

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION BY MEADOW)
LAKE WIND FARM III LLC FOR CERTAIN) CAUSE NO. 43759
DETERMINATIONS BY THE COMMISSION WITH)
RESPECT TO ITS JURISDICTION OVER)
PETITIONER'S ACTIVITIES AS A GENERATOR OF) APPROVED: NOV 24 2009
ELECTRIC POWER)

BY THE COMMISSION:

James D. Atterholt, Commissioner

David E. Veleta, Administrative Law Judge

On August 10, 2009, Meadow Lake Wind Farm III LLC ("Petitioner") filed its Petition and Request for Expedited Treatment with the Indiana Utility Regulatory Commission ("Commission") in this Cause for certain determinations, declinations of jurisdiction and approvals relating to its proposed construction of an approximate 103.5 megawatts ("MW"), phased, wind-power generating facility located in White County, Indiana ("Facility"), in accordance with Ind. Code § 8-1-2.5.

On October 6, 2009, Petitioner submitted information responsive to four questions issued in a docket entry dated October 1, 2009. Pursuant to notice as provided by law, proof of which was incorporated into the record, an evidentiary hearing in this Cause was held in Room 224 of the National City Center, 101 West Washington Street, Indianapolis, Indiana, at 9:30 a.m. on October 8, 2009. At the hearing, the Petitioner presented its case in chief, consisting of the prefiled direct testimony and exhibits of Bill Whitlock, Director of Development for the Great Lakes Region of Petitioner. The Office of Utility Consumer Counselor ("OUCC") participated in the hearing and presented the prefiled testimony and exhibits of Ronald L. Keen. No other persons appeared or otherwise participated.

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

1. **Notice and Jurisdiction.** Proper legal notice of the hearing in this case was given and published by the Commission as required by law. The Commission has jurisdiction over Petitioner and the subject matter of this case.

2. **Petitioner's Characteristics.** Petitioner is a limited liability company duly organized and existing under the laws of the State of Delaware. Petitioner's principal place of business is at 808 Travis Street, Suite 700, Houston, Texas 77002. Petitioner's sole member is Horizon Wind Energy LLC ("Horizon"). Horizon is a limited liability company existing under the laws of the State of Delaware with its principal place of business at 808 Travis Street, Suite 700, Houston, Texas 77002 and with offices in California, Kansas, New York, Illinois, Oklahoma, Minnesota, Washington and Oregon. Additionally, Horizon has a local office at 129 E. Market St., Indianapolis, IN 46204. Horizon's expertise includes the development,

construction and operation of wind power electric generating facilities. The ultimate parent of Petitioner and Horizon is Energias de Portugal, S.A. ("EDP").

3. **Relief Requested.** Petitioner has requested the Commission determine that the public interest allows it to decline to exercise its jurisdiction pursuant to Ind. Code § 8-1-2.5-5 over Petitioner with respect to the construction, ownership and operation of, and any other activity in connection with, the Facility. Petitioner will be a wholesale provider of electricity and will generate electricity from wind, a renewable energy resource, for sale in the wholesale power market.

The Facility will generate electricity using wind turbines mounted on steel towers. The long-term plan is for all of the phases to combine to generate up to approximately 1,000 MWs of electricity. This Cause involves only Phase III, which is anticipated to generate approximately 103.5 MWs of electricity and is located entirely in unincorporated White County, Indiana. The power output from the Facility will be sold exclusively in the wholesale electric market. Petitioner will self-certify the Facility as an exempt wholesale generator and apply for market-based rate authority under rules and regulations of the Federal Energy Regulatory Commission ("FERC"). Therefore, its wholesale rates for power will be subject to FERC regulation.

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

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

The Commission must also determine that Petitioner satisfies the definition of "public utility" found in Ind. Code § 8-1-2-1. The evidence establishes that Petitioner's ownership, development, financing, construction and operation of the Facility is for the purpose of sale of the power from the Facility in the wholesale market to public utilities, energy service providers,

and power marketers within and without Indiana. The Commission has found in prior cases that a business that only generates electricity and then sells that electricity directly to public utilities is itself a public utility. See e.g., *Benton County Wind Farm, LLC*, Cause No. 43068 (IURC 11/20/2007). In *Benton County*, the Commission specifically found that it had jurisdiction over a wind energy generator with wholesale operations such as Petitioner. Consequently, for purposes of the ownership, development, financing, construction and operation of the Facility, we find that Petitioner is a public utility within the meaning of Ind. Code § 8-1-2-1 and Ind. Code § 8-1-8.5 and an “energy utility” within the meaning of Ind. Code § 8-1-2.5-2.¹

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

In determining whether the public interest will be served, the Commission shall consider the following:

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

Ind. Code § 8-1-2.5-5

The evidence in this Cause demonstrates that Petitioner does not intend, nor does it request authority, to sell the electricity generated by the Facility to the general public or to any retail customer. Instead, the power will be generated solely for resale subject to the jurisdiction of FERC under the provisions of the Federal Power Act. Petitioner indicated that it will operate the Facility in a manner consistent with good utility practice. The Petitioner also indicated that it is not seeking authority to exercise certain of the rights, powers, or privileges of an Indiana

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

public utility in the construction and operation of the Facility, including the power of eminent domain, and the exemption from zoning and land use regulation. Further, the costs of the Facility will not be recovered through a rate base/rate of return or other process typically associated with public utility rates.

The OUCC's witness, Ronald L. Keen, testified in support of Petitioner's construction of the Facility and request for relief. Mr. Keen recommended that the Commission's Order declining jurisdiction include various conditions consistent with prior Commission Orders. As part of the Commission's public interest analysis regarding any proposed declination of jurisdiction, the Commission must evaluate facilities such as the Petitioner's based on a number of factors, including the following:

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

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

(1) **Local Zoning and Permitting Requirements.** Petitioner submitted evidence that it has complied or will comply with local zoning and land use requirements, has or will obtain all local construction-related permits, and will not rely on the public utility exemption from local zoning regulation.

Mr. Whitlock testified that in November 2007 White County requested that Horizon review and comment on the County's draft wind farm ordinance as it was being developed. The White County Zoning Ordinance that was adopted by the White County Commissioners includes a chapter on Wind Energy Conversion Systems ("WECS"). This chapter includes specifications for the development of wind farms in White County ("Siting Ordinance").

According to Mr. Whitlock, WECS are a permitted use in two districts: Agricultural (A-1) and Agricultural Industry (A-2). For the Facility, the vast majority of the land is in the Agricultural District (A-1), with a small amount of land in the Agricultural Industry (A-2) and Light Industrial (I-1) Districts. Petitioner expects all of the turbines to be placed in Agricultural (A-1) or Agricultural Industry (A-2) Districts.

(2) Land Use and Wind Resources. Based on the evidence presented, Horizon, utilizing its experience in developing numerous other wind projects throughout the United States, has determined that the wind resource at the project site is sufficient for the development of an economically viable project. In addition, the landowners on whose land the project wind turbines will be located have consented or will consent to the locations of the wind turbines on their land. A preliminary site map that reflects the approximate locations of these facilities was submitted in this Cause as Exhibit BW-1.

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

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

(5) Transmission Interconnection. The Project is expected to interconnect with AEP's 345 kV transmission system at the substation built for Phase I of Meadow Lake Wind Farm.² The Project's electrical system will consist of (i) a 34.5 kV collection system, which will collect energy generated by each wind turbine at approximately 690 volts which will be increased to 34.5 kV by step-up transformers located at or near each wind turbine, and deliver it via electric cables, which will be primarily, if not entirely underground, to (ii) a substation transformer, where the collection system voltage of 34.5 kV will be increased to the expected transmission voltage of 345 kV, for delivery to (iii) a dedicated 345kV project transmission line that will interconnect with the AEP 345 kV switchyard which (iv) is directly interconnected with AEP's 345 kV transmission system.

From the Phase II substation, approximately 6 miles of overhead 345kV transmission line will transmit electricity to the AEP 345 kV switchyard. The overhead route will run through private farmland, not along public right of ways. The overhead transmission line will cross Interstate 65 and the collection system will traverse U.S. Highway 231 in accordance with a permit issued by the Indiana Department of Transportation ("INDOT"). Monopole structures will be used for all pole structures. The power output from the Facility will be sold exclusively in the wholesale electric market. Petitioner will self-certify the Facility as an exempt wholesale generator and apply for market-based rate authority under FERC rules and regulations. Therefore, its wholesale rates for power will be subject to FERC regulation.

² Although Phase III will be located in the Midwest ISO footprint, it will interconnect with the transmission system of AEP, which is a member of PJM Interconnection, Inc.

Mr. Whitlock testified that PJM Interconnection, Inc. ("PJM") is presently conducting Interconnection System Impact Studies for the Petitioner's interconnection requests. AEP's transmission system is part of the wholesale power grid controlled by PJM. Petitioner's queue position with PJM is T126.

Mr. Whitlock testified that the Impact Studies associated with the interconnection requests to PJM are expected to indicate that the Project's interconnection with the AEP transmission system will not negatively impact system performance. If any network upgrades are identified in the Impact Studies, they will be specified in the Project's Interconnection Service Agreement ("ISA").

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

With respect to additional environmental and land use issues, Mr. Whitlock testified that Petitioner contracted for an environmental summary to identify potential wetland, biological and cultural issues associated with the Facility. That assessment was incorporated into his testimony as Exhibit BW-2, and concluded that no environmental issues are foreseen that would delay or prevent the permitting and construction of the Facility. Additionally, Petitioner contracted for an assessment of the project site by Petitioner's wildlife consultants. That assessment concluded that the project location will not have a significant impact on wildlife habitat or any threatened or endangered species. Mr. Whitlock attached the Executive Summary of the wildlife report to his testimony as Exhibit BW-3. Petitioner also obtained a preliminary archaeological study of the project site to determine whether archaeological resources may exist and to ensure that construction does not affect any significant cultural resources. If construction takes place in an area in which archaeological resources may be present, Petitioner will conduct a Phase 1(a) archaeological survey.

(7) Using the Public Right-Of-Way. The I-65 and U.S. 231 public rights-of-way run through Phase III. Accordingly, Petitioner is seeking the ability to use those rights-of-way for collection and transmission purposes. In past declination proceedings, public utilities seeking a declination of Commission jurisdiction have voluntarily agreed to waive an Indiana public utility's right to use the public right-of-way. Here, however, Petitioner desires to retain the

rights, powers and privileges of an Indiana public utility to cross the public right-of-way at certain points.

Mr. Whitlock stated that many wind energy projects, due to their large size, necessitate traversing the public right-of-way at some point. In addition, Mr. Whitlock testified that denying a public utility the right to use the public right-of-way would result in a significant impediment to developing a wind farm in Indiana. Mr. Whitlock further testified that Petitioner is seeking permits from the Indiana Department of Transportation to cross the rights-of-way of Interstate 65 and U.S. 231.

The OUCC did not object to Petitioner's use of the public right-of-way. The OUCC's witness, Mr. Keen, testified that Petitioner should be granted a conditional and limited right to use public rights-of-way to cross Interstate 65 and U.S. Route 231 for the transmission of energy from the wind farm generation field to the AEP switching yard where the generation can be incorporated into the transmission grid for use by consumers.

Based upon the evidence presented, we find Petitioner's uncontested request for limited use of the public right-of-way for the Facility's transmission lines to be reasonable, and the Petitioner retains the right to cross the public right-of-way, specifically I-65 and U.S. 231, as depicted in Petitioner's Exhibit BW-1.

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

Mr. Whitlock testified that he believes the public interest will be served in a number of important respects by the addition of the electric generating capacity represented by the Facility. First, the public needs electricity. In response to a October 1, 2009 Docket Entry, Mr. Whitlock testified that Indiana electric utilities have issued multiple Requests for Proposals ("RFP") that request bids for the provision of renewable energy, some of which are specific to wind energy. Mr. Whitlock interprets the issuance of these RFPs as an indication of a deficiency in the Indiana renewable energy market. Additionally, Indianapolis Power & Light ("IPL") has experienced a modest increase in the number of customers enrolled in its Green Power Program. Mr. Whitlock believes that Indiana customers want increased access to renewable energy resources and the wind energy produced at Petitioner's proposed wind farm will give those customers increased exposure to those resources. Mr. Whitlock opined that Petitioner's proposed wind energy production will allow Indiana to diversify its energy portfolio in advance of the potential enactment of federal and state carbon legislation.

Second, Petitioner's proposed wind farm represents an environmentally friendly means of generating electricity. Third, the public in Indiana will benefit from the efficiencies which flow from proximity to the source of generation as the high cost of transmitting power over long distances makes it generally advantageous for load to be located near its source. Fourth,

landowners in White County will receive substantial economic benefits from the placement of wind farm facilities on their properties. Fifth, local taxing bodies will receive tax revenues. Finally, up to 300 construction jobs and approximately 12 full-time operations and maintenance jobs will be created by the Facility.

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

Petitioner is a subsidiary of Horizon and an indirect subsidiary of EDP, Portugal's largest utility. Horizon is the third largest wind developer in the United States and is the fourth largest wind developer in the world. Mr. Whitlock testified that Horizon will provide Petitioner with all necessary financial, technical and managerial expertise to construct and operate the Facility and that the Petitioner will operate the Facility in a commercially reasonable manner in accordance with good utility practice. Mr. Whitlock also attached EDP's annual report as Exhibit BW-6. The evidence presented demonstrates that Petitioner has the ability to finance, construct, and manage the Facility.

(d) **Affiliate Transactions:** In addition to determining whether the public interest would be served if the Commission declines jurisdiction, the Commission also must consider what actions it must take to ensure that the public interest is served throughout the commercial life of the Facility. Specifically, the Commission must determine the extent to which it must reserve its authority over the Petitioner's activities involving affiliate transactions and transfers of ownership. To ensure that the Commission's declination of jurisdiction over an "energy utility" is in the public interest, the Commission must be assured that adequate consumer protections are in place should an "energy utility" subsequently become an affiliate, as defined in Ind. Code § 8-1-2-49, of any regulated Indiana retail utility. While the Commission is declining jurisdiction over Petitioner's affiliate transactions initially, the Commission reserves its authority to regulate Petitioner should it become an affiliate of any regulated Indiana retail utility. Accordingly, Petitioner must inform the Commission, and the OUCC, when it becomes an affiliate of any regulated retail utility operating in Indiana at the time of its occurrence. Further, Petitioner shall obtain prior Commission approval with respect to the sale of any electricity to any such affiliated, regulated Indiana retail utility. The Commission notes that it retains certain authority under Section 201 of the Federal Power Act to examine Petitioner's books, accounts, memoranda, contracts, and records consistent with the limitations contained therein. 16 U.S.C. § 824 (2005).

(e) **Transfers of Ownership:** The Commission reserves its jurisdiction under Ind. Code § 8-1-2-83, and requires Petitioner to obtain prior Commission approval of any transfer of Petitioner's franchise, works or system. Petitioner, however, shall not be required to seek prior approval, but shall provide written notice to the Commission and the OUCC, of any transfers of

ownership of Facility assets or ownership interests in the Petitioner involving: (1) the grant of a security interest to a bank or other lender or collateral agent, administrative agent or other security representative, or a trustee on behalf of bondholders in connection with any financing or refinancing (including any lease financing); (2) a debtor in possession; or (3) a foreclosure (or deed in lieu of foreclosure) on the property owned by Petitioner or ownership interests in Petitioner. Additionally, a third-party owner and operator may succeed to Petitioner's declination of jurisdiction, provided: (1) the Commission determines that the successor has the necessary technical, financial, and managerial capability to own and operate the Facility; and (2) the successor satisfies the same terms and conditions imposed on Petitioner as set forth in this Order.

5. **Financial Assurance.** As a condition of this Order the Commission requires the Petitioner to maintain financial assurance to ensure that the WECS will be properly decommissioned at the end of its serviceable life. The testimony presented in this Cause demonstrates that Petitioner is required by the Siting Ordinance to outline the anticipated means and cost of removing a WECS at the end of its serviceable life, or upon becoming a discontinued or abandoned use, to ensure that the WECS is properly decommissioned. The decommissioning plan must include a contractor cost estimate for demolition and removal of the WECS facility. Removal includes all equipment and facilities to no less than a depth of four feet below ground.

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

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

The following reports ("Reporting Requirements") shall be prepared and filed by Meadow Lake Wind Farm.

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

(1) Project ownership and name(s) of the Facility;

- (2) Name, title, address, and phone number(s) for primary contact person(s) responsible for operating and maintaining the Facility;³
- (3) Number and location of wind turbines deployed;
- (4) Anticipated total output of Facility;
- (5) Manufacturer, model number and operational characteristics of turbines;
- (6) Connecting utility(s);
- (7) Copy of any Interconnection System Impact Studies prepared by PJM;
- (8) Expected in-service (commercial operation) date;
- (9) An estimate of the engineering/construction timeline and critical milestones for the Facility;
- (10) The status of the ISA with PJM, and
- (11) The information listed under (b) hereof, to the extent such information is available.

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

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

(c) Additional Requirements. In the event that Petitioner intends to materially increase or decrease or otherwise materially change the Facility's capacity or operation, the owner must obtain the Commission's prior approval. Petitioner shall notify the Commission in the event that it modifies or suspends the project under the terms of the ISA and does not reinstitute work within three (3) years following commencement of such suspension. If the Commission determines that Petitioner has: (a) failed to enter into an agreement pursuant to PJM generator interconnection procedures; (b) suspended

³ Prior Commission orders have required the petitioner to provide the name, title, address and phone number(s) for the primary contact person(s) responsible for the facility.

the project under the terms of the ISA and has not reinstated work within three (3) years following commencement of such suspension; or (c) has otherwise suspended its efforts to complete the project within three (3) years of this Order, the Commission may, following notice to the Petitioner, proceed to issue an Order terminating the declination of jurisdiction set forth herein.

7. **Conclusion.** Pursuant to the provisions set forth in Ind. Code § 8-1-2.5-5, the Commission finds that declining to exercise its jurisdiction over Petitioner and the Facility will facilitate the immediate construction of the proposed Facility and add needed generation capacity in Indiana. This should be beneficial for those public utilities that may indirectly have access to the power produced, and to the State of Indiana. We further conclude that the Commission's declining to exercise jurisdiction over Petitioner will promote energy utility efficiency. Moreover, Petitioner has demonstrated that it has the technical, financial and managerial capability to construct and operate the proposed Facility. It has also shown that the wholesale market for electricity in Indiana will benefit from the addition of the generating capacity and therefore that its market entry is reasonable.

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

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

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

1. Petitioner is hereby determined to be a "public utility" within the meaning of Ind. Code § 8-1-8.5-1 and Ind. Code § 8-1-2-1 and an "energy utility" within the meaning of Ind. Code § 8-1-2.5-2.

2. The Facility is hereby determined to be a "utility" within the meaning of Ind. Code § 8-1-2-1.

3. The Commission declines to exercise its jurisdiction over Petitioner and its construction, operation and financing of the Facility, except as specifically stated within this Order.

4. Petitioner shall not exercise an Indiana public utility's rights, powers, and privileges of eminent domain and of exemption from local zoning and land use ordinances in the construction and operation of the Facility. Petitioner retains the rights, powers and privileges of a public utility to cross the public right-of-way, specifically I-65 and U.S. 231, as depicted in Petitioner's Exhibit BW-1.

5. Petitioner shall not sell at retail in the State of Indiana any of the electricity generated by the Facility without further order of the Commission. The gross revenues generated by sales for resale of the electricity generated by the Facility are hereby adjudged to be exempt from the public utility fee prescribed by Ind. Code § 8-1-6-1 *et seq.*

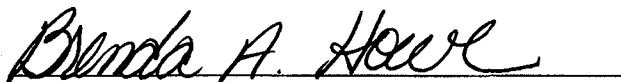
6. Petitioner shall comply fully with the terms of this Order and submit to the Commission all information required by the terms of this Order.

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

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

APPROVED: NOV 24 2009

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



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