utility</u>. As an initial matter, we must determine which entities are the public utilities in this arrangement. NIPSCO is an intervenor and co-sponsors the same Settlement testimony in this proceeding as does Petitioner, GenCo. Mr. Parisi also serves as the President, CEO, and COO of both companies.[1] NIPSCO is undeniably an energy utility in the State of Indiana and the foundational base in this arrangement. GenCo, as Petitioner, asks to become a "public utility" within the meaning of Ind. Code § 8-1-2-1. This

[1] At the evidentiary hearing, Mr. Parisi first testified that he is not the Chief Operating Officer for GenCo despite such indications in testimony. Tr. A-53:16. Later, Mr. Parisi corrected himself, stating that "[f]or both Northern Indiana Public Service Company and for NIPSCO GenCo, I carry the title President, Chief Operating Officer, and Chief Executive Officer." Tr. A-60:24-61:13. The Settling Parties' proposed order still presents Mr. Parisi as the President and Chief Operating Officer, and not the Chief Executive Officer, for both entities. Settling Parties' Proposed Order at 1.

determination would mean it is an "energy utility" under Ind. Code § 8-1-2.5-2 as well. As a public utility, GenCo would be granted a monopoly over a customer base *vis a vis* NIPSCO and would operate in a monopsony market, also by virtue of its unique relationship to NIPSCO, unlike an independent power producer, which enjoys no guaranteed market power on either the supply or demand sides.

Although GenCo would bear the financial responsibility and risk for investments made on behalf of those customers, thereby purportedly insulating NIPSCO's non-megaload customers from associated costs, such a separate entity is also expected to generate higher returns. During NiSource's Q4 2024 earnings call earlier this year, the company's CEO Lloyd Yates flatly stated that GenCo "allows us to operate in an area where we negotiate with our counterparties to earn returns above and beyond what our potential regulated returns are." (CAC Ex. 1 at 11). Conversely, NIPSCO's non-megaload customers will also be "insulated" from the benefits of having a broader customer pool to share in the utility's fixed costs if NIPSCO's megaload customers were to be served in a more traditional arrangement with NIPSCO, rather than via GenCo. The Verified Petition in this proceeding states:

> NIPSCO's strategy is centered first around protecting existing customers since the risks associated with the purchase, ownership, development, financing, construction, and operation of the necessary generation to serve these potential customers will be isolated to NIPSCO GenCo. This strategy also provides a vehicle to attract the necessary capital to undertake the construction of the necessary generation facilities, provides optionality and flexibility for financing arrangements, and allows for expedited development and construction of the required facilities, which is necessary to attract the megaload developers and begin providing service to them under the required timelines." IURC. Cause No. 46183. Petition, p. 4, paragraph 5.

Accordingly, the benefits to the utility do not weigh in favor of the declination of jurisdiction.

b. <u>Benefit for the utility's customers</u>. We must also evaluate whether the declination of jurisdiction is beneficial for each of the utility's customers. Under GenCo's proposed structure, GenCo's sole customer would be NIPSCO, and NIPSCO would buy at wholesale to resell the power to megaload retail customers. However, we find that both NIPSCO and NIPSCO's retail customers would benefit from strict Commission oversight over GenCo's generating projects, as the Commission could ensure that the construction and operation are completed efficiently and safely with a transparent method of cost recovery.

Neither data center/developer that intervened in this case supported the Settlement. Although NIPSCO's other potential megaload customers could benefit from the GenCo structure, we must balance these potential benefits with the impacts to NIPSCO's other customers. Without any special contracts in the record, or procurement strategy, or any other specific details of service or cost to megaload customers, it is difficult to determine whether the GenCo strategy is beneficial to the megaload customers. However, most customers are unlikely to benefit without any competitive procurement process for generation.

The Settlement Agreement explicitly provides members of the Industrial Group with the option to acquire excess capacity and energy from GenCo through Rate 531. For this to be an attractive option, GenCo would need to offer that excess capacity and energy at prices below MISO wholesale market rates. Therefore, this structure would enable Industrial Group members to access electricity at potentially below-market prices – an option not available to similarly situated customers outside the Settlement framework.

Although GenCo and NIPSCO have touted their proposal's potential to safeguard NIPSCO's retail customer base from financial risk associated with megaload-related buildout, GenCo has not adequately detailed the adequacy of these safeguards. NIPSCO states that it expects that GenCo may use competitive procurement to obtain the generation resources needed to serve the requirements of NIPSCO's megaload customers, but it has not committed to do so. (CAC Ex. 1, Attachment TT-2). NIPSCO declined to commit to seek to make continued retail payment performance by megaload customers under special contracts a condition to continuing validity of power purchase agreements with GenCo. CAC CX 1 (NIPSCO Resp. to CAC Data Request 1-002). NIPSCO and GenCo also declined to commit that GenCo's revenue under the wholesale PPAs should be calibrated to cover its costs (CAC CX 23, NIPSCO Resp. to CAC Data Request 3-006), or that NIPSCO's annual payments to GenCo would be aligned with retail payments received from megaload customers (CAC CX 24, GenCo Resp. to CAC Data Request 6-008). NIPSCO declined to commit to match the length of retail special contracts with megaload customers to the length of related GenCo power purchase agreements. (CAC CX 24, NIPSCO Resp. to CAC Data Request 3-008).

We note that NIPSCO's parent company might ultimately provide financial support to GenCo (NIPSCO Response to CAC Data Request 1-001(a) (CAC Ex. 1, Attachment TT-2)), which could ultimately raise NIPSCO's cost of capital. (NIPSCO Response to OUCC Data Request 3-006(b) (CAC Ex. 1, Attachment TT-2). We are concerned about the possibility of a write-off or encumbrance affecting GenCo for a stranded asset if adequate demand to support GenCo's depreciation of the asset does not continue, which could affect NIPSCO's borrowing costs.

The issue of matching generation procured in the PPA to that required in the special contract is also relevant here. GenCo stated in rebuttal and the settlement that it could be efficient for NIPSCO to procure excess resources from GenCo for non-megaload customers, although it does concede an attempt to match the two. However, without oversight of GenCo activities and this understanding that excess could be procured by NIPSCO for other purposes, it is even more critical that a competitive procurement process is followed to ensure any generation developed by GenCo that has the potential for under-utilization be thoroughly "vetted" via competition.

As noted above, Mr. Parisi declined to make numerous commitments regarding megaload customer retail special contracts, including adopting similar assurance provisions like those contained in Cause No. 46097. Furthermore, Mr. Parisi's explanation of why NIPSCO did not propose a megaload customer tariff in its recent electric rate case was unsatisfying, as the company was clearly aware of the growing interest from data centers at the time the rate case was filed. In

balancing the impacts to the various customers, the benefits to the utility's customers do not weigh in favor of the declination of jurisdiction.

c. Benefit for the State. The magnitude of risk at issue here is different than that which is typical in a declination case. GenCo has not attempted to constrain its declination proposal temporally or to a specific number of projects, meaning it could encompass a large amount of costs in the future. In contrast, a typical declination case is limited to a specific project or projects and is not open-ended as is proposed here.

NIPSCO GenCo also invokes in conclusory fashion the purported economic development interests of local and state governments as justification or benefits for the proposed construct. We are concerned that this proposed entity is the first of its kind in the nation, as admitted by Mr. Parisi during his testimony (Tr., pp. A-66:25, A-67:1) and yet there has been no effort made by either the Petitioner Genco or Intervenor NIPSCO to look at "best practices" elsewhere in the nation (Tr. p. A-67) or even to review what NIPSCO's peer utilities are doing to serve megaload customers. (Tr. p. A-67, lines 12-19).

GenCo has no employees or assets of its own apart from its relationship with NIPSCO. We agree with Intervenors who have argued that GenCo's true role is that of a go-between that passes on funds flowing from NIPSCO retail customers to NiSource's shareholders in amounts that would not otherwise be permitted under traditional ratemaking.

Further, we find that GenCo's relationship with NIPSCO would cause confusion and a veil of secrecy regarding NIPSCO's true cost of service and GenCo's financial structure. The only business engaged in by GenCo is building generation for NIPSCO. GenCo's expenses are ultimately paid for by NIPSCO's ratepayers (whether they be megaload customers or other customer classes) who receive no benefit from this arrangement.

Considering this, while we find the declination of jurisdiction may benefit a very small number of NIPSCO's customers such as those represented by the NIPSCO Industrial Group, that potential benefit is very limited and even less secure. Moreover, that limited benefit to these few customers is outweighed by the burden the declination of jurisdiction would place on those customers by allowing this arrangement to proceed without protections in place now.

3. The extent to which the declination of jurisdiction will promote energy utility efficiency. I.C. § 8-1-2.5-5(b)(3). The third factor requires the Commission to consider whether the Commission's declining to exercise its jurisdiction, in whole or in part, will promote energy utility efficiency. To analyze energy utility efficiency, the Commission often looks to whether the Commission's regulation would be duplicative of other regulatory bodies or could cause inefficiencies in a facility's development or operation. *See, e.g.*, Cause No. 46004, *In re Fletcher Power Pet. Comm'n Jurisdiction* at 4 (June 19, 2024); Cause No. 46029, *In re Headwaters Wind Farm III Pet. Comm'n Jurisdiction* at 4 (June 19, 2024); Cause No. 45891, *In re Galea Springs Pet. Comm'n Jurisdiction* at 4 (Oct. 18, 2023); Cause No. 45604, *In re Petersburg Energy Ctr. Pet. Comm'n Jurisdiction* at 4 (Dec. 22, 2021). The Commission often

notes testimony stating that declination will allow a petitioner to fully devote its resources to complying with the requirements of federal, local, and other state regulatory agencies. *Id*.

But, here, we have not found within GenCo's filing (nor are we generally aware of) additional regulatory bodies that would duplicate the oversight of generation construction and operation that the IURC would exercise. For example, FERC's role would be limited to approving wholesale power purchase agreements, but would not provide ongoing visibility into GenCo's operations, which is necessary and prudent to preserve.

In testimony, GenCo appears to conflate the concept of energy utility efficiency with the "sophisticat[ion]" of megaload customers (Pet. Ex. 1, p. 20:4-14.); supposed "competitive forces" that somehow would apply in the case of a monopoly retail electric utility (NIPSCO) (*Id.* at 31:17-32:4); and a purported need for "speed to market." (*Id.* at 8:6-7, 32:11-14, 35:2). We do not see why the nature of new retail customers that GenCo's wholesale supply service could support contributes to GenCo's "efficiency" as a utility. Efficiency must mean something more than the obvious point that a utility can save time by evading regulatory review; otherwise, every declination request would be meritorious.

Mr. Parisi also testified that if GenCo were required to obtain a CPCN, as required by I.C. § 8-1-8.5-2, "this would be a material hurdle to timely development and procurement of needed generation resources, which would impact Gen Co's ability to attract megaload customers . . ." *Id.* As several intervenors have testified, during the pendency of this case, the Governor signed House Enrolled Act 1007 ("HEA 1007"). Under HEA 1007, the CPCN approval timeline of 8 months has been dramatically reduced under the new review pathways for generation projects serving megaload customers. While NIPSCO is not required to use the expedited process established under HEA 1007, it certainly eliminates the regulatory lag issue that the GenCo structure was intended to address.

The Settlement also allows GenCo to defer our decisions regarding key policy choices to later filings. Without our guidance, GenCo and NIPSCO are unlikely to include protections for non-megaload customers in future megaload-related contracts.

To the extent that Petitioner asserts that its sole customer is NIPSCO, the evidence does not demonstrate that it is in the public interest for us to conclude that NIPSCO, or its potential megaload customers, some of which appear to be unknown at this time, will not benefit from the statutory purposes of utility regulation. We cannot conclude from the evidence presented in the instant Cause that there are technological or operating conditions, competitive forces, or regulation by other state or federal regulatory bodies that render the exercise, in whole or in part, of jurisdiction by the Commission unnecessary or wasteful.

The references in this Order to previous Commission Orders provide a view of some of the circumstances under which we have found it appropriate to decline jurisdiction. The Commission is not aware of, and the parties have not cited as precedent, any proceeding that was factually consistent with this proceeding wherein the Commission declined to exercise its jurisdiction over

an energy utility. The facts presented to us in this Cause are distinguishable from previous factual circumstances in which the Commission has declined to exercise its jurisdiction.

4. <u>The impact of the declination of jurisdiction on the utility's ability to compete with other providers of functionally similar energy services or equipment. I.C. § 8-1-2.5-5(b)(4)</u>. The fourth factor we must consider in deciding a request to decline jurisdiction is whether the exercise of Commission jurisdiction inhibits an energy utility from competing with other providers of functionally similar energy services or equipment. In analyzing this factor, we have looked to the petitioner's ability to compete with providers of similar energy services or equipment. *See, e.g.,* Cause No. 45891, *In re Galea Springs Pet. Comm'n Jurisdiction* at 4 (Oct. 18, 2023) (noting testimony stating "that the exercise of Commission jurisdiction would inhibit Petitioner in competing with other providers of functionally similar energy services or equipment"); Cause No. 46029, *In re Headwaters Wind Farm III Pet. Comm'n Jurisdiction* at 4 (June 19, 2024) (same). For example, in cases where independent power producers seek a declination of jurisdiction, the Commission looks to whether other independent power producers also received a similar declination of jurisdiction.

GenCo conflates this factor by claiming its proposal is reasonable due to the "increasingly competitive environment," referring to competition for the economic development opportunities presented by megaload customers. (GenCo Ex. 1, 29:11). Yet, NIPSCO GenCo has conflated its own business interest in securing unbounded, blanket regulatory relief with the business interests of its affiliate (e.g., the desire to attract and serve megaload customers). There is no "competitive environment" for either NIPSCO GenCo or NIPSCO to navigate: NIPSCO is the primary supplier of generation for customers in its service territory, and under the proposed construct, NIPSCO GenCo would be the sole supplier of generation for NIPSCO's megaload customers.

Importantly, we agree with Mr. Thomas's testimony that a *lack* of Commission oversight would in fact inhibit competition with other providers of functionally similar energy services or equipment. (CAC Ex. 1 at 10:4-5). On its face, GenCo's request and the Settlement do not spur competition, and this structure has the potential to give an unfair advantage to GenCo over other Indiana utilities, wholesale power providers, and independent energy system developers. NIPSCO has made clear that GenCo would not have any competitors from among independent power developers to provide contracted power to NIPSCO to meet megaload customers' retail needs. NIPSCO Resp. to CAC Data Request 3.4 (CAC Ex. 1, Att. TT-2). Further, GenCo declined to commit to use competitive bidding in its future project development. GenCo Response to CGA Data Request 1-003 (CAC Ex. 1, Att. TT-2). And the Settlement Agreement itself (para. A.4.c) contemplates that GenCo could have access to build a new generation project at the site of a retiring NIPSCO generation resource; there is no provision to open that access to competitive bidding.

Testimony from a prospective data center developer greatly concerns us. The need for transparency and equity highlighted in Mr. Davies' testimony was compelling. Specifically, "unlike a tariff offering, the proposed NIPSCO GenCo structure is a 'black box,'" and the rate impacts of that structure will not be known until perhaps it is too late. Under special contract structure, NIPSCO enjoys wide discretion to pick winners and losers among those who apply for data center service. Unlike the publicly available information tariffs that are open to all prospect

(and eligible) customers, the details of the special contracts are not publicly available. A general tariff offering that allows a defined class of customers would put all large scale customers on more equal footing and creates public awareness of the market access option. (Takanock Ex. 1, 16:17-23, 17:1-3).

If granted, NIPSCO GenCo's request for unbounded, blanket CPCN declination would unfairly advantage NIPSCO GenCo over other IPPs operating in the state of Indiana and, therefore, potentially quell competition from those IPPs with negative impacts to NIPSCO's megaload and non-megaload alike in the long term.

Perhaps most critically, NIPSCO GenCo's justification for the unbounded, blanket regulatory relief from the statutes listed in the Petition is based on the needs of GenCo's affiliate its affiliate – even though NIPSCO is neither the petitioner nor a joint petitioner. In seeking to leverage I.C. ch. 8-1-2.5, NIPSCO GenCo is essentially asking the IURC to find that, among other criteria, NIPSCO is inhibited "from competing with other providers of functionally similar energy services". IC § 8-1-2.5-5(b)(1). Regardless, the intent of NIPSCO in acquiring energy and capacity from NIPSCO GenCo is so NIPSCO can attract megaload customers. But NIPSCO is not inhibited from competing with other energy utilities operating in Indiana – which are subject to the same regulatory environment – as the statute directs the IURC to consider. And for that matter, neither is NIPSCO GenCo.

NIPSCO GenCo would be handed a distinct competitive advantage over other energy utilities and IPPs looking to do business in Indiana, enabling NIPSCO GenCo to corner the market for its affiliate's megaload customers and, potentially, to also capture an outsized share of the wholesale power market with any excess capacity NIPSCO GenCo would sell to MISO. Petition, pp. 2-3. Assuming an otherwise level playing field, the "speed to market" advantage would cause NIPSCO to favor NIPSCO GenCo over IPPs not enjoying unbounded, blanket relief from the CPCN Statutes to serve its megaload customers for demand up to and potentially exceeding 8,600 MW by 2035. Pet. Ex. 1, p. 3, lines 10-13. *See also* NIPSCO GenCo's Response to CAC Request 2-005. *Also see* NIPSCO GenCo's Response to OUCC Request 1-011; the OUCC asked whether and how NIPSCO's 2024 IRP would change were the petition approved in full, ostensibly due to increased demand from megaload customers; NIPSCO GenCo objected to the question. The implication, of course, is that the magnitude of potential demand could be greater than what was forecast in the 2024 IRP.

IPPs would not have fair access to the business opportunity of serving NIPSCO's megaload customers. Even with the settlement, IPPs do not get even close to equal market access to serve this enormous load. We must focus on the request of the Petitioner (i.e., NIPSCO GenCo), and not use this proceeding to find that the Petitioner's affiliate (i.e., NIPSCO) is inhibited from competing with "other providers of functionally similar energy services."

Regarding the Petitioner, NIPSCO GenCo is not inhibited from competing with other IPPs. NIPSCO GenCo has (1) the same opportunities to seek declination of jurisdiction for specific projects as any other energy utility, public utility, or IPP operating or seeking to operate in Indiana, and (2) is bound to the same regulations and policies under Indiana law as any other energy utility,

public utility or IPP operating in Indiana. The Commission's prior determinations over declination requests for specific projects demonstrate that the IURC understands when retaining jurisdiction over the CPCN Statutes does (or does not) unduly "inhibit" an energy utility. If it becomes apparent that NIPSCO GenCo will, in fact, monopolize business opportunities, IPPs will have less incentive to develop projects in the Hoosier State – an outcome which would negatively impact the public interest.

The problem of *underutilized* assets emerges as a threat to IPPs, as well as NIPSCO's retail customers, if NIPSCO purchases energy or capacity from these assets outside of a competitive procurement process. Any underutilized assets resulting from the hundreds of thousands of MW of generating capacity NIPSCO GenCo anticipates building would threaten IPPs seeking to do business in Indiana as follows: if NIPSCO's megaload demand fails to materialize and NIPSCO GenCo, as a result, is left with excess generation from underutilized generating facilities, NIPSCO could purchase energy and capacity from NIPSCO GenCo to serve its non-megaload retail customers, curbing NIPSCO's need for arrangements with other IPPs. This threat emerges because NIPSCO GenCo failed to show evidence of need that would otherwise be provided by a signed PPA detailing the generation NIPSCO is obligated to deliver to megaload customers and that NIPSCO GenCo, in turn, is obligated to provide.

There is little to no evidence presented by NIPSCO GenCo that it will not improperly receive cross-subsidization from its affiliate NIPSCO by virtue of its access to NIPSCO's assets, including NIPSCO employees, management, and investors, which indicates that its strategy to insulate NIPSCO's non-megaload customers is not without holes. As discussed above in the summary of testimony, Mr. Parisi could not answer how GenCo will pay its bills for, *e.g.*, external lawyers or NiSource employees' services, other than to say that its parent company is currently paying the bills, and GenCo will eventually assume responsibility for the bills. He failed to explain when GenCo will pay the bills or how it will obtain funds to do so. Mr. Parisi also declined to commit to quitting at least one of his dual roles as head of both NIPSCO and GenCo, which gives us serious concern as to the two companies' intent to establish truly arm's-length separation for purposes of inter-company negotiations.

Section 2 of the Settlement Agreement states that "GenCo may compete with other potential suppliers to construct behind the meter installations for new or existing customers." (Settlement Agreement, § A.2.f., at p. 9). This provision directly contradicts the consistent representations made throughout the proceeding that NIPSCO would be GenCo's sole customer. By reserving the right to construct behind-the-meter generation for new or existing customers, GenCo is positioning itself to operate in a competitive, unregulated market - an approach that reflects a fundamentally different business model from what was proposed in the original Petition. This expanded scope raises additional concerns regarding regulatory oversight, competitive fairness, and the potential for unmonitored affiliate transactions. By developing behind-the-meter generation for new or existing customers, Genco would be operating in direct competition with NIPSCO's regulated utility service. This would reduce NIPSCO's retail load and, in turn, could shift fixed costs onto remaining customers; thereby increasing rates for those who continue to rely on NIPSCO for electric service. This competitive dynamic is especially concerning given that both entities are affiliates under the same parent company, NiSource, creating additional concerns

around transparency, fairness, and potential cross-subsidization. Not to mention, the name recognition of NIPSCO GenCo is an unfair advantage over other suppliers.

NIPSCO GenCo should be treated no differently than any of the independent power producers operating in Indiana. Our analysis under this factor weighs heavily against Petitioner.

5. Whether the declination of jurisdiction will enhance or maintain the value of the utility's retail energy services. With the proliferation of megaload customers and the directive to serve them, there is no doubt that the value to NIPSCO (and shareholders of NIPSCO's ultimate parent company) of the utility's retail energy services will be enhanced. NIPSCO's 2024 IRP contemplated 2,600 MW of new demand (a figure that exceeds the utility's current peak demand) by 2035 in its "Reference Case," with an alternate figure of 8,600 MW of new demand in the "Emerging Load" case. CGA Ex. 1 at 23. Similar to our denial of the BlueIndy ARP in Cause No. 44478, "It follows that [NIPSCO / GenCo] would experience increased revenues from the sale of electricity." Final Order at 19. This, however, does not mean that NiSource should be able to engineer a way to increase its revenues while not enhancing or maintaining the value of energy services for NIPSCO's retail customers.

As such, declining exercise of the Commission's jurisdiction does not enhance or maintain the value of GenCo's retail energy services (of which it has none), nor the value to NIPSCO retail customers. No current or prospective megaload customer has supported GenCo's requested relief or the proposed Settlement. As developed elsewhere in this Order, non-megaload retail customers may take on greater risk if the Commission does not exercise its usual authority to review new generation projects. Declination of jurisdiction would primarily enhance the value of NIPSCO and GenCo's parent company, NiSource. Such a benefit is not sufficient to decline jurisdiction.

B. Legal Standard for Reviewing Settlement Agreements. Settlements presented to the Commission are not ordinary contracts between private parties. *U.S. Gypsum, Inc. v. Indiana Gas Co*., 735 N.E.2d 790, 803 (Ind. 2000). Any settlement agreement that is approved by the Commission "loses its status as a strictly private contract and takes on a public interest gloss." *Id*. (quoting *Citizens Action Coalition v. PSI Energy, Inc.,* 664 N.E.2d 401, 406 (Ind. Ct. App. 1996)). Thus, the Commission "may not accept a settlement merely because the private parties are satisfied; rather [the Commission] must consider whether the public interest will be served by accepting the settlement." *Citizens Action Coalition*, 664 N.E.2d at 406. Furthermore, any Commission decision, ruling or order, including the approval of a settlement, must be supported by specific findings of fact and sufficient evidence. *U.S. Gypsum*, 735 N.E.2d 790 at 795 (citing *Citizens Action Coalition*, 582 N.E.2d at 331)). Our policy regarding settlement agreements is also applicable even though fewer than all the parties are signatories, or if there is a contested settlement as presented herein. Therefore, before the Commission can approve the settlement agreements in this proceeding, we must determine whether the evidence in this Cause sufficiently supports the conclusion that the settlement agreements are reasonable and just and serve the public interest.

The Commission is concerned about GenCo's commitment to the public interest considering the affiliated interest between GenCo and NIPSCO. Our statutory analysis of the issue

of declination of jurisdiction above has caused us to conclude that it is not in the public interest for us to decline to exercise jurisdiction over the Petitioner. Based on the analysis above and the testimony filed in support of the Settlement Agreement, we also find that the proposals in the Settlement Agreement should not be approved. While some of the Settlement Agreement terms would provide the Commission with more regulatory authority than the Petitioner's initial proposal, we find no compelling reason that our regulatory authority should not include all applicable legal standards.

Although NIPSCO has stated that it will submit any special contract for with a megaload customer for Commission review, at this time, we have no such agreements before us in this Cause. If NIPSCO, as a public utility subject to Commission jurisdiction, desires for rates, charges, and other terms of service for a megaload customer, then the Commission believes it would be appropriate for Petitioner to initiate a separate proceeding that requests approval of each such special contract, thereby allowing an opportunity for any interested person to be aware of and to possibly participate in the proceeding.

As a regulated public utility that desires customized rate arrangements, NIPSCO can request Commission approval of special contracts to serve megaload and other customers that require unique customer arrangements. I.C. §§ 8-1-2-24 and 8-1-2-25 contemplate that, in some circumstances, customized rates or other financial charges may be more beneficial to a public utility and its customers than tariff rates. However, these statutory provisions require that the Commission maintain jurisdiction and provide oversight over any unique financial devices. Absent such regulatory oversight, these special financial arrangements could involve price reductions for specific customers that can result in a shifting of cost recovery between customer classes, or result in a windfall to the utility. As a result, special contract cases have the potential to be contested, and a docketed proceeding provides a more adequate level of process for the parties and the Commission to address such issues. Such Commission oversight can help to ensure that all utility customers are treated fairly and that any financial arrangement is reasonable.

This is the same process that NIPSCO used to establish service to its only current data center customer, DX Hammond. The Commission also approved special contracts for Duke Energy Indiana and a tariff for Indiana Michigan Power Company to serve data center customers in their respective service territories. *See* Final Orders in Cause Nos. 46038 and 46097. We find, therefore, that the provisions in I.C. §§ 8-1-2-24 and 8-1-2-25 provide an appropriate mechanism to request Commission approval of data center service arrangements.

In conclusion, we find that the contrived, two-tiered business organization between GenCo and NIPSCO is unnecessary, excessive, detrimental to ratepayers, and not in the public interest. All payments, in any form, by or through NIPSCO to GenCo are disallowed under I.C. § 8-1-2-49(a), and NIPSCO is ordered to cease such payments and sever all connection with GenCo immediately, and so report to the Commission in a compliance filing within thirty (30) days of the date of this Order.

7. Confidential Information. Motions seeking a determination that designated confidential information involved in this proceeding be exempt from public disclosure under Ind. Code § 8-1-2-29 and Ind. Code ch. 5-14-3 were filed by NIPSCO and GenCo on April 14, 2025. Each request was supported by affidavit showing certain documents to be offered into evidence contained trade secret information as defined by Ind. Code § 24-2-3-2 and within the scope of Ind. Code § 5-14-3-4(a)(4). The requests were granted by the Presiding Officers on May 1, 2025, finding such information confidential on a preliminary basis. Subsequently, the parties submitted the designated confidential information.

After reviewing the designated confidential information, we find that such information is trade secret as defined by Ind. Code § 24-2-3-2. The information has independent economic value from not being generally known or readily ascertainable by proper means. Each moving party takes reasonable steps to maintain the secrecy of the information, and disclosure of such information would cause harm to the moving party. Therefore, we find that the information should be exempted from the public access requirements contained in Ind. Code ch. 5-14-3 and Ind. Code § 8-1-2-29 and held confidential and protected from public disclosure by the Commission.

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

1. The Verified Petition of NIPSCO Generation LLC requesting that the Commission decline to exercise its jurisdiction is hereby denied.

2. The Settlement Agreement submitted in this Cause is hereby rejected as being not in the public interest.

3. NIPSCO is hereby ordered to submit the aforementioned compliance filing within thirty (30) days of the date of this Order.

4. The information filed in this Cause pursuant to the motions for protection and nondisclosure of confidential and proprietary information is deemed confidential pursuant to Ind. Code § 5-14-3-4 and Ind. Code § 8-1-2-29, is exempt from public access and disclosure by Indiana law, and shall be held confidential and protected from public access and disclosure by the Commission, except as described herein.

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

HUSTON, BENNETT, FREEMAN, VELETA, AND ZIEGNER CONCUR:
APPROVED:
I hereby certify that the above is a true
and correct copy of the Order as approved.

_____
Dana Kosco
Secretary of the Commission