STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

VERIFIED PETITION OF NIPSCO GENERATION LLC FOR CERTAIN DETERMINATIONS BY THE COMMISSION WITH RESPECT TO ITS JURISDICTION OVER PETITIONER'S ACTIVITIES AS A NON-RETAIL GENERATOR OF ELECTRIC POWER.	))))))	**CAUSE NO. 46183**

ORDER OF THE COMMISSION

Presiding Officers:
James F. Huston, Chairman
Ann S. Pagonis, Administrative Law Judge

On January 10, 2025, NIPSCO Generation LLC ("NIPSCO GenCo", "GenCo" or "Petitioner") filed its Verified Petition with the Indiana Utility Regulatory Commission ("Commission") for an order declining to exercise its jurisdiction, pursuant to Ind. Code § 8-1-2.5-5, over certain aspects of Petitioner's purchase, ownership, development, financing, construction, and operation of generating facilities and related assets (the "Facilities"). Also on January 10, 2025, Erin E. Whitehead, Vice President of Regulatory Policy and Major Accounts for Northern Indiana Public Service Company LLC ("NIPSCO") filed prepared testimony and attachments on behalf of GenCo which was later adopted by Vincent A. Parisi, President and Chief Operating Officer for GenCo and NIPSCO.[1,2]

Petitions to Intervene were filed by the Citizens Action Coalition of Indiana, Inc. ("CAC"); Invenergy Renewables LLC ("Invenergy"); Board of County Commissioners of LaPorte County, Indiana ("LaPorte"); Clean Grid Alliance ("CGA"); NIPSCO Industrial Group ("Industrial Group"); "Takanock Beckham, LLC" ("Takanock")[3]; United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO/CLC and its Locals 12775 and 13796 ("USW"); and DX Hammond JV LLC ("DX Hammond"). These petitions were granted without objection. On February 14, 2025, NIPSCO filed a Petition to Intervene, which was granted over the objection of the Indiana Office of Utility Consumer Counselor ("OUCC") on February 27, 2025. The OUCC also participated as a party.

On March 24, 2025, CAC, CGA, and LaPorte filed a Motion to Dismiss, to which GenCo

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[1] GenCo filed a correction to this direct testimony on March 24, 2025.

[2] On April 11, 2025, GenCo filed a Notice of Substitution of Witness whereby Vincent A. Parisi adopted the direct testimony and attachments previously filed by Ms. Whitehead.

[3] On June 13, 2025, Notice of Corporate Name Change of Intervenor Takanock, Inc. to Takanock Beckham, LLC was filed.

responded on April 3, 2025, and the moving parties replied on April 7, 2025. The Motion to Dismiss was denied by Docket Entry dated May 2, 2025.

On March 31, 2025, LaPorte filed the direct testimony of Michael R. O'Connell, Principal Consultant for Midwest Energy Consulting LLC.

On April 1, 2025, the OUCC and certain intervenors filed their respective cases-in-chief, as follows:

- Brian R. Latham, Electric Division Director, OUCC;
- Ted Thomas, Founder of Energize Strategies on behalf of CAC;
- Emily R. Piontek, Regulatory Associate, CGA;
- Michael P. Gorman; Managing Principal with the firm of Brubaker & Associates, Inc. on behalf of Industrial Group;
- Kenneth Davies, founder and CEO of Takanock; and
- David Pavlik, Managing Member of Decennial Group, LLC on behalf of DX Hammond.

GenCo filed a Motion for Protection and Nondisclosure of Confidential and Proprietary Information on April 14, 2025, relating to information to be included in prefiled direct testimony and attachments of Takanock Witness Davies, which motion was granted by Commission Docket Entry dated May 1, 2025.

Also on April 14, 2025, NIPSCO filed a Motion for Protection and Nondisclosure of Confidential and Proprietary Information, relating to information to be included in prefiled direct testimony and attachments of Takanock witness Davies, which motion was granted by Commission Docket Entry dated May 1, 2025.

On April 14, 2025, NIPSCO filed the cross-answering testimony of Tchapo Napoe, Vice President and Treasurer Corporate Finance for NiSource Inc. ("NiSource") and NiSource Corporate Services Company ("NCSC"). Also on April 14, 2025, GenCo filed the rebuttal testimony and attachments of Vincent A. Parisi.

On April 14, 2025, GenCo filed a Motion to Strike portions of the direct testimony of Takanock Witness Davies, to which Takanock responded on April 14, 2025, and GenCo and NIPSCO jointly replied on May 1, 2025.[4] During the evidentiary hearing, the Presiding Officers denied the motion to strike.

On May 1, 2025, the Presiding Officers issue a Docket Entry requesting additional information from Petitioner to which Petitioner responded on May 7, 2025.

On May 8, 2025, GenCo, NIPSCO, and NIPSCO Industrial Group filed a Joint Notice of Agreement in Principle, Request to Vacate Evidentiary Hearing Date and Request for Attorneys' Conference. On that same day, LaPorte County filed an Objection to Request to Vacate the

[4] GenCo and NIPSCO jointly replied a day late pursuant to an unopposed motion.

Evidentiary Hearing to which GenCo and NIPSCO replied also on the same day. Also on May 8, 2025, the Presiding Officers, by Docket Entry, continued the hearing over LaPorte County's objection and scheduled an Attorneys' conference to discuss the procedural schedule.

On May 9, 2025, GenCo filed a Notice of Submission of Confidential Information indicating that it had submitted to the Commission as a confidential document the term sheet reflecting the settlement in principle. On May 12, 2025, CAC, CGA, LaPorte County, Takanock, and the Union filed a Joint Response to the Proposed Procedural Schedule for Settlement to which GenCo, NIPSCO, and the Industrial Group replied on May 14, 2025.

Also on May 14, 2025, Genco and NIPSCO filed the settlement testimony of Witness Parisi, and the NIPSCO Industrial Group filed settlement testimony of Witness Gorman. That same day, GenCo submitted Settling Parties' Joint Exhibit No. 1, the Stipulation and Settlement Agreement among the Settling Parties.

On May 22, 2025, the Presiding Officers by docket entry established the procedural schedule for settlement.

On June 13, 2025, the OUCC filed the testimony of Michael W. Deupree, consultant from Acadian Consulting Group, CAC filed the testimony of Mr. Thomas, LaPorte County filed the testimony of Mr. O'Connell, CGA filed the testimony of Ms. Piontek, and Takanock filed the testimony of Mr. Davies in opposition of the Settlement.

On June 17, 2025, GenCo and NIPSCO filed settlement reply testimony of Witness Parisi, which included a Revised Joint Exhibit 1 in clean and redlined version of the Stipulation and Settlement Agreement among the Settling Parties ("Settlement Agreement" or "Settlement"), to present an agreed upon change in response to non-settling parties and a correction to the Settlement Agreement explained further in this Order below.

On June 30, 2025, GenCo, NIPSCO, and the Industrial Group filed a Joint Motion for Limitation of Cross-Examination by Parties with Similar Interests and Supporting Memorandum. During the evidentiary hearing, after hearing oral argument from the parties, the Presiding Officers denied the motion.

The Commission held an evidentiary hearing on July 1, 2025, at 9:30 a.m. in Room 222 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana. GenCo, NIPSCO, the OUCC, and Intervenors were present and participated through counsel. The testimony and exhibits of the participating parties were admitted into the record without objection.

The Commission, based upon the applicable law and the evidence of record, now finds as follows:

1. Jurisdiction and Notice. Notice of the hearing in this Cause was given and published by the Commission as required by law. As discussed further below, Petitioner intends to engage in activity that would qualify it as a "public utility" under Ind. Code § 8-1-2-1 and as an "energy utility" under Ind. Code § 8-1-2.5-2. Therefore, the Commission has jurisdiction over Petitioner and the subject matter of this proceeding.

2. Petitioner's Characteristics and Businesses. GenCo is a limited liability company with its principal place of business located at 801 East 86th Avenue, Merrillville, Indiana. GenCo intends to purchase, construct, own, and operate generation facilities and related assets, but will have no retail customers. Petition ¶2. GenCo will have no franchises, service territory, or retail customers and will make no retail sales in Indiana or elsewhere. All sales by Petitioner of electric energy produced by its generation facilities will be provided exclusively to NIPSCO through a power purchase (or comparable) agreement, or if excess generation exists after satisfying contractual requirements with NIPSCO, it will be offered into the wholesale power market (governed by the policy and protocols established by the Midcontinent Independent System Operator, Inc. ("MISO")) and not at retail. GenCo will obtain the requisite approval from the Federal Energy Regulatory Commission ("FERC") for such participation in the wholesale market. Id. ¶3. GenCo will not otherwise dedicate or hold itself out to serve directly the electric needs of the general public; however, development of its generation facilities will provide significant public benefits.

3. Relief Requested. Petitioner requests the Commission to decline jurisdiction over certain aspects of Petitioner's purchase, ownership, development, financing, construction, and operation of the Facilities. Specifically, Petitioner requested a finding NIPSCO Generation LLC to be a "public utility" within the meaning of Ind. Code § 8-1-2-1 and Ind. Code § 8-1-8.5-1 and an "energy utility" within the meaning of Ind. Code § 8-1-2.5-2 for purposes of the purchase, ownership, development, financing, construction, and operation of the Facilities; finding that the Commission's limited declination of jurisdiction will serve the public interest; and declining the Commission's jurisdiction under the statutes set forth in Petition Attachment A.

The statutes of which GenCo sought declination were further refined as set forth in Settlement Agreement Exhibit A.

4. Overview of the Evidence.

A. GenCo Direct Evidence. Mr. Parisi provided an overview of GenCo's request and explained that the specific sections of the Indiana Code for which declination is being requested are delineated in Attachment A to the Petition. Pet. Ex. 1 at 4. He then discussed the interest from potential megaload customers. *Id.* at 4-7. He explained that these inquiries are different than usual in two respects. First, there is the sheer number of inquiries. Second, and just as important, is the magnitude of the requests of the potential electric load. *Id.* at 5. He said the overwhelming majority of the inquiries NIPSCO is seeing are for hundreds of MW, and in some cases thousands of MW, and they are generally related to development of data centers. Based on the magnitude of potential electric load, NIPSCO refers to these potential customers as "megaload customers." *Id.* Mr. Parisi described the typical characteristics of megaload customers and the type of service they demand. *Id.* at 5-6. He said the largest of the megaload customers, who are most actively developing projects across the world, are very financially capable—with many of them being among the largest corporations in the world. Typically, these companies are also incredibly financially savvy—including having experience in energy markets and rate structures in numerous states and regions across the U.S. and the world. *Id.* at 6. He explained that generally speaking, these types of customers are emphasizing the desire for service to begin as soon as possible and to ramp up quickly. He said most of these types of customers are seeking duplicate feeds for increased reliability and are willing to pay the costs associated with the necessary

infrastructure. *Id.* at 6-7. He also described the factors contributing to this influx of inquiries to potentially locate large projects in NIPSCO's electric service territory. *Id.* at 7.

Mr. Parisi explained how NIPSCO is approaching this opportunity, and what the fundamental considerations are that NIPSCO has focused on when developing its strategy to serve megaload customers. *Id.* at 8-9. He explained that NIPSCO has approached this opportunity intentionally and thoughtfully. As it evaluated different options and ultimately developed its current strategy, there were three primary considerations that NIPSCO has focused on: (1) protecting existing retail customers; (2) serving new megaload customers with speed and flexibility; and (3) maintaining NIPSCO's financial integrity. *Id.* at 8. He said while demand is growing rapidly, supply of electricity is struggling to keep pace, as the necessary infrastructure and resources necessary to produce and deliver energy take a period of many months, or years in many cases, to construct. This has led to extreme competition (1) by megaload developers to find utilities who can serve electric load in as short of a time as possible and (2) by electric utilities and other providers to attract these megaload customers to their electric systems. *Id.* at 9-10. Mr. Parisi testified that NIPSCO GenCo is a key element of NIPSCO's overall plan to attract and ultimately serve megaload customers. Utilizing GenCo enables speed-to-market, which is important to many megaload customers, and allows NIPSCO to develop the type of resources that megaload customers may desire—but without those costs being borne by NIPSCO's current, and future, non-megaload retail customers. *Id.* at 10.

He described the relationships between NIPSCO, GenCo, and megaload customers. *Id.* at 11-12. He explained that NIPSCO will be the retail electric provider for all megaload customers. GenCo will develop generation assets and be obligated pursuant to a full requirements agreement (such as a PPA) with NIPSCO to supply all energy and capacity to NIPSCO which is needed to serve its new, retail, megaload customers. GenCo will be regulatorily required to satisfy its requirements to NIPSCO based upon the Commission's approval of such contractual arrangements. NIPSCO and the megaload customer will enter a special contract that will address the provision of electric service to the customer. *Id.* at 11. Mr. Parisi said subject to the Commission's approval in a separate proceeding, which will be filed at a later time, NIPSCO and NIPSCO GenCo will enter into a power purchase (or similar) agreement, whereby all energy and capacity from GenCo's generation assets will be sold to NIPSCO and utilized by NIPSCO to serve megaload customers. He explained that GenCo is key to NIPSCO's overall approach, as it is GenCo that will construct, own, and operate the generation facilities and related assets necessary to serve new megaload customers. He said GenCo and NIPSCO will be separate companies, although both are subsidiaries of NIPSCO Holdings II. This separation will allow the assets used to serve megaload customers to be "ringfenced" from the assets owned and operated by NIPSCO to serve its other retail customers. The protection this provides to NIPSCO's non-megaload customers is a key part of why GenCo was formed. *Id.* at 13.

Mr. Parisi further explained serving potential megaload customers with respect to NIPSCO's overall financial integrity and the financial risk that may be imposed on NIPSCO. *Id.* at 13-16. He explained that all stakeholders—NiSource and its shareholders, NIPSCO and its customers, the Commission, and many others—have an aligned interest in ensuring the ongoing financial integrity of NIPSCO. *Id.* at 13. He said understanding that NIPSCO has an obligation to serve its existing customers and to reasonably plan for growth within its service territory, NIPSCO is not willing to undertake providing what is essentially a new type of service if it would potentially

jeopardize NIPSCO's financial integrity and impact its ability to serve its retail customers. *Id.* at 14.

Mr. Parisi also explained customer protections. *Id.* at 17-21. He noted how NIPSCO traditionally serves customers with loads of this size and how the related investments needed to serve such customers would be handled if GenCo were not formed and utilized as proposed. *Id.* at 17-18. He stated for sake of clarity, he is not suggesting there is anything fundamentally wrong with a more traditional approach to ownership and operation of the assets necessary to serve megaload customers. Although there are ways to attempt to protect current customers under this type of process to some degree—including use of minimum contract terms, minimum load factors, exit fees, etc.—this type of approach presented challenges to NIPSCO in terms of the three fundamental considerations outlined above, including reasonably protecting customers. *Id.* at 18. He said having ownership and the related capital and operation and maintenance ("O&M") costs outside of NIPSCO protects NIPSCO's current customers from the costs of generation recovered during construction and operation (construction work in progress ("CWIP"), depreciation, fuel costs, O&M, etc.), as well as continuing to pay for a generation asset that may no longer be needed if a megaload customer were to terminate a contract or leave following expiration of a contract term. *Id.* at 19. He explained it is possible that there will be some investments that NIPSCO (not GenCo) will make and seek to include in rate base for recovery from all customers through the traditional ratemaking process. This would be the case if investments are identified that support and have benefits for the broader NIPSCO electric system that are needed as a large load(s) comes online. *Id.* at 19. He explained that if investments are necessary that also benefit the broader NIPSCO electric system, megaload customers would also share in the cost responsibility for such assets. *Id.* at 20. He explained that there is the potential that NIPSCO could have an identified need for generation resources (or a discreet need for capacity and/or energy) and that GenCo could have a resource that is not being fully utilized that could meet NIPSCO's need. Mr. Parisi testified that GenCo is not seeking declination of the Commission's authority over sales, transfers, assignments, etc. of assets between utilities under Ind. Code 8-1-2-83. *Id.* at 21. He explained that the risk will be shared by NIPSCO Holdings II and NiSource and their respective owners/shareholders (through ownership of GenCo) and megaload customers (through minimum demand charges, collateral requirements, etc.) *Id.*

Mr. Parisi further testified about the importance of speed and flexibility to potential megaload customers. *Id.* at 21-23. He said speed-to-market has been a priority for the overwhelming majority of the potential megaload customers with whom NIPSCO has spoken. Utilizing GenCo to construct, own, and operate generation facilities presents an opportunity to significantly reduce the time it takes to bring new generation online as compared to the traditional regulatory model. *Id.* at 21-22. He said the ability to serve megaload customers as early as possible is a key factor that can allow NIPSCO to differentiate itself from other electric utilities, and using GenCo allows this to happen. *Id.* at 22. He said a Commission order denying GenCo's requests for relief in this proceeding would potentially inhibit NIPSCO's ability to serve these megaload customers quickly, to develop the types of generation resources megaload customers are seeking, and to reduce the risk to its other customers from such service. The result would be that some or many of the megaload customers who desire to locate in Indiana or northern Indiana specifically, may look elsewhere for their projects—taking with them billions of dollars in investment and the numerous related benefits to the State of Indiana. *Id.* at 22-23.

Mr. Parisi also addressed the Five Pillars of Ind. Code § 8-1-2-0.6 and noted that under the Commission's General Administrative Order 2023-04, declination of jurisdiction requests are not one of the proceedings in which evidence about the Five Pillars is encouraged. *Id.* at 23-28; 25.

Mr. Parisi discussed GenCo's declination request. *Id.* at 28-39. He explained that GenCo is an energy utility within the meaning of Indiana Code § 8-1-2.5-2 and a public utility within the meaning of Ind. Code § 8-1-2-1. *Id.* at 29. He provided the legislative findings of Ind. Code. 8-1-2.5-1 which set forth the Indiana General Assembly's explanation of why such relief for an energy utility should be available. He said these legislative findings outline the factors at play as NIPSCO seeks to encourage megaload customers to locate within its service territory— especially the competition with other utilities across the country for these types of customers and the need for flexibility in regulation. *Id.* at 29-30.

Mr. Parisi also discussed the public interest. *Id.* at 31-33. He said having GenCo construct, own, and operate the generation facilities and related assets not only isolates the risk associated with serving these potential megaload customers from NIPSCO's current customer base, but it also brings the benefits of this unprecedented economic development to NIPSCO's customers and to Indiana. *Id.* at 31. He explained that the exemptions from the various provisions of Ind. Code ch. 8-1-8.5 are to eliminate provisions that have limited application to this structure and are also to assure speed-to-market, which is necessary to attract these megaload customers. Because NIPSCO GenCo will not provide service at the retail level, other sections listed in Attachment A to the Petition (e.g., Ind. Code § 8-1-2-42) simply have no application. *Id.* at 32. He said other sections are unnecessary given the sophistication of the megaload customers. Exemption from the various financing provisions is important to attract the capital necessary, do so quickly enough, and provide flexibility to accomplish the needed speed-to-market. The Commission's exercise of jurisdiction under many of the chapters or sections identified in Attachment A to the Petition is unnecessary and wasteful as contemplated by Ind. Code § 8-1-2.5-5(b)(1). *Id*. He explained that further, because this structure supports NIPSCO's service to highly sophisticated megaload customers, competitive forces will demand reliable service at competitive prices, making declination of many of the chapters or sections identified in Attachment A to the Petition beneficial for NIPSCO GenCo and its customer (NIPSCO) and will promote energy utility efficiency as contemplated by Ind. Code §§ 8-1-2.5-5(b)(2) and (3). *Id.* at 32-33. He said the Commission will continue to maintain visibility into NIPSCO as the only customer of NIPSCO GenCo. Importantly, exercise of Commission jurisdiction inhibits NIPSCO GenCo and NIPSCO from competing with others in this space as contemplated by Ind. Code § 8-1-2.5-5(b)(4). *Id.* at 33. He explained that it is important that NIPSCO be able to attract these customers, insulate current NIPSCO customers from any attendant risks, while also allowing interested stakeholders, including NIPSCO customers and the State of Indiana, to enjoy the benefits of such unprecedented economic development. He said this is the type of alternative to traditional regulatory policies and practices contemplated by Ind. Code. ch. 8-1-2.5 that the Commission should be allowed the flexibility to permit. *Id*.

Mr. Parisi specifically discussed why GenCo is seeking declination of Ind. Code 8-1-8.5. *Id.* at 36-38. He said the primary purpose for a CPCN is to make a determination of a need for a project to protect customers from unnecessary capital expenditures. This protection is not necessary, as GenCo will not have retail customers, as NIPSCO will be GenCo's only "customer." Second, the prohibition in Ind. Code 8-1-8.5-2 that "a public utility may not begin the construction,

purchase, or lease of any [] facility for the generation of electricity" before a CPCN is issued presents a significant impediment to bringing online the generation resources necessary to serve megaload customers under the timeline they desire to be served. *Id.* at 36-37. He said again, allowing GenCo to undertake construction activities without a CPCN is reasonable because NIPSCO's retail customers will not be responsible for costs GenCo incurs. *Id.* at 37. He explained that The Commission will, however, have authority to review and approve the contractual arrangements between NIPSCO—GenCo, and NIPSCO—megaload customer, which provides an additional reason that declination is appropriate. Finally, Mr. Parisi testified it is his understanding that granting declination of the requirement to obtain a CPCN is typical in Commission declination proceedings filed by ("IPPs"). *Id.* at 37-38.

Mr. Parisi explained that while it is not an explicit factor under Ind. Code § 8-1-2.5, it is important that approval of GenCo's petition will further the public policy goals of the State of Indiana to attract these kinds of project developers and further Indiana's economic development pipeline. This public policy is clear from the passage of Ind. Code § 6-2.5-15, which provides significant incentives to data centers who locate in Indiana in the form of sales and use tax exemptions for anywhere between 25 and 50 years. *Id.* at 38.

B. OUCC and Intervenor's Cases-in-Chief.

i. OUCC Case-in-Chief. OUCC Witness Latham testified that while he is not opposed to the isolating structure underlying GenCo's request, he recommended the Commission deny GenCo's request for declination because Petitioner has not met its burden to demonstrate that declination is in the public interest under the four criteria in Ind. Code § 8-1-2.5-5(b). Pub. Ex. 1 at 2.

Mr. Latham also testified that GenCo's request is not a typical declination request. He stated that requests for declination of Commission jurisdiction are typically for a specific generation project, such as a solar or wind farm. He explained that GenCo's declination request is for a wholesale generation company, whose operations, developments, and projects will be removed from much of the Commission's jurisdiction on an ongoing basis without the Commission yet knowing the extent or assessing the propriety of the generation plans or GenCo's financial wherewithal to fulfill its obligations. He stated that GenCo has not brought forward any project or yet substantiated any additional generation over which the Commission should decline jurisdiction. He stated that another atypical aspect of GenCo's declination request is that GenCo is an affiliate of NIPSCO, both wholly owned subsidiaries of NIPSCO Holdings II LLC. He indicated that while declination of utility affiliates is not common, these types of arrangements have been seen by the Commission in proposed joint ventures, where a utility affiliate forms a joint venture with a third party to own generation, and the energy from the facility is then sold back to the utility. He explained that with other declinations, these joint venture arrangements involved a known generation facility already under development, while also examining the arrangement between the joint venture and the utility. He testified in this proceeding, however, the affiliation presented is unprecedented and could have potential ramifications if GenCo issues debt that is in any way collateralized by NIPSCO's assets or ratepayers. Mr. Latham testified that GenCo has not determined what credit support it will receive from NiSource or other affiliates, so it is unknown how a bankruptcy at GenCo would affect the NiSource corporate structure or ultimately affect NIPSCO and its retail customers. He

testified it is also troublesome that a regulated utility could conceivably control significant unregulated load that could be inserted into the wholesale market and drive competitors out based on pricing. *Id*. at 4-6.

Mr. Latham stated he has concerns regarding protection of NIPSCO's current customers. He stated debt issued to construct GenCo's property, plant, and equipment will, presumably, be issued by GenCo, leaving NIPSCO and its parent company's assets unencumbered. He testified debt cross collateralization between GenCo and NIPSCO or debt issued by the parent company could, however, lead to NIPSCO ratepayers being responsible for GenCo debt should GenCo or its parent be unable to service GenCo's debt. Mr. Latham further testified if NIPSCO ratepayers become responsible in any way for GenCo debt, the Commission will have little recourse but to allow NIPSCO to raise its rates to avoid creditor control of NIPSCO's assets if GenCo is unable to service its debt. Mr. Latham recommended the Commission ensure that NIPSCO's other ratepayers are not potentially subject to GenCo-related debt prior to approving GenCo's declination requests. *Id*. at 6-7.

Mr. Latham testified that he appreciated the original thinking by GenCo and NIPSCO to prepare for the anticipated megaload customers and meet their needs. He testified the creation of a separate entity to provide the generation needs for NIPSCO and its new megaload customers could substantially reduce the risk of burdening NIPSCO's existing customers with the significant investment this generation will require. He further testified, however, that the details of the proposal are too "speculative" to provide assurance to the Commission and the interested parties of that protection. He testified that he realized part of the reason for this lack of information is because the specific arrangements between NIPSCO and GenCo and the special contracts between NIPSCO and the megaload customers will be presented to the Commission in future proceedings, but the broad unknowns at this time are concerning. He stated additionally, because of this lack of substantive information, GenCo has failed to show its proposal meets the four factors under Ind. Code § 8-1-2.5-5 for establishing its declination requests are in the public interest. *Id*. at 7-8.

Mr. Latham provided his response to GenCo's explanation that it meets the public interest factor under Ind. Code § 8-1-2.5-5(b)(1). Mr. Latham testified "unnecessary" and "wasteful" are an unfortunate choice of words for a system designed to apply the principles of the regulatory compact. He stated avoiding or rushing the thoughtful regulatory analysis that protects reliability at a reasonable cost should not be sacrificed to address projected load growth or give one utility a competitive advantage in its industry. He further stated unfortunately, the explanation also does not address other parts of this statutory section and little information was provided on the operations of GenCo. Mr. Latham testified that GenCo has no assets, does not know how it will be staffed, how its facilities will be financed, or its capital structure, and does not have any existing credit facilities. Additionally, GenCo has not identified any generation capacity or type that it expects to bring online in the years 2026 through 2030. Mr. Latham stated that GenCo acknowledges that NIPSCO and GenCo will negotiate purchase power agreements at arm's length "to the extent practical," the "precise manner in which this will be accomplished has not been determined." He further stated the phrase "to the extent possible" is open-ended and subject to interpretation. Mr. Latham testified that any evaluation of the "practicality" of the arm's length negotiation will need to be decided to the satisfaction of the Commission. Further, Mr. Latham testified Ms. Whitehead also states that GenCo will be

"ringfenced" from NIPSCO. That is, GenCo and NIPSCO will be separate companies under NIPSCO Holdings II, and GenCo's generation assets will not be included in NIPSCO's rate base, and the costs of GenCo's generation assets will not be recovered from current customers. *Id*. at 9-10.

Mr. Latham testified GenCo states it "does not currently expect that NIPSCO's generation, transmission, distribution, and financial assets will be used as collateral in financing GenCo's generation investments," but has not offered a stronger commitment to avoid cross collateralization with NIPSCO. Mr. Latham stated the possibility of GenCo using NIPSCO's assets as collateral creates the possibility of NIPSCO's customers bearing financial responsibility for GenCo's actions. Additionally, Mr. Latham testified Ms. Whitehead indicates that because the structure supports "NIPSCO's service to highly sophisticated megaload customers, competitive forces will demand reliable service at competitive prices." Mr. Latham further testified however, this statement refers more to the competitive position of NIPSCO to compete for business from megaload customers and the price it will charge to these customers. He testified there is no discussion of the competitive forces that will apply to GenCo relative to its position in the wholesale market, and notably, GenCo also does not explain how any of the statutes under which it is seeking declination are addressed by other regulatory bodies and will presumably make the Commission's jurisdiction "unnecessary" and "wasteful." Mr. Latham further testified the petition does state GenCo will "obtain the requisite approval from the Federal Energy Regulatory Commission for such participation in the wholesale market,"[28] but this issue is not discussed in Ms. Whitehead's testimony. Mr. Latham explained that one aspect of overlapping jurisdiction the OUCC routinely evaluates in declination proceedings is how local regulations will affect a generation facility. He testified it remains unknown how GenCo will address local issues or finance its projects and commitments. Of particular concern is how NIPSCO will be able to respond if GenCo is unable to meet its obligation to serve NIPSCO. He further testified while NIPSCO and GenCo may attempt to address this possibility in their contracts, in a worst-case scenario, NIPSCO may struggle to obtain sufficient generation to meet its load obligations. *Id*. at 11-13.

Mr. Latham testified overall, based on the lack of substantial or substantive information on GenCo's operation, ringfencing, competitive forces, financing, and regulation by other bodies, he recommended the Commission find GenCo has not sufficiently shown that declination is in the public interest as required by Ind. Code § 8-1-2.5-5. *Id.* at 13.

Regarding the requirements under Ind. Code § 8-1-2.5-5(b)(2), Mr. Latham testified that while NIPSCO and northwest Indiana would benefit from this economic development, Ms. Whitehead makes no direct connection showing that declination of GenCo will bring these benefits. He stated Ms. Whitehead's conclusory statements provide no support or explanation as to why it is declination, specifically, that will provide the identified benefits. Rather, her explanation describes how the structure benefits NIPSCO's service while improperly attributing the benefit to GenCo. *Id*. at 13-14.

Regarding the public interest requirement under Ind. Code § 8-1-2.5-5(b)(3), Mr. Latham testified Ms. Whitehead only references competitive forces as promoting energy utility efficiency. He testified it is not clear how or in what way declination of jurisdiction will enable competitive forces to promote energy utility efficiency. *Id*. at 14.

Regarding the public interest requirement under Ind. Code § 8-1-2.5-5(b)(4), Mr. Latham testified he disagreed that GenCo has shown that its requests meet this requirement. Mr. Latham testified is notable that Ms. Whitehead is referring to NIPSCO rather than GenCo in this explanation, when it is GenCo that is seeking the declination. He testified Ms. Whitehead does not discuss how GenCo will be competing with "other providers of functionally similar energy services," such as other wholesale generators, or how declination will inhibit GenCo's competition. He further testified as with the explanation of the other factors, Ms. Whitehead's testimony fails to show how it is in the public interest for the Commission to decline jurisdiction in this context. Mr. Latham explained Ms. Whitehead does describe an advantage of declination to GenCo as allowing for "speed-to-market" for generation, as GenCo would avoid the time necessary to obtain a CPCN from the Commission. However, this also goes to NIPSCO's advantage and does not explain how this advantage would address whether the Commission's jurisdiction would inhibit GenCo from competing with functionally similar energy service. *Id*. at 14-15.

Regarding the Commission's consideration of public interest under Ind. Code § 8-1-2.5-5(b), Mr. Latham testified the Commission's consideration is not limited to the four factors listed in that section. Mr. Latham explained that while this section states that the Commission "shall" consider these factors, and the Commission in the Docket Entry establishing the procedural schedule stated that "arguments and evidence presented should be reasonably framed to those issues," the Commission has considered other factors in declination proceedings. He provided examples of such. *Id*. at 15-17. He testified if the Commission approves GenCo's petition without modification, the Commission will be relinquishing its consideration of these other factors when GenCo develops future generation facilities. *Id*. at 16-17.

Mr. Latham testified regarding the other factors he recommended the Commission consider in determining if GenCo's request is in the public interest, he testified due to the nature of GenCo's request, in addition to the four factors identified in Ind. Code § 8-1-2.5-5(b), the primary factor he recommended be considered in determining whether this proposal is in the public interest is whether NIPSCO's current customers are protected from any financial harm or responsibility associated with GenCo and its development, construction, and ownership of generation assets, and a careful weighing of the purported benefits against the risks. *Id*. at 17.

Mr. Latham further testified NIPSCO's increased load from megaload customers will potentially equal or surpass NIPSCO's current load obligations Thus, securing or constructing enough generation to meet a load of this magnitude will likely cost GenCo billions of dollars. Mr. Latham testified because of the risks associated with this amount of money, the requested declination should not be approved unless and until the Commission is confident that NIPSCO's current customers are protected from bearing any of this financial risk. Additionally, he further testified consideration should be given to the potential demands the megaload customers will put on NIPSCO's current transmission and distribution system, and how these costs will be fairly allocated to the megaload customers and not unfairly burden current customers. *Id*. at 17-18.

Regarding what GenCo states about protecting NIPSCO's current customers, Mr. Latham explained GenCo states it will be "ringfenced" from NIPSCO and that current NIPSCO customers will not be responsible for GenCo's generation investments. Mr. Latham testified,

however, other than stating that GenCo will be a separate corporation from NIPSCO, and GenCo's assets will not be included in NIPSCO's rate base, GenCo has neither shown nor fully explained what this ringfencing will entail. Further, there is no discussion about allocating system costs between megaload customers and current customers and how NIPSCO will prevent any subsidization of these costs by current customers. *Id*. at 18.

Mr. Latham further testified that all of the information necessary to evaluate NIPSCO's megaload customer strategy was not presented or made available in this proceeding. He testified this is a concern. Mr. Latham testified the contracts between NIPSCO and megaload customers and between NIPSCO and GenCo could shed light on the financial relationship between NIPSCO and GenCo, but due to the nature of this petition, these will be examined in future proceedings. He testified this is concerning as GenCo is requesting declination to be granted before GenCo and NIPSCO will continue with and provide the parameters of this arrangement. Further, Mr. Latham stated the request is to approve a broad declination over GenCo's operations that would continue indefinitely. He testified is unknown if or how GenCo's operations could change in the future. Mr. Latham further testified while the Commission could always reassert its jurisdiction, it is concerning that changes to GenCo could be made without the Commission's oversight. *Id*. at 18-19.

Mr. Latham then explained that in the event the Commission grants GenCo's request for declination, there are several statutes that GenCo has requested declination where the OUCC recommends the Commission retain jurisdiction. These include Ind. Code § 8-1-2-47, Ind. Code § 8-1-2-51, and Ind. Code §§ 8-1-2-76 through -80. *Id*. at 18-20.

Mr. Latham further testified there are other statutes he would like to address. He testified GenCo has not sought declination of Ind. Code § 8-1-2-49. Mr. Latham testified this section, in part, gives the Commission "the right to inspect the books, accounts, papers, records, and memoranda of any public utility and to examine, under oath, any officer, agent, or employee of such public utility in relation to its business and affairs." He further explained this section also addresses Commission "jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with utility corporations and other utility companies under the jurisdiction of the commission…" Mr. Latham testified if the Commission does grant GenCo's request, it is important the Commission explicitly retain jurisdiction over this authority as it will allow the Commission to review GenCo's books and records, if needed, to ensure continued declination is appropriate or to modify or re-assert jurisdiction over GenCo. *Id*. at 21.

In conclusion, Mr. Latham testified GenCo has not met the requirements under Ind. Code § 8-1-2.5-5 necessary to show that its proposed structure and the requested declination are in the public interest for the Commission to decline to exercise its jurisdiction. He testified in the event the Commission grants GenCo's declination request, the OUCC recommends the Commission retain jurisdiction under a number of statutes, as described in Section IV of Mr. Latham's testimony, to preserve necessary public insight into certain aspects of GenCo's overall operation and preserve the Commission's ability to investigate GenCo based on the relationship between NIPSCO and GenCo as it evolves.

ii. <u>CAC Case-in-Chief</u>. Mr. Thomas testified on behalf of CAC. Mr.

Thomas summarized his testimony and recommendations as follows: the structure of an affiliate under common control owning and operating generation resources and exclusively selling power for megaloads to a public utility is unprecedented and requires maximum scrutiny from regulators and ratepayer representatives. Mr. Thomas testified given that, as discussed in Section II of his testimony, GenCo has not established that its proposal would be in the public interest, he recommended the Commission deny GenCo's request for declination of IURC jurisdiction. He testified if, however, the Commission is inclined to allow the arrangement to proceed, it should do so only if certain crucial modifications and conditions are imposed as discussed in Section III below. CAC Ex. 1 at 3-4.

Mr. Thomas testified the public interest will not be served by declining jurisdiction. He testified GenCo has not demonstrated that its proposal would serve the public interest as discussed throughout this testimony. *Id*. at 4-5.

Mr. Thomas further testified GenCo has not demonstrated that technological or operating conditions render the exercise, in whole or in part, of jurisdiction by the Commission unnecessary or wasteful. He testified this a primary source of concern, as GenCo has not provided adequate information or details about its operating conditions. *Id*. at 5.

Mr. Thomas provided his reasons for why the exercise is not unnecessary or wasteful. First, he testified it is his understanding that in other declination-of-jurisdiction matters, the Commission regularly reviews information about the Petitioner's intended operations, and evaluates the sponsor's experience in developing, constructing, and operating energy projects. He testified 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. Yet here, GenCo states that it has no assets, does not know how it will be staffed, and it has not provided adequate information about its approach to project procurement, project construction, or project operation. *Id*. at 5.

Second, Mr. Thomas testified that the Commission also considers how the generation construction projects will be financed. But, here, he explained GenCo has not disclosed information about how it will finance future generation projects. He testified GenCo has stated that its "financing structure is still being determined," and that "[d]ecisions regarding financing of GenCo's facilities will be made in the future." He testified GenCo has also declined to rule in or rule out the prospect of forming a joint venture with an independent entity. Further, Mr. Thomas stated 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." *Id*. at 5-6.

Mr. Thomas testified that as discussed in detail in his testimony, additionally, GenCo's application fails in its inadequate "ringfencing" proposal between GenCo, NIPSCO, and NiSource. *Id*. at 6.

Mr. Thomas explained how GenCo has not demonstrated that *competitive forces* would render the exercise of jurisdiction by the Commission unnecessary or wasteful. He testified in other declination of jurisdiction cases, the Commission has looked to competitive forces in wholesale power markets and the need for an entity to attempt to compete in said markets without regulatory impediment. Mr. Thomas testified GenCo has not identified the competitive forces that

would serve as a check to its market power. Additionally, 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. *Id*. at 6.

Mr. Thomas also explained how GenCo did not demonstrate that *the extent of regulation by other state or federal regulatory bodies* would render the exercise of jurisdiction by the Commission unnecessary or wasteful. Mr. Thomas testified as an initial matter, 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, later clarifying that this refers to authorization to engage in market-based wholesale power transactions under 18 C.F.R. Part 35, Subpart H.15 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. He testified the Commission's jurisdiction would also maintain ongoing visibility into GenCo's operations, which is necessary and prudent to preserve. *Id*. at 7.

Mr. Thomas also testified that GenCo has not demonstrated that the declination of the Commission jurisdiction will be *beneficial for the energy utility, the energy utility's customers, or the state*. He testified GenCo focuses on the potential benefits of bringing megaload customers to Indiana on an expedited basis. Under GenCo's proposed structure, GenCo's sole customer would be NIPSCO, and NIPSCO would buy at wholesale to re-sell the power to megaload retail customers. He testified in his view, 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. Mr. Thomas testified the magnitude of risk at issue here is different than that which is typical in a declination case. He stated 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. *Id*. at 7-8.

Mr. Thomas further testified GenCo has not adequately explained how NIPSCO's retail customers would benefit from its proposed structure. He stated 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. The potential time saved by foregoing a subsequent declination proceeding is not an adequate benefit, because NIPSCO's customers benefit from transparency and the Commission's decision-making. *Id*. at 8.

Mr. Thomas testified further that while NIPSCO's parent company might ultimately provide financial support to GenCo, this could ultimately raise NIPSCO's cost of capital. He testified he is concerned about the possibility of a write-off or encumbrance affecting GenCo for a stranded asset in the event that adequate demand to support GenCo's depreciation of the asset does not continue, which could affect NIPSCO's borrowing costs. GenCo has stated that it "does not yet know how it will account for the affiliate's cost and/or the owner's costs for each project." Further, as explained in detail in Mr. Thomas's testimony, he explained he has additional concerns given that NIPSCO has not explained how it would protect NIPSCO and NIPSCO customers from other financial risks. He testified the application simply lacks enough foresight and details on

which the Commission could base a decision. *Id*. at 8.

Mr. Thomas stated GenCo has not demonstrated that the Commission declining to exercise, in whole or in part, its jurisdiction will *promote energy utility efficiency*. He testified in his review of prior declination of jurisdiction cases, he found that 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. He testified 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. But, here, Mr. Thomas explained he has not found within GenCo's filing (nor is he 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, not monitoring actions on the ground. Mr. Thomas further testified in testimony, GenCo appears to conflate the concept of energy utility efficiency with the "sophisticat[ion]" of megaload customers; supposed "competitive forces" that somehow would apply in the case of a monopoly retail electric utility (NIPSCO); and a purported need for "speed to market." He stated these are creative interpretations of "efficiency," but he does 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. Mr. Thomas testified 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. *Id*. at 8-9.

Mr. Thomas further testified GenCo has not demonstrated that the exercise of Commission jurisdiction inhibits an energy utility from competing with other providers of functionally similar energy services or equipment. He stated indeed, the lack of Commission oversight here would inhibit competition with other providers of functionally similar energy services or equipment. Mr. Thomas testified by allowing GenCo to build and/or acquire an indefinite number of future projects with no Commission review, GenCo could avoid any competitive bidding process utilizing other developers as either the owner or construction contractor. In fact, GenCo has declined to commit in discovery responses to use competitive bidding in its future project development. Mr. Thomas testified it is difficult to say what sort of "energy services or equipment" GenCo provides or will provide, as it presently has no assets, but, he testified, he assumes GenCo will, in its activities on the ground, resemble a typical dedicated power developer. He stated, still, he should note that the independent power developers who have received declinations of jurisdiction are not affiliated with – nor are they the monopoly wholesale supplier to – a retail utility. *Id*. at 10.

Additionally, Mr. Thomas testified NIPSCO has made clear that GenCo would not have any competitors to provide contracted power to NIPSCO to meet megaload customers' retail needs – the very opposite of competition. He testified GenCo also stated in discovery that it has not performed any "analysis of competition or analyzed its competitive advantage with respect to other energy or capacity providers to mega-load customers." He further testified he did not see how the absence of Commission jurisdiction will unleash GenCo to be a robust competitor in the power development market. *Id*. at 10-11.

Mr. Thomas further testified furthermore, GenCo's proposal would actually give GenCo

an unfair competitive advantage compared to other Indiana utilities and utilities in other states that do not have this special declination status (assuming my conditions and recommendations are not adopted). He testified everyone else has to "play by the IURC rules" and, to his knowledge, no other Indiana utility has proposed a similar declination arrangement. He testified Indiana Michigan Power Company ("I&M"), for example, is projecting even larger megaload growth, yet it is following the IURC rules and typical practice and procedure. *Id*. at 11.

Mr. Thomas also testified regarding his opinion of the purpose of GenCo. Mr. Thomas testified it appears that the purpose of GenCo is to allow new "megaload" customers to pay a premium for generation to speed up the time in which generation is available to serve their load and for enhanced reliability characteristics. He testified NiSource leadership indicated an overly rich profit center as it relies on NIPSCO's monopoly franchise from the State of Indiana for this arrangement, telling investors that GenCo "allows us to operate in an area as we negotiate with our counterparties to get returns above and beyond what our potential regulated returns are." Mr. Thomas stated one firm, Jefferies Global Research & Strategy, assumed a 13% ROE-equivalent return level at GenCo (which is likely even higher given the debt/equity ratio). He testified this is a departure from traditional electric service in which all customers pay for all generation based on class allocations determined by the Commission. *Id*. at 11-12.

Mr. Thomas testified the competition to be among market leaders in artificial intelligence is intense, and speed to market and enhanced reliability are key location factors for new megaload customers. He testified achieving the right balance between speed to market for megaload customers while maintaining just and reasonable rates for families and businesses currently served by NIPSCO would yield significant economic development benefits for the State of Indiana. However, Mr. Thomas stated GenCo's proposal does not achieve that balance, as there are significant risks to existing retail customers when a utility seeks to serve a substantial amount of new megaload customers that remain unaddressed by GenCo's proposal. *Id*. at 12.

Mr. Thomas testified that he believes load growth will continue to be driven by artificial intelligence investments, but over the expected life of generation assets the drivers of artificial intelligence investment will change in ways that are difficult to forecast this early in the technology adoption cycle. He testified the model for commercialization of artificial intelligence is not yet developed, and energy cost and semiconductor costs create an incentive for efficiency and innovation. He stated the preferred generation mix of megaload customers could change over time with zero marginal cost renewables driving the capacity factor for natural gas units below current forecast, which would cause a per-unit increase in the cost of that capacity over time. *Id*. at 12.

Mr. Thomas also testified regarding the risks serving new megaload customers pose to existing retail customers of NIPSCO. He testified the most important risks were identified in GenCo witness Erin E. Whitehead's testimony. These risks include the costs incurred to serve megaload customers being shifted to existing customers and the financial risk related to ownership of generation assets should megaload customers' demand diminish or disappear before expiration of the useful life of the generation assets. *Id*. at 13.

Mr. Thomas explained how GenCo/NIPSCO propose to mitigate these risks He testified according to Ms. Whitehead, by having GenCo, rather than NIPSCO, own and operate generation

assets used to serve megaload customer, those assets will be "ringfenced" from NIPSCO's existing retail customers. He stated as Ms. Whitehead explains: "Having ownership and the related capital and O&M costs outside of NIPSCO protects NIPSCO's current customers from the costs of generation recovered during construction and operation (construction work in progress (CWIP), depreciation, fuel costs, O&M, etc.), as well as continuing to pay for a generation asset that may no longer be needed if a megaload customer were to terminate a contract or leave following expiration of a contract term." *Id*. at 13.

Mr. Thomas testified it is important that financial risk be mitigated because a utility owns assets for the benefit of its customers. He testified the economic risk and reward flow through to the customers of the utility, and a traditional regulated utility's compensation is based on total investment rather than economic performance of the assets. A key part of the regulator's role is that of a risk manager. Mr. Thomas testified the financial stability of the utility is, like the physical assets of the utility, an asset that exists to benefit customers. He stated this asset is part of the reason that GenCo can obtain financing to construct generation facilities. He testified as Ms. Whitehead put it, "All stakeholders—NiSource and its shareholders, NIPSCO and its customers, the Commission, and many others—have an aligned interest in ensuring the ongoing financial integrity of NIPSCO." *Id*. at 13-14.

Mr. Thomas further testified that NIPSCO's financial status is not the only asset that enables GenCo to exist. He testified the operational technical capabilities of NIPSCO employees is also an asset funded by customers that allows GenCo to exist, as is a monopoly service territory granted by the State of Indiana. *Id*. at 14.

Mr. Thomas further testified that ringfencing GenCo's assets does not fully mitigate the risk to NIPSCO's customers. He testified for one thing, whether NIPSCO's current customers are fully protected from the costs of serving the megaload customers depends on whether the amounts paid by megaload customers under the special contracts that NIPSCO intends to enter into with them fully cover the costs that NIPSCO would pay under the PPAs that NIPSCO intends to enter into with GenCo to provide service to the megaloads. He testified this is an issue of both sufficiency and duration. Namely, NIPSCO's existing retail customers could be subject to significant costs if (a) the amounts paid by the megaload customer under the special contract are insufficient on an annual basis to cover the cost of the PPA to serve that megaload for the year, and/or (b) the duration of the special contract is shorter than the PPA which could leave NIPSCO's retail customers holding the bag if the special contract is not renewed or extended. *Id*. at 14.

Mr. Thomas testified neither GenCo nor NIPSCO provided sufficient details regarding the PPAs and special contracts to alleviate concerns about this risk.

Mr. Thomas testified that both GenCo and NIPSCO have provided very little information regarding the likely terms, conditions, pricing, etc., of either the PPAs between NIPSCO and GenCo or the special contracts between NIPSCO and each megaload customer, and have pointedly refused to provide substantive responses to discovery requests regarding the PPAs and special contracts on the grounds that they have not been negotiated yet. As such, there is significant uncertainty about whether the PPAs and special contracts will be sufficient to protect existing NIPSCO retail customers from the costs to serve megaload customers. Similarly, with regards to the duration of the PPAs and special contracts, NIPSCO stated in a discovery response

that it has deemed confidential that: "NIPSCO currently anticipates matching the term length of its PPAs with NIPSCO GenCo to the length of the contractual term from the corresponding NIPSCO-customer special contract to the extent reasonably possible." *Id*. at 15-16.

Mr. Thomas testified again, GenCo and NIPSCO have provided too little information regarding the PPAs and special contracts to provide assurance that the duration of the special contracts will be long enough to cover the term of the PPAs needed to serve those contracts. *Id*. at 16.

Mr. Thomas further testified there are ways that the Commission could help mitigate this risk to NIPSCO's existing retail customers. He testified the Commission should take at least three steps to help mitigate this risk. First, it should require GenCo and NIPSCO to ensure that the annual amounts to be paid by each megaload customer under its special contract with NIPSCO are sufficient to at least cover the costs that NIPSCO pays under the PPA with GenCo to provide service to that megaload customer. Second, the Commission should require NIPSCO to annually report the amount that it costs to serve each megaload customer and the total amounts paid by that megaload customer, and provide for a true-up mechanism in the event that NIPSCO's costs exceed the amount paid. Third, the Commission should require NIPSCO and GenCo to ensure that the duration of each special contract at least matches that of the PPA for serving that megaload customer. *Id*. at 16.

Mr. Thomas also testified there are other risks to NIPSCO's existing retail customers that need to be addressed. He testified there are risks should a megaload customer depart from its special contract early. Mr. Thomas stated Ms. Whitehead's testimony regarding the protection of NIPSCO existing retail customers would be used to protect NIPSCO customers from the cost consequences should a megaload customer's load depart GenCo. But that assumes that there will be sufficient total profits from all megaload customers to cover this risk. He testified the Commission should understand as completely as possible what would happen should these risks materialize and how risk and reward should be balanced if outlier events occur over the expected life of the generation assets owned by GenCo. *Id*. at 16-17.

Mr. Thomas further testified GenCo also alluded to several other potential contract terms and conditions that could be used by NIPSCO in its contracts with individual megaload customers, such as minimum demand charges and collateral requirements. He testified however, neither NIPSCO nor GenCo have specified what these terms and conditions will be or committed to standardizing them across similarly situated megaload customers. Mr. Thomas testified in order to mitigate risk, the Commission should condition any approval of the declination proposal on a requirement that NIPSCO and GenCo include in the special contract with megaloads provisions similar to those approved in Cause No. 46097 regarding early terminations, exit fees, and reduction in load to ensure that existing NIPSCO retail customers will not be left holding the bag in the event that a megaload customer significantly reduces its load or seeks to terminate the contract early. *Id*. at 17-18.

Mr. Thomas explained how this risk can be further mitigated. He testified first, the risk should be measured over time. The Commission should track and measure the financial performance of GenCo by having it report its return on investment in a format similar to how NIPSCO reports its achieved return on investment in a rate case so that an apples-to-apples

comparison of NIPSCO and GenCo's financial performance can be made in a format that is already familiar to the Commission, Commission staff, and stakeholders. GenCo should report what it would have earned if it used the capital structure approved in the Commission's most recent NIPSCO rate case as well as what it actually earned using its actual capital structure. *Id*. at 18.

Second, he testified the Commission should require that any mitigation of risk measures that it adopts should be included in the contract between GenCo and NIPSCO, and in the contract between NIPSCO and a megaload customer, each as applicable, so that the balance of risk and reward is fully understood by all parties at the inception of any transaction. This should include the items identified above regarding the safeguards imposed in Cause No. 46097. *Id*.

Mr. Thomas testified third, in that GenCo is an affiliate of NIPSCO, the Commission should make it clear that GenCo's commitments to the Commission and other stakeholders are indistinguishable from NIPSCO's commitments. He testified he is concerned that some discovery responses suggest that a question should be directed to NIPSCO instead of GenCo, when there should be a common body of knowledge among these affiliated entities. *Id*. at 18-19.

Mr. Thomas testified regarding financial harm could impact NIPSCO customers if GenCo were to experience financial distress. He testified financial distress at GenCo could alter the perception of the credit risk of NIPSCO, resulting in a lower credit rating and higher debt costs that would flow through to NIPSCO customers. In addition, to the extent that the ultimate corporate parent of both GenCo and NIPSCO (NiSource Inc.) provides financing support to GenCo, any call upon NiSource's resources to support GenCo could in turn worsen the market's perception of NiSource's financial stability and directly increase NIPSCO's cost of borrowing. Mr. Thomas testified that, in turn, would raise NIPSCO's rate of return in general electric rate cases, which would comprise a bill increase relative to otherwise. *Id*. at 19.

Mr. Thomas testified regarding what the Commission should do to protect NIPSCO customers from higher debt costs that could result from financial distress at GenCo. He testified the Commission should condition approval of the application on GenCo's acceptance of responsibility for higher debt costs charged to NIPSCO that are caused by financial distress at GenCo. He further testified the Commission should identify a method to determine a baseline of what normal debt market conditions are at the time of GenCo's financial distress so that the difference in debt costs can be correctly attributed to the financial distress rather than change in market conditions over time. He testified financial distress should be discretionary with the Commission rather than a result directed by a formula. However, the Commission should define financial distress in the present proceeding to establish a baseline with several triggering events that could be considered such as negative returns at GenCo or megaload customer contract expiration. However, Mr. Thomas testified that such condition would not fully mitigate the risk to NIPSCO's customers, because this condition is predicated on financial distress at GenCo, yet it would require GenCo to bear additional costs. He testified this assumes profits exist to cover the additional costs, and the risk of GenCo's insolvency remains unmitigated. *Id*. at 19-20.

Mr. Thomas testified regarding what other steps the Commission can take to balance the risk and reward between GenCo and NIPSCO customers. He testified the Commission should condition approval of GenCo's declination request on NIPSCO having a right to match any offer

to purchase GenCo assets and establish a process for Commission review of sales of GenCo assets with stakeholder input. This would offer some protection to NIPSCO's customers with respect to the value of any assets disposed of by GenCo. *Id*. at 20.

Mr. Thomas also testified regarding how administrative and general expenses should be allocated so that GenCo bears its share of central overhead and management. He testified administrative and general expenses should be allocated on the basis of a labor allocator, although this is not fully compensatory given the knowledge and expertise that NIPSCO will provide to GenCo. He testified NIPSCO's payroll should be compared to GenCo's payroll to allocate administrative and general expenses. *Id*. at 20-21.

Mr. Thomas further testified there is a risk that NIPSCO customers bear the cost of maintaining reserve margin cost that should be allocated to GenCo load. He testified GenCo assets and assets used to serve non-megaload customers are dispatched across the entire MISO balancing authority in a manner in which the lowest marginal cost resource is used to serve the load regardless of ownership or location of the generating units. He stated then, load is matched to generation owned by utilities within MISO in a manner in which the least expensive generation owned by each utility is matched to that utility's load. Mr. Thomas testified if a given utility has more generation than load, that generation is assigned to other load in exchange for compensation, and vice-versa. When generation is credited by NIPSCO to megaload and non-megaload customers, it should be done in a manner that proportionately allocates reserve margin and other ancillary services so that reserve margin costs are shared by both megaload customers and non-megaload customers. He testified if a megaload customer has contracted for 400 MW of capacity, that capacity should be reduced by the reserve margin required by MISO. He stated when allocating the fixed cost of generation assets, the same allocation methodologies and same reserve margin cost result should be used by GenCo as are used by NIPSCO for non-megaload customers to avoid both cost shifts and trapped costs. *Id*. at 21.

Mr. Thomas further testified there are a number of risks that can be partially but not fully mitigated. He testified there are risks that are mitigated by the GenCo concept. He explained in that transmission and distribution service will be provided to megaload customers in the same manner as existing customers, the risk of an unjustifiable cost shift has been somewhat mitigated. He testified however, NIPSCO has not explained how it will ensure its transmission and distribution cost allocations will be timely updated to match what could be rapidly changing proportional usage across customer classes. He stated costs will go up to serve additional load, so it is critical that these increased costs are appropriately apportioned to the correct customers in a timely manner. Also, because transmission and distribution costs are fixed cost, more kWh to spread over the fixed costs provides some benefit to non-megaload NIPSCO customers, so existing customers should be timely credited for this benefit. *Id*. at 21-22.

Mr. Thomas explained how if the risks to NIPSCO ratepayers cannot be fully mitigated, how can risk and reward be balanced. He testified first, risk that is well thought out is what drives innovation. Reward should follow risk and because NIPSCO's customers are assuming some risk, it is appropriate for those customers to share in the reward of the premium that megaload customers are willing to pay for speed to market and the right reliability characteristics of electricity generation. He testified the Commission should establish a baseline rate of return on equity for GenCo, and a percentage of amounts above the baseline should be allocated to

NIPSCO's customers in order to properly balance risk and reward. This should either be projected and trued up or permitted to lag and count as cost-free capital to GenCo when measuring its return on investment. *Id*. at 22.

Mr. Thomas testified regarding his recommendation with respect to the baseline and to the percentage allocable to NIPSCO customers. He testified he recommended that the baseline be NIPSCO's authorized rate of return on equity in its most recent general rate case for electric service, and that the participation rate of NIPSCO's customers be 50%. He stated this would allow GenCo to earn the full return on equity for actual equity that is invested in GenCo prior to any sharing with NIPSCO customers, but would also allow NIPSCO customers to participate in any premium paid for speed to market. This would also provide an incentive for GenCo to be financed with equity rather than debt, which helps protect NIPSCO's credit rating. GenCo would be able to earn substantially more than NIPSCO's average weighted return on capital, and NIPSCO's non-megaload customers would be compensated for their risk. *Id*. at 22-23.

Mr. Thomas also provided examples of how this computation should be performed. Mr. Thomas explained first, GenCo's actual return on equity should be computed as if there were no sharing mechanism. If the actual return is equal to or less than the Commission's authorized return on equity from NIPSCO's most recent rate case, then GenCo would retain all of the earnings and nothing would be shared with NIPSCO's non-megaload customers. He stated each dollar of earning above the Commission's authorized return on equity would be shared 50/50 between GenCo and NIPSCO's non-megaload customers. If GenCo's return on equity was 20% and the Commission's authorized rate of return on equity for NIPSCO was 10%, GenCo would retain the first 10% earned and the additional 10% would be shared 50/50 such that GenCo would retain 75% of the earnings and NIPSCO's non-megaload customers would receive credit for 25% of the total earnings. *Id*. at 23.

Mr. Thomas testified regarding in his opinion, whether the GenCo declination application is in the public interest. He testified GenCo has not demonstrated that its application serves the public interest under Ind. Code § 8-1-2.5-5. Additionally, while the application accurately identifies some of the major potential risks to NIPSCO's non-megaload customers and expresses an intention to protect those customers from the identified risks, what is missing are the mechanisms and binding commitments needed to mitigate the risks to the extent possible and to balance risk and reward in that not all risks can be mitigated. Mr. Thomas testified the Commission and all stakeholders should have a good understanding of what will happen if stranded asset risk materializes and also what will happen if the market supports a substantial speed premium such that GenCo's financial success exceeds expectations. He testified if risk and reward are balanced between GenCo. and non-megaload customers through the types of binding conditions discussed in his testimony, and if there is a good understanding of what will happen in a variety of good and bad scenarios, then the application with the proposed modifications could be in the public interest. *Id*. at 24.

Mr. Thomas summarized his proposed conditions if the Commission approves the declination request. He testified that he recommended that the Commission only approve the declination request with the following conditions:

- GenCo and NIPSCO must be required to ensure that the annual amounts to be paid

by each megaload customer under its special contract with NIPSCO are sufficient to at least cover the costs that NIPSCO pays under the PPA with GenCo to provide service to that megaload customer;

- NIPSCO must annually report the amount that it costs to serve each megaload customer and the total amounts paid by that megaload customer, and NIPSCO must provide for a true-up mechanism in the event that NIPSCO's costs exceeded the amount paid;

- NIPSCO and GenCo must ensure that the duration of each special contract at least matches that of the PPA for serving that megaload customer;

- NIPSCO and GenCo must include in each special contract provisions similar to those approved in Cause No. 46097 regarding early terminations, exit fees, and reduction in load to ensure that existing NIPSCO retail customers will not be left holding the bag in the event that a megaload customer significantly reduces its load or seeks to terminate the contract early;

- GenCo must annually report its earnings in a format similar to that used in the minimum standard filing requirements outlined in Indiana Administrative Code so that NIPSCO and GenCo's financial performance can be compared on an apples-to-apples basis;

- Conditions on approval order by the Commission must be stated in any contract between NIPSCO and megaload customers;

- GenCo must be bound by representations made by NIPSCO, and NIPSCO must be bound by representations made by GenCo in this and future proceedings;

- GenCo must be held responsible for higher debt costs incurred by NIPSCO because of any financial distress of GenCo;

- NIPSCO must have a right to match any offer to purchase GenCo assets with Commission review;

- Administrative and general expenses must be allocated between NIPSCO and GenCo with a labor allocator;

- GenCo and NIPSCO must be required to maintain the same reserve margin; and

- GenCo earnings on equity investment must be shared 50/50 with NIPSCO customers on any amount in excess of the authorized ROE in NIPSCO's latest rate case.

Id. at 24-26.

iii. <u>LaPorte Case-in-Chief</u>. Mr. O'Connell argued that the declination

request should not be approved because it would be anti-competitive and provide NIPSCO an unfair advantage. LaPorte Ex. 1 at 6. He claimed in the event GenCo's declination is approved, all "excess profits" (anything exceeding NIPSOC's authorized return) should be returned to NIPSCO customers. *Id.* at 13. Mr. O'Connell suggests two alternatives to the GenCo structure: utilize Rate 531 or create a new tariff-based rate. *Id.* at 19-22. He argued there are two risks posed to NIPSCO and its ratepayers by the GenCo structure: existing NIPSCO ratepayers potentially bearing the costs associated with stranded generation assets or increased financing costs and current ratepayers might not be adequately compensated for the substantial value they effectively provide to Genco, nor would they benefit from the additional load growth within NIPSCO's service territory." *Id.* at 25.

iv. Industrial Group Case-in-Chief. Mr. Gorman testified on behalf of the NIPSCO Industrial Group. Mr. Gorman testified the proposed structure should not be approved as proposed. IG Ex. 1 at 5. He testified specifically, there needs to be clear separation between NIPSCO, megaload customers, and NIPSCO GenCo, to reduce NIPSCO's risk. He stated however, under the proposal, NIPSCO's risk is expanded because it faces the default risk of both NIPSCO GenCo and megaload customers. Hence, the proposal for an essentially unregulated GenCo affiliate actually increases NIPSCO's investment risk instead of reducing that risk. *Id*. Mr. Gorman explained the specific concerns with NIPSCO's proposal to develop an unregulated GenCo affiliate to serve megaload customers. *Id*. at 5-7.

Mr. Gorman testified regarding what protections are necessary and appropriate to limit the scope of GenCo operations to the context presented by the Petitioner as the reason for the proposed structure. He testified at a minimum, the assurances and limits recited by witness Whitehead need to be explicitly incorporated as binding terms and conditions for any grant of relief in this case. In particular, GenCo's operations should be subject to at least the following: 1. GenCo should be the supplier of capacity and/or energy only for new megaload customers, expressly excluding existing NIPSCO customers or any expansion of operations or facilities by existing NIPSCO customers; 2. NIPSCO will be GenCo's only customer, and GenCo will not use its assets or service arrangements with NIPSCO to support competitive services to other customers in competitive markets; 3. NIPSCO will not transfer to GenCo any existing generation assets supporting service to non-megaload customers, and GenCo will not bid on or build any future or replacement capacity to serve non-megaload customers; and 4. GenCo's assets will be limited to generation resources, and GenCo will not own any substations, interconnection equipment to retail customers, or any transmission facilities. *Id*. at 10

Mr. Gorman also testified that the proposal for the IURC to waive nearly all of its regulatory jurisdiction over NIPSCO GenCo is not reasonable. He testified the petition proposes extremely limited Commission oversight of GenCo. This includes no obligation that NIPSCO GenCo make its books, records, and sources of revenue available to the IURC for inspection and analysis. He stated because NIPSCO GenCo will have PPAs or similar agreements with NIPSCO, and NIPSCO will rely on those PPAs to comply with its special contract obligation with megaload customers, GenCo's books and records must be subject to regulatory scrutiny so NIPSCO and affected parties can assess GenCo's financial strength and ability to meet its PPA obligation to NIPSCO. Mr. Gorman testified that, NIPSCO GenCo needs to be able to prove it has sufficient PPA counter-party credit standing and presents no more than an acceptable level of default risk. If GenCo is at liberty to refuse to make its books and records available to NIPSCO, the IURC and

other parties, it will put NIPSCO at risk of default on meeting its special contract service obligations, which can also threaten NIPSCO's ability to serve all retail ratepayers at just and reasonable rates. Mr. Gorman testified further, entirely waiving the CPCN process for GenCo as proposed may well place NIPSCO's financial position at risk. He stated NIPSCO will have an obligation to serve megaload customers under the terms of the Commission-approved special contract, and NIPSCO will expect to be able to recover the cost of providing service under the special contract from the applicable retail customers. Hence, GenCo's ability to meet its generation supply PPA obligations is critical to NIPSCO, which in turn is also important in protecting NIPSCO's ability to meet its service obligation to all retail customers and thus to support the public interest. *Id*. at 20-21.

v. <u>CGA Case-in-Chief</u>. Emily Piontek testified on behalf of Clean Grid Alliance. Ms. Piontek's testimony discussed how certain aspects of GenCo's request for regulatory relief in this proceeding, if approved as filed, would not serve the public interest and would cause undue harm to other energy providers seeking to do business in the State of Indiana. CGA Ex 1 at 5.

Specifically, Ms. Piontek addressed how the Petition does not serve the public interest as contemplated in Ind. Code subsections 8-1-2.5-5(b)(1), (2), and (4) of the declination statute, showing that neither competitive forces nor regulation by other governmental bodies renders the exercise of IURC jurisdiction unnecessary or wasteful; that IURC declination as sought by Petitioner would not benefit the customers of its energy utility affiliate, NIPSCO, nor the state of Indiana; and that IURC jurisdiction over NIPSCO GenCo's activities does not materially or unreasonably inhibit the Petitioner. Ms. Piontek also discussed how the Petition violates the public interest for these reasons:

- It is anti-competitive, because it guarantees an enormous share of new demand to the Petitioner and does not delineate any avenue by which Independent Power Producers ("IPPs") can vie to provide megaload customers with energy and capacity, thereby enabling NIPSCO GenCo and its affiliate NIPSCO to operate in both a monopoly and monopsony world.

- It is overbroad and fails to justify declination for each statute in its request.

- The unbounded, blanket nature of the request fails to include appropriate safeguards to ensure protection of the public interest.

- It unreasonably and without justification conflates the business interest of NIPSCO GenCo in securing unbounded, blanket regulatory relief with the business interests of its affiliate (e.g., the desire to attract and serve megaload customers) and with the economic development interests of local and state governments, as discussed throughout.

- It improperly asks the IURC to create policy that is outside the scope of IURC's jurisdiction.

Id. at 5-6.

Finally, Ms. Piontek explained that CGA does not oppose all aspects of this Petition. She explained that the Petitioner's appeal for recognition as an "energy utility" and a "public utility," for the purpose of separating resource procurements (and the associated financial risks) made on behalf of its affiliate NIPSCO's megaload customers from NIPSCO's non-megaload retail customers, is an admirable goal and an imperative of the public interest. *Id* at 6.

Ms. Piontek testified regarding CGA's issues with certain requests for declination, She testified CGA does not object to the request for declination of jurisdiction for all statutes set forth by NIPSCO GenCo in the Petition. She testified CGA recognizes that some of the regulatory relief requested by NIPSCO GenCo may be appropriate, serve the public interest, and/or satisfy the intent of Ind. Code § 8-1-2.5-5. However, CGA objects to the request for regulatory relief from 17 of the 51 statutes set forth in the Petitioner's Attachment A. *Id*. at 6-7. Ms. Piontek grouped the statutes included in the Petitioner's request for relief that CGA objects to by their topic area or code section and listed them by order of descending importance to CGA. She testified these include: the CPCN Statutes, the IRP Statute, Enforcement Statutes: and Energy Efficiency Statutes. *Id*. at 7-8.

Ms. Piontek testified the Petitioner has failed to justify its need for blanket, unbounded declination of jurisdiction for all of its future generating projects, which she has shown by demonstrating the flexibility of the existing declination statute in responding to filings on a per-project basis, by highlighting the "active" and growing interest from data centers in northern Indiana under the current regulatory regime, and by explaining how NIPSCO GenCo would not be inhibited from competing with other IPPs in vying to serve NIPSCO's megaload customers. Furthermore, she testified the Petition raises more questions than it answers: the Petitioner has not presented key details in its Petition, in the Petitioner's Exhibit, nor through discovery. Most notably, the Petitioner has not presented any contract or PPA with NIPSCO that would otherwise have provided the IURC with the level of information the Commission requires to make such an important declination determination; instead, Commissioners are left to speculate. Ms. Piontek testified given the high stakes associated with the Petition, which range from its potential to unduly inhibit other IPPs and suppress the competitive power market to the longer-term impacts to NIPSCO's megaload and non-megaload customers and to the state (and thus, to other electric utilities and their customers), the IURC must find that NIPSCO GenCo does not offer appropriate safeguards in exchange for the regulatory relief sought. *Id*. at 43-44.

Ms. Piontek ultimately testified she recommended the IURC find that approving the Petition in whole is not in the public interest as contemplated in sections Ind. Code § 8-1-2.5-5(b)(1), (2), and (4) of the declination statute. She testified NIPSCO GenCo has not shown that competitive forces or regulation by other governmental bodies render the exercise of IURC jurisdiction in whole unnecessary or wasteful; that IURC declination in whole would benefit the energy utility's customers or the state of Indiana; nor that IURC jurisdiction over NIPSCO GenCo's activities would inhibit the Petitioner. *Id*. at 44.

Ms. Piontek also recommended solutions in responding to the urgent challenge presented by megaload customers. She testified a solution to the challenge of megaload additions would be to take the Petitioner's proposal as its loose basis, given its potential to protect NIPSCO's non-megaload consumers from the serious risks to them associated with serving the utility's megaload customers. From there, she testified such a solution would promote a competitive energy market

for IPPs while simultaneously meeting the needs of NIPSCO's megaload customers and satisfying the intent of the CPCN and IRP statutes regarding *evidence* for need and comprehensive system planning, respectively. She also recommended that IURC could require NIPSCO and GenCo to file annual reports demonstrating that the decision remains in the public interest in a contested case. The IURC could require GenCo to provide NIPSCO with an update on its generation planning process for inclusion in the NIPSCO IRP. The IURC could issue contingent requirements for NIPSCO GenCo to further serve the public interest. such as by requiring NIPSCO GenCo to procure some level of generation from renewable and storage resources or by requiring NIPSCO GenCo to source some level of other carbon-free generation. *Id*. at 44-45.

vi. Takanock Case-in-Chief. Kenneth Davies testified on behalf of Takanock. Mr. Davies claimed it is important for the Commission to hear the difficult experience that Takanock has had in dealing with NIPSCO in obtaining electric service at our data center site. Despite its obligation to provide service throughout its monopoly service territory, Mr. Takanock testified he believes NIPSCO is "picking and choosing" which data center projects it cooperates with, and he is concerned that NIPSCO GenCo's proposal is anticompetitive. Takanock Ex. 1 at 6-13.

Mr. Davies further testified the new Black Hills tariff gave Microsoft access to Black Hill's backup generation to meet Microsoft's capacity needs, and allowed Black Hills to purchase power from the market on Microsoft's behalf at a firm price to meet Microsoft's energy needs. He testified this could be a template for utility-customer partnerships in Indiana and other states. He says under Georgia law, customers with connected loads of less than 900kW (about the size of a modern grocery store) must take electricity from the franchised supplier. He stated however, if any customer with a load of 900kW or more locates within the corridors of an electric supplier's lines, that customer may have a choice of suppliers. Once a customer chooses a supplier, the large customer's chosen electric supplier has the exclusive right to serve that customer for the life of the premises. Of course, a similar change in Indiana would require a legislative change to the Electric Service Territory Act (Ind. Code ch. 8-1-2.3). He testified, however, as has already been done with NIPSCO's Rate 531, NIPSCO could use the Alternative Regulatory Act (Ind. Code ch. 8-1-2.5) to provide a similar tariff option permitting data centers and megausers access to other energy suppliers. *Id*. at 14-15.

vii. DX Hammond Case-in-Chief. David Pavlik testified on behalf of DX Hammond. Mr. Pavlik testified DX Hammond has been working with NIPSCO since early 2023 on the expansion of the Digital Crossroads Campus. All of these efforts—a projected total of over $7 billion of development, tens of millions of dollars in new tax revenue, and the creation of cutting-edge technology that can form the basis of an artificial intelligence ("AI") economy for Indiana—are dependent on successfully contracting with NIPSCO as a "megaload customer." DX Hammon Ex. 1 at 4.

Mr. Pavlik testified the expansion of the existing Hammond Data is expected to create approximately 1,200 additional jobs for local trades during construction, deploy more than $2 billion in construction spending, and, upon completion, support an estimated 36 new full-time positions in the high-tech sector. He stated through the initial investment and continual reliance on the local workforce, the project will further solidify the region as a growing hub for innovation and economic opportunity. He testified the approximately $2 billion construction investment will

facilitate an additional $5 billion of investment in highly specialized, state-of-the-art AI, quantum computing and advanced computing infrastructure. *Id*. at 5.

Mr. Pavlik further testified any uncertainty of delivery or delay in securing the required generation assets will jeopardize plans to expand the Digital Crossroads Campus with DX3 and the resulting investments and benefits to the Northwest Indiana region. *Id*. at 6.

Mr. Pavlik stated DX Hammond seeks to continue its current path of development of DX3 and believes that the outcome of this proceeding may affect that development path. *Id*. at 6-7.

C. <u>GenCo Rebuttal</u>. GenCo witness Parisi responded to the other parties' testimonies relating to (1) the appropriate scope of this proceeding; (2) the public interest standard under which the Commission should evaluate GenCo's request; (3) certain clarifications and commitments as to (a) the scope of GenCo's operations, (b) the Commission's oversight, and (c) the relationship between GenCo and NIPSCO; and (4) why it is appropriate for the Commission to decline jurisdiction of the CPCN Statute. Pet. Ex. 1-R at 2-43.

Mr. Parisi first commented that while there are divergent interests among the OUCC and the other intervenors, no party disputed what GenCo explained in its case-in-chief –that Indiana and northwestern Indiana is the focus of significant megaload customer interest. *See* Pet. Ex. 1, pp. 4-7. Specifically, DX Hammond witness Pavlik testified (at 3) that DX Hammond is planning to add an additional 200 megawatts to its current data center campus in Hammond, Indiana; Takanock Witness Davies testified (at 6-7) that: "Takanock is developing a data center project in Elkhart County, Indiana. *Id.* at 4. Due to demand from its potential data center customers, and given Indiana's availability of applicable land, electric-transmission facilities, natural gas infrastructure and fiber capacity, and proximity to major urban centers, Takanock may pursue additional projects in Indiana[;]" and CGA Witness Piontek (at 23) provided Figure 1 from Indianapolis Business Journal showing 10 data centers currently in development (including DX Hammond's data center campus), seven of which are located in northwest Indiana. *Id.* at 4-5.

Mr. Parisi stated that there appears to be general alignment that a regulatory strategy needs to be deployed to address this opportunity. He testified that given this very real interest, NIPSCO has developed a megaload strategy – the first step in that strategy is approval of GenCo's requested limited declination in this proceeding. He testified that GenCo established in its case-in-chief filing that approval of the requested limited declination of jurisdiction will serve the public interest and that nothing raised by the OUCC or intervenors changes that GenCo's request is in the public interest. *Id.* at 5.

Mr. Parisi also pointed out that the stakeholders who generally represent retail customers' interests (OUCC, Industrial Group, CAC, and LaPorte) are mostly focused on recommendations that they believe will further the goal of protecting retail customers' interests. *Id.* at 5. He stated that while the other intervenors (Takanock, DX Hammond, and CGA) mostly focused on protecting data center customers (a type of megaload) and IPPs – this is not what this proceeding is about; rather, the focus should be to find a path forward that approves GenCo's request in this proceeding so that NIPSCO can further develop and present its megaload strategy to the Commission for approval. *Id.* at 5-6.

Mr. Parisi found the OUCC and the intervening parties' insistence on addressing issues outside the scope of this proceeding shows a lack of appreciation that review and approval of the declination request of GenCo, a separate entity from NIPSCO, is a necessary step *before* more clarity on NIPSCO's overall megaload strategy can be finalized and presented to the Commission. *Id.* at 6. He cited to the Commission's February 27, 2025 docket entry. He stated that rather than frame all their issues to this limited declination request, parties have attempted to expand the scope to include NIPSCO, a party not seeking any relief in this proceeding, and its overall megaload strategy. The OUCC and intervening parties then went on to express concerns with an alleged lack of clarity. *Id.* at 6-7.

Mr. Parisi stated that while he can appreciate the parties' desire to have a full understanding of NIPSCO's overall megaload strategy, whether or not GenCo is viable is foundational to finalize NIPSCO's megaload strategy. He stated that if NIPSCO does not have clarity on if and how it can use the GenCo structure, it cannot fully know *how* to craft megaload customer special contracts and NIPSCO-GenCo PPAs. *Id.* at 8. He said it is these agreements that will allow NIPSCO to address the out-of-scope issues noted above. Mr. Parisi testified that while the parties seek to have all their issues related to the megaload customer special contracts and the NIPSCO-GenCo PPAs addressed as part of GenCo's request in this proceeding, these out-of-scope issues ignore how an approved GenCo structure would address concerns related to megaload customers. *Id.* at 8-9.

Mr. Parisi testified that despite this overreach, NIPSCO has committed to file any megaload customer special contracts and NIPSCO-GenCo PPAs in future proceedings, which is the venue in which many of these issues should be addressed. He also testified that GenCo commits to align the amount of generation it develops with reasonably anticipated needs of NIPSCO's megaload customers. He also discussed further clarifications and commitments GenCo is willing to make to its declination request and intended structure to address some of the issues raised by the OUCC and intervenors. *Id.* at 9.

Mr. Parisis explained that Takanock Witness Davies is correct (at 15) that ordering NIPSCO to make a tariff offering (including opening access to the market akin to NIPSCO Rate 531) is not what this proceeding is about, as it is a request to issue a directive to NIPSCO, not GenCo. As noted in Paragraph 4 of the Verified Petition, service to customers with these kinds of service requirements is not contemplated under NIPSCO's existing tariff. GenCo was formed in recognition that the service requirements for data centers and the potential risks to NIPSCO and its customers are very different from those of any other customers, as discussed in Paragraph 5 of the Verified Petition. *Id.* at 10.

Mr. Parisi also testified that many of the parties agree that it is reasonable for a regulatory strategy to be developed for megaload customers. *Id.* at 11. For example, Takanock witness Davies (at 5) explained that "[g]iven the significant amount of power being requested and the related investment, there are reasonable regulatory concerns with potential cost-shifting related to electric service for data centers and other megaload customers[;]" CAC witness Thomas (at 13) testified that "[t]he most important risks [related to serving new megaload customers] were identified in GenCo witness Erin E. Whitehead's testimony. These risks include the costs incurred to serve megaload customers being shifted to existing customers and the financial risk related to ownership of generation assets should megaload customers' demand diminish or disappear before

expiration of the useful life of the generation assets[;]" and OUCC Witness Latham (at 2) explained that the OUCC is "not opposed to the isolating structure underlying GenCo's request." He went on to testify (at 7) that "[t]he creation of a separate entity to provide the generation needs for NIPSCO and its new megaload customers could substantially reduce the risk of burdening NIPSCO's existing customers with the significant investment this generation will require." *Id.*

Mr. Parisi explained how GenCo's requested relief resolves some of these issues, in service of the public interest. Given the other parties alignment, he pointed to his direct testimony (at 31-33), that having GenCo construct, own, and operate the generation facilities and related assets reasonably isolates and mitigates the risk associated with these potential customers from NIPSCO's current customer base, but also brings the benefits of this unprecedented economic development to NIPSCO's customers and to Indiana. He testified that the exemptions from the various provisions of Ind. Code ch. 8-1-8.5 outlined in Petition Attachment A are to eliminate provisions that have limited application to this structure and are also to assure speed-to-market, which is necessary to attract megaload customers. *Id.* at 12.

Mr. Parisi testified that the Commission will continue to maintain visibility into NIPSCO as the only customer of GenCo and will retain approval authority each time a megaload customer special contract or NIPSCO-GenCo PPA is brought to the Commission for approval. *Id.* This includes the authority to reject such agreements if they are not found to be just, reasonable, and in the public interest, as well as the ongoing authority to ensure the parties to such agreements are complying with their obligations thereunder. He noted that Commission approval and ongoing jurisdiction over these contracts is largely ignored by many of the other parties. *Id.* at 12-13.

Mr. Parisi testified that potential megaload customers, as evidenced by those who filed testimony in this proceeding, are highly sophisticated, demand high service, and have many choices available to them when determining where to make developments. He testified that GenCo's requested limited declination of jurisdiction in this proceeding will enable NIPSCO to support Indiana's efforts to position itself to compete effectively with other states to attract this economic development by providing a vehicle for speed-to-market, which is critical to these megaload customers. He also stated that it is important that NIPSCO be able to attract these customers, reasonably insulate current NIPSCO customers from any attendant risks, while also allowing interested stakeholders, including NIPSCO customers and the State of Indiana, to enjoy the benefits of such unprecedented economic development. *Id.* at 13.

Mr. Parisi further testified that the standard for approval of GenCo's requested relief is set forth in Ind. Code § 8-1-2.5-5(a), which requires a determination that "the public interest requires the commission to commence an orderly process to decline to exercise, in whole or in part, its jurisdiction over either the energy utility or the retail energy service of the energy utility, or both." Therefore, whether the public interest requires declination is the ultimate finding the Commission must make. He set out the enumerated factors the Commission is to consider stating that these factors to be "considered" are not elements that GenCo must prove. *Id.* at 14-15.

In responding to several of the parties' witnesses approach viewing the factors as if they are "elements" to be proven, Mr. Parisi testified that GenCo offered evidence related to each of these factors in its case-in-chief, as the Commission is tasked with considering each factor in

making its public interest finding, but it is not mandatory that the Commission issue an affirmative finding with respect to each of the four factors. *Id.* at 15-16. He testified that GenCo's approach has been to seek limited declination by listing specific statutes for which declination has been sought, and for each such statute, enumerating the factors that GenCo contends support the required Commission determination of the public interest, which information is set forth in Petition Attachment A. He stated that for the most part, the other parties ignored the section-by-section approach taken by GenCo in Petition Attachment A, as well as the public interest factors set forth in that same attachment and the service of the public interest and instead ask for the requested relief to simply be denied. He noted that no party disputed the individual statements set forth in the column labeled "Public Interest Explanation" for each of the sections listed on Petition Attachment A; however, a few parties did approach GenCo's requested relief by reviewing specific statutes, specifically, Commission oversight of GenCo and the certificate of public convenience and necessity ("CPCN") requirements in Ind. Code ch. 8-1-8.5. *Id.* at 15-16.

Mr. Parisi agreed with OUCC Witness Latham (at 16) acknowledging that the Commission is not limited to the four enumerated factors and has considered other factors in determining whether the proposed GenCo structure is in the public interest. He testified that, as evidenced in GenCo's case-in-chief and reiterated and clarified in this rebuttal testimony, the ultimate public service GenCo will provide is to be the foundation of NIPSCO's megaload strategy, which is designed to significantly reduce risk to jurisdictional customers – which is in the public interest. *Id.* at 16-17.

Mr. Parisi responded to a variety of opinions on potential safeguards or requirements that several parties believe should be put in place if the Commission were to ultimately grant GenCo's declination request. *Id.* at 17-18. He testified the proposed requirements to be placed on GenCo if its declination request were approved, generally fell into two categories. On the one hand, there were the traditional "consumer parties" (such as the OUCC, CAC, and Industrial Group) who regularly participate in NIPSCO's regulatory proceedings and who largely focused their testimony on concerns related to protection of NIPSCO and its current customers. On the other hand, certain parties (such as CGA and Takanock) did not, in his opinion, focus on protection of NIPSCO and its current customers and instead focused on their own corporate interests in opposing GenCo's declination request. *Id.* at 18-19.

He clarified that is not to say the non-consumer parties raised no issues that should be evaluated by the Commission, but for purposes of evaluating whether GenCo's declination request is in the public interest, his rebuttal testimony predominantly focused on safeguards and requirements that the consumer parties believe should be put in place if the Commission approves GenCo's request, as these relate most directly to the Commission's evaluation of the public interest. *Id.* at 19.

Mr. Parisi responded to OUCC Witness Latham (at 17) stating that the "primary factor" he recommends be considered "is whether NIPSCO's current customers are protected from any financial harm or responsibility associated with GenCo and its development, construction, and ownership of generation assets, and a careful weighing of the purported benefits against the risks[;]" Industrial Group Witness Gorman (at 5) similarly expressing two primary concerns related to (1) a need for clear separation of NIPSCO and GenCo, and (2) an alleged increased risk to NIPSCO and its customers under GenCo's proposal, because NIPSCO would face the risk of

GenCo defaulting on its contract with NIPSCO, in addition to the traditional risk that a customer could default on a special contract with NIPSCO[;] and LaPorte Witness O'Connell (at 25) was concerned about the possibility that NIPSCO customers could bear the costs associated with stranded generation assets. *Id.* at 19-20.

Mr. Parisi responded to the OUCC and Industrial Group various requirements or safeguards that should be placed on GenCo (and to a certain extent, NIPSCO) to address their concerns if the Commission ultimately approves the declination request. He testified the various proposals offered by the consumer parties, generally fell into three categories: (1) the scope of GenCo and its operations, (2) the Commission's ongoing oversight of GenCo and its activities, and (3) the interaction and relationship between GenCo and NIPSCO. He stated that from GenCo's perspective, the first two categories are most directly relevant to GenCo's declination request, but in an attempt to be responsive to what GenCo heard from stakeholders, he also addressed the third category. *Id.* at 20.

Mr. Parisi testified that GenCo's purpose is straightforward—it is proposed as a vehicle to develop the generation resources NIPSCO reasonably anticipates will be necessary to ultimately be used by NIPSCO to serve load from megaload customers, and to do so in a way that reasonably and appropriately protects NIPSCO and its customers from potential risks related to the significant capital investment that is expected to be necessary. *Id.* at 21. He stated the size of potential generation additions and the speed at which potential customers desire to take service are unlike anything he has experienced in his many decades in the energy industry, which is also a key reason wju GenCo was created and declination of certain Commission jurisdiction is being sought, including specifically declination under the CPCN Statute. *Id.* at 21-22/

In response to Industrial Group witness Gorman (at 10) that "[a]t the extreme, this initiative could be the first step in completely deregulating the power production function currently performed by NIPSCO[,]" he stated unequivocally that neither GenCo nor NIPSCO have any desire to deregulate the generation functions for utilities in Indiana. Similarly, in response to CGA Witness Piontek's claim (at 25-26) that GenCo could be used "to capture an outsized share of the wholesale power market with any excess capacity NIPSCO GenCo would sell to MISO[,]" he confirmed that GenCo has no desire or plans to become an IPP, provide energy or capacity to any utility other than NIPSCO, or otherwise materially overbuild its generation portfolio in an attempt to capture a share of the MISO wholesale power market. *Id.* at 22.

First, Mr. Parisi testified GenCo will only have one customer—NIPSCO, which will naturally limit the size and scope of GenCo's generation investment and operations, as NIPSCO will not have the ability to enter into PPAs for an infinite amount of energy capacity and will only seek to contract with GenCo for the energy and capacity it reasonably expects to need to serve its megaload customers. Thus, Industrial Group witness Gorman's request (at 10) that "NIPSCO will be GenCo's only customer" and that GenCo not attempt to attract other customers in competitive markets is a commitment GenCo has already made. *Id.* at 23.

Second, Mr. Parisi testified that while NIPSCO will be GenCo's only customer, GenCo and NIPSCO commit that GenCo will only supply energy and capacity for NIPSCO's megaload customers and not existing non-megaload customers, which is consistent with his direct testimony and is in direct response to Industrial Group witness Gorman's request (at 10) that "GenCo should

be the supplier of capacity and/or energy only for new megaload customers[.]" However, he stated that GenCo and NIPSCO will not foreclose the possibility that they could enter into an agreement related to provision of energy and/or capacity for non-megaload customers, as there could be a time in the future when doing so would be beneficial to NIPSCO's current customers, and the companies do not want to foreclose this potential. *Id.* at 24. He explained that if the companies desire to do so at some point in the future, the companies would need to file a separate request with the Commission for approval at that time. *Id.*

Third, Mr. Parisi testified that GenCo commits that the generation under its control will be tailored to NIPSCO's anticipated megaload needs, guided by NIPSCO's ongoing integrated resource planning process and informed by customer negotiations and Commission-approved special contract demand. He stated that this is not to say that there will not be periods of time during which GenCo's available generation may exceed the needs of NIPSCO's megaload customers, especially because resources necessarily must be brought online in advance of customers taking service or increasing their load ramp. He stated GenCo will also be looking at a combination of capacity, energy, and carbon-free energy requirements of NIPSCO's megaload customers as it plans for and procures generation resources. *Id.* at 25. He testified that this commitment is offered in response to testimony of various parties, who express concerns that GenCo could be used as a vehicle to create a large IPP or otherwise may expand the scope of its operations far beyond provision of service to NIPSCO to meet NIPSCO's megaload customer needs, which is not GenCo's intent. *Id*. at 25-26.

Fourth, Mr. Parisi testified that GenCo commits to providing capacity that is inclusive of the MISO planning reserve margin requirements, which will ensure that the NIPSCO-GenCo PPA covers the full load requirements of megaload customers, as discussed by CAC witness Thomas (at 21). *Id*. at 26.

Finally, in response to Industrial Group Witness Gorman (at 19), Mr. Parisi testified that if GenCo develops behind-the-meter-generation service offerings, it will be each customer's decision as to whether they have interest in contracting with GenCo for such service. He stated this is not a retail service that NIPSCO would offer; neither would it be a service GenCo would provide to NIPSCO via a PPA. Instead, it would be a customer-driven decision, both with respect to if it has a desire for behind-the-meter-generation and if it desires to work with GenCo to provide such generation. *Id*.

Mr. Parisi responded to OUCC Witness Latham's (at 19-20) request that the Commission retain jurisdiction over three statutes that were part of GenCo's declination request: (1) Ind. Code § 8-1-2-47, which relates to the Commission's authority to adopt reasonable rules and regulations governing inspections, tests, and audits; (2) Ind. Code § 8-1-2-51, which relates to the Commission's general investigative authority; and (3) Ind. Code §§ 8-1-2-76 through -80, relating to a public utility's need for Commission approval of a public utility's plan(s) to issue debt. *Id.* at 27.

Mr. Parisi stated that while GenCo disagrees it is necessary for the Commission to retain jurisdiction under Ind. Code § 8-1-2-47 since the Commission will maintain general audit authority under Ind. Code § 8-1-2-49, GenCo is willing to remove its request for declination under Ind. Code § 8-1-2-47. *Id.* at 27-28.

With respect to Ind. Code § 8-1-2-51, as pointed out above, the Commission will have approval authority and ongoing authority with respect to any NIPSCO-GenCo PPAs and NIPSCO megaload customer special contracts. Mr. Parisi testified this, in combination with the other sections of jurisdiction the Commission will retain, is sufficient. He stated that declination of jurisdiction does not necessarily have to carry on in perpetuity; but, rather, the Commission, the OUCC, or any person with proper standing to file a complaint, can initiate proceedings to revisit the determination of declination pursuant to Ind. Code § 8-1-2.5-7 should circumstances warrant. *Id.* at 28.

With respect to debt issuances under Ind. Code §§ 8-1-2-76 through -80, Mr. Parisi testified GenCo is not aware of any instance where the Commission has required debt issuances to be reported under a declination order. He also stated that since NIPSCO and its customers will not be financially responsible for GenCo's generation investments, GenCo does not believe Commission jurisdiction needs to be retained. *Id.*

Mr. Parisi then responded to CGA witness Piontek's testimony (at Attachment 1-A) that the Commission should retain jurisdiction related to clean coal technology, energy efficiency, and to investigate, regulate rates and charges, address complaints, and enforce statutes. As to the clean coal technology requirements, Mr. Parisi testified that since GenCo has no coal-fired generation, there is no need to retain jurisdiction over clean coal technology. He also testified that with respect to energy efficiency and rates and charges, since GenCo will not serve customers at retail, that jurisdiction is simply not applicable and should be declined. *Id.* at 29.

Mr. Parisi addressed one of the concerns raised by several parties relating to how GenCo and NIPSCO will interact with each other, considering the plans expressed by GenCo to enter into PPAs with NIPSCO and the fact that they are affiliated companies. *Id.* at 29-30. He testified there are two primary commitments GenCo is willing to make to address these issues. First, it has always been GenCo's expectation that affiliate guidelines would be created to govern its relationship with NIPSCO and that such guidelines would be filed with the Commission and made available to interested stakeholders. He stated that GenCo has not yet developed and executed such guidelines, as it does not currently know the extent to which its planned scope of operations may be impacted by a Commission order approving its declination request, assuming the Commission ultimately does so. *Id.* at 30. He testified that assuming approval of GenCo's declination request, GenCo and NIPSCO will work together to develop such guidelines and will submit them to the Commission—which would occur no later than the time at which the first NIPSCO-GenCo PPA is presented to the Commission for approval. *Id.* at 30-31.

Mr. Parisi also testified GenCo will enter into separate service agreements with NIPSCO and NCSC stating that it is very likely that the GenCo-NCSC agreement will largely mirror the current NIPSCO-NCSC agreement, as NCSC utilizes materially similar agreements for all its operations companies. He stated these agreements would address things such as the scope of services to be provided, compensation for such services, the allocation of costs to GenCo, the bases for such cost allocation, etc. He testified these service agreements will be filed with the Commission no later than the date the first NIPSCO-GenCo PPA is presented to the Commission for approval. He also testified that, consistent with the request of Industrial Group Witness Gorman (at 13), GenCo is also willing to file these agreements either in a docketed proceeding (such as when a PPA is presented) or in a 30-day filing—and will not simply provide notice to

the Commission that they have been executed. *Id.* at 31.

Mr. Parisi responded to various concerns relating to the PPAs that will be entered into between NIPSCO and GenCo. *Id.* at 32-33. He explained that Industrial Group witness Gorman (at 18) testified that "PPAs between GenCo and NIPSCO associated with the provision of service to a particular megaload customer should be presented in the anticipated special contract review proceeding and should be subject to approval by the Commission." CAC witness Thomas (at 16) also testified that the Commission should take three steps to "help mitigate this risk to NIPSCO's existing retail customers[,]" which were: (1) ensuring that the annual amounts paid by each megaload customer under its special contract with NIPSCO are sufficient to cover the costs that NIPSCO pays under the NIPSCO-GenCo PPA; (2) requiring annual reporting by NIPSCO of the amounts collected from megaload customers and paid to GenCo and requiring true ups of such payments; and (3) ensuring that the duration of each special contract at least matches that of the NIPSCO-GenCo PPA for serving that megaload customer. *Id.* at 32.

Mr. Parisi testified that the scope of this proceeding is limited to GenCo's request for limited declination of jurisdiction and is not about future megaload customer special contracts (which GenCo will not even be a party to) or future NIPSCO-GenCo PPAs. He stated that to the extent either type of agreement is executed, it will be independently presented to the Commission for review and approval under the applicable legal standard—and interested stakeholders will have the opportunity to intervene and participate in these proceedings. *Id.* at 33. Mr. Parisi testified that in the spirit of cooperation and to address concern raised by Industrial Group Witness Gorman, GenCo is willing to commit to submit all NIPSCO-GenCo PPAs to the Commission for approval.[5] He testified GenCo and NIPSCO are open to submission of PPAs in the same filing as a related megaload customer special contract but can commit to submit PPAs and related megaload customer special contracts to the Commission at approximately the same time, so they can be concurrently evaluated. *Id.*

Mr. Parisi also responded to specific requests from stakeholders limiting the scope of GenCo operations that GenCo is not willing to commit to. *Id.* at 33-35. First, Industrial Group Witness Gorman proposes (at 10) that (1) "NIPSCO will not transfer to GenCo any existing generation assets supporting service to non-megaload customers, and GenCo will not bid on or build any future or replacement capacity to serve non-megaload customers" and (2) "GenCo's assets will be limited to generation resources, and GenCo will not own any substations, interconnection equipment to retail customers, or any transmission facilities." He stated that GenCo understands this latter request to mean that the Industrial Group does not want GenCo owning or operating transmission and substation equipment that is part of the broader electric grid, and not that they are opposed to GenCo owning customer-facing substations. Mr. Parisi testified GenCo has no plans to own any substation-type equipment, other than customer substations. With respect to the former request, Mr. Parisi testified GenCo is willing to commit that it will not purchase any NIPSCO asset absent explicit authorization from the Commission to do so. He stated that while GenCo currently has no plans to purchase any current NIPSCO assets,

[5] Such PPAs are affiliate contracts for energy and capacity and will also be required to be approved by the Federal Energy Regulatory Commission before becoming effective.

at some point in the future, it could be that doing so would present a benefit or cost savings to NIPSCO and its non-megaload customers. *Id.* at 34.

Second, CAC Witness Thomas proposes (at 20) that the "Commission should condition approval of GenCo's declination request on NIPSCO having a right to match any offer to purchase GenCo assets and establish a process for Commission review of sales of GenCo assets with stakeholder input. This would offer some protection to NIPSCO's customers, with respect to the value of any assets disposed of by GenCo." He testified that with the structure and commitments presented in GenCo's case-in-chief and in rebuttal, GenCo is limiting and mitigating NIPSCO customers' risk. He stated it would be unreasonable to mandate that GenCo first offer any assets to NIPSCO, unless there is an accompanying guarantee of cost recovery from current NIPSCO customers, which GenCo is not seeking. *Id.* at 3-5

Third, in response to arguments from CAC Witness Thomas (at 23) and LaPorte Witness O'Connell (at 13) seeking to force GenCo to give a portion of its earnings to NIPSCO's customers, Mr. Parisi testified such arguments are outside the scope of this proceeding, as GenCo has not presented any transaction or revenue recovery to the Commission. He stated that nothing prohibits CAC and LaPorte from raising these arguments in the proper forum at the proper time, but this declination proceeding is neither of those. *Id.*

In response to Industrial Group Witness Gorman (at 15) and CGA Witness Piontek (at 10) objection to GenCo's request for declination with respect to the CPCN requirements set forth in Ind. Code ch. 8-1-8.5 ("the "CPCN Statute"), Mr. Parisi testified the CPCN Statute does not generally apply to the activities in which GenCo will be engaged. *Id*. at 36. He stated that to understand why, it is important to understand the regulatory policies inherent in the CPCN Statute. He stated the CPCN Statute requires prior approval of the acquisition or construction of generation and establishes the elements that must be proved to receive that prior approval. In addition to public convenience and necessity, these elements include, but are not limited to, a finding of the best estimate of costs, consistency with the utility's IRP, and consideration of the applicant's other arrangements for power with other electric utilities, as well as other methods of providing service. *Id. See* Ind. Code § 8-1-8.5-5.5. In return, the energy utility is then assured recovery of and on the approved costs that are incurred in reliance on the CPCN, even if the unit is abandoned before being placed in service. *See* Ind. Code § 8-1-8.5-6.5. This is the quid pro quo inherent in the CPCN Statute– in return for requiring prior approval, the energy utility is assured recovery of its costs even if the cost to develop the generation increases for reasons outside the utility's control, generation is never placed into service, etc. *Id.* at 36-37.

Mr. Parisi testified GenCo will have no retail customers, proposes to not be subject to the requirement to submit an IRP to the Commission,[6] does not and will not have "other arrangements" for power, and will only provide service at wholesale. As such, he testified GenCo will not provide the retail service falling within the Commission's jurisdiction for which it could have "other methods" to provide. Mr. Parisi testified that, most importantly, GenCo will have no assurance of cost recovery through retail rates but, rather, will only receive recovery of its costs

[6] 170 IAC 4-7-2.

through payments from NIPSCO through a NIPSCO-GenCo PPA, which will only be entered into if NIPSCO executes a megaload customer special contract. *Id*. at 37.

Mr. Parisi testified that both that megaload customer special contract and the NIPSCO-GenCo PPA will be submitted to the Commission for approval in a docketed proceeding. He stated that forcing GenCo to obtain prior approval of the construction is to impose the "quid" of the CPCN Statute without providing the "quo." He also stated there is a later proceeding (approval of the megaload customer special contract and NIPSCO-GenCo PPA) before GenCo will receive any ability for cost recovery. *Id.* at 38.

Mr. Parisi testified the Commission will have oversight over GenCo's construction of generation. He disagreed with CGA Witness Piontek's characterization (at 10) of GenCo's request as being "unbounded or blanket" and Industrial Group Witness Gorman's assertion (at 14) that "GenCo would be able to construct generation resources . . . without any need to obtain a CPCN and *with no* certification process or *regulatory oversight by the Commission whatsoever*." (Emphasis added.). *Id.* He stated that GenCo has no cost recovery mechanism until a NIPSCO-GenCo PPA is approved. He explained that GenCo ultimately will need a PPA for all generation that it builds. Thus, the Commission will ultimately have the opportunity to review the cost recovery associated with all GenCo generation. He stated that if GenCo spends money on generation that is not ultimately backed by an approved NIPSCO-GenCo PPA, NIPSCO's retail customers will not be paying any of those costs. Mr. Parisi testified it is for this reason that the CPCN Statute is an example of one statute over which jurisdiction should be declined. *Id.* at 38-39.

Mr. Parisi also testified the Commission's exercise of jurisdiction will be unnecessary and wasteful and will inhibit NIPSCO's ability to attract megaload customers to Indiana due to competition with other providers of retail service. Specifically, he stated it would be problematic were GenCo to be required to obtain a CPCN, as the prohibition of Ind. Code § 8-1-8.5-2 that construction cannot begin until a CPCN has been issued would apply, which would be a material hurdle to timely development and procurement of needed generation resources, which would impact GenCo's ability to attract megaload customers—for the benefit of the State of Indiana, NIPSCO, and its customers. *Id.* at 39.

Mr. Parisi testified the purpose of the CPCN Statute – protecting both the energy utility and retail customers when new generation is proposed – is not fulfilled by Commission jurisdiction over GenCo. He testified that retail customers will be adequately protected by the Commission's exercise of jurisdiction when it approves the NIPSCO-GenCo PPA, and that approval will also be the source of recovery for GenCo. Further, there is a need for speed-to-market in attracting megaload customers to Indiana. *Id.* at 39-40. Mr. Parisi testified it is not in the public interest to layer a docketed proceeding of up to 240 additional days (or even a 150-day period as suggested by Mr. Gorman (at 16)), as this would delay GenCo's ability to develop necessary generation and would provide retail customers with no additional protections beyond those already provided by approval of the NIPSCO-GenCo PPA in a future, separate proceeding. *Id.* at 40.

Mr. Parisi testified GenCo is willing to commit to providing the Commission with information about the generation it intends to construct in the event declination is granted as

requested by GenCo in this proceeding. He testified that to provide additional visibility beyond the megaload customer special contract and NIPSCO-GenCo PPA filings, GenCo is committing to provide certain reporting metrics in this proceeding, subject to confidentiality if GenCo determines such protection is necessary. *Id.* at 40. First, GenCo commits to making a compliance filing in this Cause at least 30 days in advance of beginning construction for each asset or group of assets GenCo is sourcing to serve any individual megaload customer (the "Construction Compliance Filing"). The Construction Compliance Filing will provide details relating to the size, fuel source, and location of the generation asset(s). Second, GenCo commits to make semi-annual compliance filings to identify any changes to the information included in the Construction Compliance Filing and provide construction progress updates for all ongoing generation assets, such as progress related to generation interconnection, permitting, zoning, etc. (the "Semi-Annual Update Compliance Filing"). He explained that GenCo would make its initial Semi-Annual Update Compliance Filing 90 days following the issuance of an order in this Cause. *Id.* at 40-41.

Mr. Parisi testified the opportunity presented by megaload customers is unlike anything previously experienced in the industry. Attracting and serving these types of customers has the potential to lead to tremendous benefits for Indiana, NIPSCO, and its customers, but there are also accompanying challenges. He stated GenCo is being proposed in direct response to these challenges—including enabling the development of needed generation resources more quickly than under traditional regulation while providing reasonable and appropriate protections to NIPSCO and its customers. *Id.* at 41. He said Indiana, and northwest Indiana in particular, will sit in a unique position compared to the rest of the country in addressing load growth of this nature, both protecting traditional customers from the most significant cost risks while enabling unforeseen economic growth in the region. *Id.* at 41-42.

Mr. Parisi stated GenCo intentionally tailored its declination request to address the need for speed-to-market but to also allow the Commission to maintain an appropriate level of oversight of GenCo's operations. He stated that with the clarifications and commitments GenCo has provided in his rebuttal testimony, when evaluated under the appropriate legal standard, it is clear that approval of GenCo's request for limited declination of jurisdiction is in the public interest and should be approved. *Id.* at 42.

D. <u>NIPSCO Cross-Answering Evidence</u>. NIPSCO witness Napoe addressed the other parties' testimonies regarding financial risks and impacts on NIPSCO that they allege are presented from the creation and use of GenCo to own and operate major capital investments related to interconnecting and serving megaload customers. NIPSCO Ex. 1 at 2. He first pointed out that the concerns raised by OUCC Witness Latham and LaPorte witness O'Connell about alleged financial risks or impacts that GenCo's activities or operations could have on NIPSCO, were addressed in Mr. Parisi's direct testimony (at 8) explaining that "[f]irst and foremost, NIPSCO is focused on ensuring that its existing retail customers are reasonably protected from risks related to serving megaload customers[,]" as we; as a lengthy section on the "Customer Protections" that are part of GenCo's proposal. *Id.* at 4. Mr. Napoe stated that neither GenCo nor NIPSCO have promised absolute customer protection from any-and-all potential risks, which would be an unreasonable standard for either company to be held to, but, instead, the appropriate standard here is for the Commission to evaluate whether GenCo's proposal is in the public interest, and an aspect of that is whether NIPSCO and its customers are *reasonably and appropriately* protected from any known, potential risks posed by this arrangement. *Id.*

Mr. Napoe testified this concern can largely be addressed and mitigated by ensuring that the revenue NIPSCO recovers under a special contract with a megaload customer is priced at a level that—once NIPSCO pays GenCo under a separate power purchase agreement ("PPA")—provides GenCo sufficient revenue to cover its costs, including its financing costs. He stated this would materially reduce the risk of any default and thereby greatly mitigate the risks raised by OUCC witness Latham and LaPorte witness O'Connell. *Id.* at 4-5. He also confirmed that this is the way NIPSCO and GenCo are approaching the PPA between the parties and the special contract NIPSCO intends to enter into with a megaload customer. *Id.* at 5.

Mr. Napoe then responded to Industrial Group witness Gorman (at 8-9) that GenCo's proposal will lead to NIPSCO entering into a PPA with GenCo and that this increases risk to NIPSCO, as NIPSCO will now be signing a special contract with a potential megaload customer, as well as a PPA with GenCo; stating that NIPSCO will now face "default risk" for both contracts. *Id.* at 5-6.

Mr. Napoe first noted that Mr. Gorman fails to acknowledge that if NIPSCO were not proposing to utilize GenCo, NIPSCO itself would be directly undertaking the obligation to build, own, finance, and operate a significant amount of generation. He testified the risks associated with direct NIPSCO ownership of generation are what NIPSCO is mitigating by the creation and use of GenCo. He stated it is NIPSCO's intent and expectation that the terms of any special contract it enters with a megaload customer will correspond with the terms of a corollary PPA between NIPSCO and GenCo, as much as reasonably possible. He testified this strategy significantly and materially mitigates any potential risk NIPSCO faces from entering into a PPA with GenCo, as well as any potential risk from the overall structure GenCo is proposing. *Id.* at 6.

Mr. Napoe testified that each special contract and PPA will separately and independently be presented to the Commission for approval. He explained that each time this occurs, the Commission and interested parties will be presented with the information and evidence necessary to evaluate both agreements, and for the Commission to ultimately determine whether the agreements are just and reasonable and in the public interest. *Id.* at 6-7.

In responding to Mr. Gorman's argument (at 6) that NIPSCO's "PPA agreements with GenCo will create a debt equivalent financial obligation to NIPSCO. This debt equivalent obligation will impact NIPSCO's leverage risk, credit rating and cost of capital. This financial leverage risk will impact NIPSCO's cost of service to non-megaload customers[,]" Mr. Napoe acknowledged that it is certainly possible that, in the future, a credit rating agency could evaluate a future NIPSCO-GenCo PPA and impute some level of debt to NIPSCO. However, he pointed out that what Mr. Gorman did not acknowledge is that *currently*, no credit rating agency has imputed any level or amount of "debt" to NIPSCO in relation to any of the PPAs NIPSCO currently has with IPPs or with joint venture owners of generation projects, making Mr. Gorman's concern speculative at best. *Id.* at 7.

Mr. Napoe also testified that in addition to failing to recognize that this kind of debt imputation is not happening today for NIPSCO, and focusing on a hypothetical that only may occur in the future, Mr. Gorman has not attempted to quantify if this would be material if it did eventually happen, or weigh it against the benefits that GenCo has explained are underlying this filing. He stated the proposed transaction structure is in the public interest and provides reasonable

and appropriate protections from financial risk for NIPSCO and its customers. *Id.* at 8.

Mr. Napoe confirmed that NIPSCO agrees with the commitments offered by GenCo in its rebuttal testimony and agrees to be bound by such commitments to the extent they relate to or impact NIPSCO. Specifically, the following commitments GenCo is offering relate to or impact NIPSCO: (1) NIPSCO intends only to enter into PPAs with GenCo for energy and capacity it reasonably expects to need to serve its megaload customers, (2) NIPSCO will file special contracts with the Commission for approval, (3) GenCo and NIPSCO will file PPAs with the Commission for approval, (4) entering into affiliate guidelines between NIPSCO and GenCo, which will be filed with the Commission, and (5) entering into one or more services agreement establishing shared services and allocation of costs between NIPSCO and GenCo, which will also be filed with the Commission. *Id.* at 8-9.

5. Settlement Agreement; Commission Discussion and Findings.

A. Overview.

i. Settling Parties' Testimony. Mr. Parisi, on behalf of GenCo and NIPSCO, described the circumstances leading to the Settlement Agreement. GenCo-NIPSCO Ex. 1-S at 3-5. He explained that from the beginning of this proceeding, GenCo has been open about its willingness to engage with other parties in informal discussions to better understand their concerns with respect to the proposal. *Id.* at 3. He explained that in his rebuttal testimony, offered on behalf of GenCo, he clarified the intent behind GenCo's creation and the scope of its planned operations, including confirming that GenCo did not intend to become an IPP (at 22) and GenCo had no intention of attempting to create a de-regulated market in Indiana (at 22). He said he also offered various commitments to address many concerns raised by the parties. *Id.* He explained that following submission of rebuttal testimony by GenCo and cross-answering testimony by NIPSCO, GenCo had informal conversations with several parties to the proceeding whose testimony, generally speaking, reflected a desire for additional clarity about the three areas of commitments noted above, as well as a desire for additional commitments or "guardrails" related to GenCo and/or the GenCo-NIPSCO relationship. *Id.* at 4. He explained that following the all-party settlement meeting, GenCo and NIPSCO had additional settlement conversations with several parties. He said ultimately, GenCo, NIPSCO, and NIPSCO Industrial Group were able to reach agreement on the terms of the Settlement, which was the result of arms-length negotiations, and which is now being presented to the Commission for approval. *Id.* at 5.

Mr. Parisi explained that the Settling Parties agree the Settlement Agreement resolves all disputes, claims, and issues that are directly relevant to GenCo's request for an Order from the Commission declining to exercise its jurisdiction over certain aspects of GenCo's purchase, ownership, development, financing, construction, and operation of generating facilities and related assets currently pending in Cause No. 46183. *Id.* at 5.

Mr. Parisi testified that the Settlement Agreement is not intended to only address the concerns and arguments raised by the NIPSCO Industrial Group, but also to address a number of common concerns raised by other parties. *Id.* at 7. He briefly outlined many of the terms in the Settlement Agreement that are intended to address concerns raised by parties who, as of May 14, 2025, were not Settling Parties, but raised concerns on those same issues. *Id.* at 8-10. The terms

he identified were Section A.2.(b), Section A.2.(c), Section A.2.(e), Section A.2.(h), Section A.3.(c), Section A.3.(e), Section A.3.(f), Section A.3.(g), Section A.3.(h) and (i), and Section A.4. *Id.*

Mr. Parisi reiterated that a number of parties raised arguments about issues that are beyond the scope of this proceeding. *Id.* at 11. Mr. Parisi testified that, in light of these arguments, the Settling Parties were intentional in including Section A.1(c), which states: "All rights of all parties shall be reserved as related to all future proceedings, including, but not limited to, special contract and PPA approvals, except with respect to the processes and procedures [a]dopted in this Agreement." *Id.* Mr. Parisi explained that the use of "all parties," rather than just the "Settling Parties" in sub-section (c) is intended to make clear that, assuming Commission approval of the Settlement, all parties will retain the ability to raise any argument and take any position with respect to the substantive matters in future proceedings – such as when a PPA or special contract is presented to the Commission for approval. *Id.* at 11-12.

Mr. Parisi noted that the Settlement Agreement reflects a balancing of interests consistent with the regulatory compact and is supported by substantial evidence. As indicated by the Settlement Agreement and the discussion of the terms, GenCo (and to a lesser extent, NIPSCO) has made additional, material commitments beyond those offered in rebuttal testimony. GenCo-NIPSCO Ex. 1-S at 33-34.

ii. <u>Settlement Opposition Testimony</u>. Mr. Deupree testified on behalf of the OUCC that it opposes approval of the Settlement Agreement and the declination request. Mr. Dupree argues that the Settlement Agreement does not address all the OUCC's concerns and in fact exacerbates some of the concerns the OUCC noted in its direct testimony. Pub. Ex. 2 at 7-8. Alternatively, he recommends the Commission retain jurisdiction under a number of statutes discussed in the Direct Testimony of Brian Latham to preserve necessary public insight into aspects of GenCo's overall operations. *Id.* at 14-15.

On behalf of LaPorte County, Mr. O'Connell claimed that while the Settlement Agreement offers additional clarity regarding GenCo's scope of operations, marginally improves transparency and oversight compared to the original Petition and includes further commitments concerning GenCo-NIPSCO affiliate guidelines, GenCo remains a partially deregulated entity structured primarily to enhance investor profits. LaPorte Ex. 2 5.

On behalf of CAC, Mr. Thomas opposed the Settlement Agreement and continued to oppose the declination request. He claimed there are unaddressed shortcomings and risks identified in his direct testimony that were not addressed by the Settlement Agreement. He presented additional concerns he has given the terms of the Settlement Agreement. CAC Ex. 2 at 3.

Ms. Piontek, on behalf of CGA, explained that her overarching recommendation is that the Commission find the GenCo strategy in general, and the Settlement Agreement in particular, are inconsistent with current Indiana law in light of the passage of House Bill 1007, now Indiana Public Law 217 (2025), which added a new chapter to Ind. Code 8-1-7.9 ("HB 1007"). She said, accordingly, the NIPSCO Settling Parties' Settlement Agreement should be rejected and GenCo's petition denied.

Mr. Davies, on behalf of Takanock, recommended the Settlement Agreement be rejected and GenCo's petition denied. Takanock Ex. 2 at 3-4. He said NIPSCO has an obligation to serve its customers, including megaload customers. The GenCo structure is a "black box"—no megaload customer interested in coming to Indiana knows if or when it can get service from NIPSCO and GenCo. It leaves megaload customers to negotiate for service against a monopoly without any Commission oversight. This creates uncertainty and ambiguity, which in turn creates a business risk. *Id.*

iii. Settlement Reply Testimony. Mr. Parisi explained that there is recognition by some parties in Settlement Opposition Testimony that the Settlement addresses some of the concerns or issues raised in their cases-in-chief. GenCo-NIPSCO Ex. 1-S-R at 3. Mr. Parisi also pointed out that several parties reiterated their prior testimony and the concerns raised therein. GenCo-NIPSCO Ex. 1-S-R at 4-5. He explained that in his settlement reply testimony, he would not be re-addressing the arguments previously raised by other parties. Instead, he relied on his rebuttal testimony and settlement testimony to address those points, especially since the non-settling parties have largely raised the same arguments on these topics. *Id.* at 5. He offered testimony in response to several topics raised by the non-settling parties, which are discussed substantively below.

iv. Commission Discussion and Findings. Before we address the Settlement Agreement and related arguments in support and opposition, we begin by briefly addressing the broader context in which GenCo's request for declination of jurisdiction has been proposed. As Mr. Parisi discussed in his direct testimony (at 4-8), the electric utility industry is facing an unprecedented level of potential customer interest. This is different than what has historically been experienced in at least three respects. First, the number of customers inquiring about potential new service agreements has grown significantly over the last year or more, with NIPSCO stating in its IRP that it has seen dozens of such inquiries. Second, the size of these requests is materially larger than the typical new business customer, with NIPSCO seeing the majority of applications being for hundreds, and sometimes thousands, of MWs. Finally, the pace at which these potential customers are seeking service to be provided is much faster than is typically required. The combined impact of these requests resulted in projected load growth in NIPSCO's 2024 IRP Reference Case of 2,600 MW of load growth by 2035—effectively doubling the size of NIPSCO's electric system. Pet. Ex. 1 at 16, fn. 5.

If NIPSCO and other electric utilities are going to serve this anticipated load growth, it will indisputably require the development of significant, incremental generation resources. And if utilities are to do so on the timelines requested by these new customers, utilizing the traditional regulatory pathways, even with recent modifications enacted by the Indiana General Assembly, to obtain approval for and construct generation, will pose challenges. Likewise, the financial investment that will be required to support generation development on the scale and at the pace necessary poses potential financial risk to existing customers if traditional regulatory recovery is utilized. *See, e.g.*, Pet. Ex. 1 at 15-19. It is in this context that GenCo's application comes before the Commission.

Although in some respects this is a case of first impression that presents a unique structure designed to create a partially regulated affiliate to build, own, and operate electric generation facilities, the Commission regularly reviews requests for declination of jurisdiction by entities

proposing to operate electric generation facilities in Indiana, and the statutory framework under which we are evaluating the request by GenCo in this proceeding is the same. The Commission also regularly reviews settlements, including those presented by less than all the parties. We are, therefore, well positioned to review the GenCo proposal, as modified by the Settlement, and evaluate it based on the facts and the law.

The evidence in this case makes clear that the proposed creation and utilization of GenCo is a strategy 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 megaload customers will be predominantly isolated to GenCo. This strategy also provides a vehicle to attract the necessary capital to undertake the construction or acquisition of incremental generation facilities, provides optionality and flexibility for financing arrangements, and allows for expedited development and construction of the required facilities, all of which is necessary to meet the service requirements of megaload developers and begin providing service to them under the required timelines. This strategy is in direct response to the challenges of increased potential load growth, which we highlighted above, and will provide benefits to all interested stakeholders and the State of Indiana. For the reasons we explain below, the Commission is approving the Settlement Agreement between and among GenCo, NIPSCO, and the Industrial Group,[7] with one modification discussed below, thereby authorizing GenCo, as a public utility and energy utility, to operate consistent with the terms of the Settlement Agreement and this order.

The Settlement Agreement is organized in the following five main sections: (1) General Commitments and Reservation of Rights, (2) Limitations on GenCo's Scope of Operations, (3) Commission Oversight, (4) General Principles for Affiliate Guidelines and (5) the Settling Parties' Commitments. Settling Parties Ex. 1 at 2. Additionally, the Settlement Agreement includes Exhibit A, which is a revised version of "Attachment A" to GenCo's Verified Petition (in clean and redline format), which the Settling Parties indicated is intended to reflect the scope of GenCo's requested declination, as modified in its rebuttal testimony and the Settlement Agreement. GenCo-NIPSCO Ex. 1-S at 3-20. We will continue below with a discussion of each of these sections of the Settlement Agreement and any opposition and make necessary individual findings, as well as the ultimate findings in this proceeding.

B. General Commitments and Reservation of Rights (Settlement Agreement Section A.1.).

i. Settling Parties' Testimony. Mr. Parisi explained that Section A.1.(a) confirms that GenCo and NIPSCO agree to be bound by all terms of the Settlement Agreement. It also includes a recitation and summary of the commitments made by GenCo and NIPSCO in rebuttal and cross-answering testimony, respectively. Sub-section (b) states that all future filings and submissions will be subject to appropriate confidentiality protections, and sub-

[7] In reply testimony, the Settling Parties presented a revised Settlement Agreement which the Commission discusses further below. The Settling Parties further identified scrivener's errors in Settlement Agreement Exhibit A at the hearing and prefiled corrections. That is the Agreement the Commission is approving and is provided and incorporated with this Order.

section (c) confirms that parties' rights are reserved with respect to future proceedings before the Commission. He explained that while it may appear to be just a boilerplate term, the Settling Parties were intentional in including sub-section (c), which states: "All rights of all parties shall be reserved as related to all future proceedings, including, but not limited to, special contract and PPA approvals, except with respect to processes and procedures adopted in this Agreement." He explained that various arguments were raised about issues that are beyond the scope of this proceeding, and there are some relatively limited terms that address future proceedings—such as the requirement for GenCo-NIPSCO PPAs to be filed with the Commission, and timelines for procedural schedules for review of GenCo generation assets. GenCo-NIPSCO Ex. 1-S at 11. He said use of "all parties" (not just the "Settling Parties") in sub-section (c) is intended to make clear that, assuming Commission approval of the Settlement Agreement, all parties will retain the ability to raise any argument and take any position with respect to the substantive matters in future proceedings—such as when a PPA or special contract is presented to the Commission for approval. *Id.* at 12.

ii. <u>Settlement Opposition Testimony</u>. Mr. Deupree discussed the term "tailored" in Sec. A.1(a)(i)(3). He said GenCo should provide a specific limitation on the amount of generation it will construct, purchase, or lease, as a specific percentage of load NIPSCO will meet, including any MISO planning reserve margin requirements. Pub. Ex. 2 at. 13. Mr. Deupree also opined that because GenCo's request is not tied to a specific generation project, GenCo is being given the broad powers of a public utility without any Commission oversight. This is not "typical" for declinations. Pub. Ex. 2 at 10.

Mr. Thomas cited the Supreme Court of Indiana opinion in *Solarize Indiana, Inc. v. Southern Indiana Gas and Electric Co. d/b/a Vectren Energy Delivery of Indiana, Inc.,* et al., 182 N.E.3d 212. He said this opinion has several implications for the standing analysis in regulatory proceedings before the IURC and, in particular, raises concerns about whether an appellate court or a party to an appeal in forthcoming contract proceedings could challenge an interested stakeholder's right to bring an appeal, even if the IURC granted that party intervention in the proceeding below. CAC Ex. 2 at 14-15.

iii. <u>Settlement Reply Testimony</u>. Mr. Parsi explained that the term "tailored" speaks for itself. Genco-NIPSCO Ex. 1-S-R at 33. He said nevertheless, explaining further, it means that GenCo cannot intentionally overbuild its generation portfolio and that what GenCo proposes to be built must be grounded in NIPSCO's IRP. Through review of the IRP and special contracts that NIPSCO reasonably anticipates will be presented to the Commission, both the Commission and interested parties will have the ability to challenge the size of GenCo's generation portfolio if they believe it is beyond the bounds of reasonableness.

iv. <u>Commission Discussion and Findings</u>. The non-settling parties' opposition to this section of the Settlement Agreement was limited. The Commission agrees that the term "tailored" is well defined given the context of its use. Procuring the generation to serve megaload customers is a task unlike any previously encountered by energy utilities or this Commission. We appreciate that providing more restrictive definitions of the word "tailored" may very well limit future flexibility for all stakeholders. As it is, the word in this context can be interpreted and applied in future proceedings contemplated by the Settlement. As to the concerns about standing rights in future appeals, that is a matter to be addressed by the courts on appeal, in

the event there are such appeals, as the courts must independently decide whether litigants before them have standing to invoke their powers. GenCo and NIPSCO made many commitments in response to opposing parties' testimony on rebuttal and then made sure to properly incorporate these same commitments into the Settlement Agreement. The Settlement Agreement presents a reasonable reservation of rights that extends to any party, not just a Settling Party. The Commission finds this section of the Settlement Agreement is reasonable and should be approved.

C. Limitations on GenCo's Scope of Operations (Settlement Agreement Section A.2).

i. Settling Parties' Testimony. Mr. Parisi testified that Section A.2.(a) makes clear that GenCo operations will be limited to serving as the energy/capacity provider to NIPSCO and NIPSCO's customers through PPAs for purposes of allowing NIPSCO to serve new megaload entities as retail customers under Commission-approved special contracts. GenCo-NIPSCO Ex. 1-S at 12. He said it also clarifies that GenCo will not be prohibited from participating in the wholesale market using existing, non-committed capacity or energy. *Id.* at 12-13. He said sub-section (c) also offers a definition of the term "megaload customer," which is any non-residential, non-municipal, or non-small commercial customer who is seeking service for at least 50 megawatts of firm service and whose characteristics or expected, final demand would mean they are unable to qualify for service under Rates 524, 531, 532 or 533. *Id.* at 13.

He said it also makes allowance for the potential need for a megaload customer to take temporary service under an existing NIPSCO rate schedule. *Id.* at 13. He explained that in the event this occurs, NIPSCO will be required to take in account the temporary use of its legacy assets in its immediately subsequent electric base rate case and make appropriate adjustments, including, but not limited to, making: (1) appropriate adjustments in the cost-of-service study for use of the assets; (2) correcting for class overearning, if any, as a result of incremental revenues associated with load not reflected in the most recently established base rate case; and (3) addressing any issues as may be appropriate by prior commitments reflected in the settlements approved in Cause Nos. 45159, 45772, and 46120, as may be necessary. *Id.* at 13-14.

Mr. Parisi explained that sub-section (b) states that GenCo's procured capacity will be planned to meet its PPA obligations to NIPSCO and resource adequacy requirements/planning reserve requirements, guided by NIPSCO's ongoing IRP process and informed by customer negotiations and Commission-approved special contract demand. This is intended to act as a safeguard to ensure GenCo does not materially overbuild its generation portfolio and that what it plans for, and actually builds, are directly informed by NIPSCO's expected energy and capacity needs. *Id.* at 14.

He said sub-section (c) states that NIPSCO and GenCo will not enter into a PPA unless NIPSCO has executed at least one special contract with a megaload customer, as NIPSCO would otherwise not have a need to utilize GenCo's assets to serve megaload customers. Because there will likely be times when GenCo has some additional generation capacity beyond what NIPSCO has contracted for, sub-section (d) clarifies that revenues from any excess energy and capacity sales will be addressed, as applicable, in the terms of special contracts between NIPSCO and any megaload customer; permissible agreements with any electing existing customer; and/or in PPAs between NIPSCO and GenCo. *Id.* at 15.

Mr. Parisi testified that sub-section (e) places guardrails on any transfer of assets between GenCo and NIPSCO or contractual arrangements that are intended to serve non-megaload customers. *Id.* at 15. Mr. Parisi explained that although GenCo has consistently stated that its primary purpose is to provide for NIPSCO's needs to serve megaload customers, there may be potential scenarios in the future where GenCo assets could be a cost-effective and prudent choice to serve NIPSCO's current, non-megaload customers. *Id.* at 15-16. Mr. Parisi testified that he does not believe the Commission (or other stakeholders) would want to foreclose this opportunity if it is in the best interest of customers, but because of the affiliate relationship between GenCo and NIPSCO, both companies were willing to agree to certain guidelines that must be followed before such action can be taken. *Id.* at 16.

Mr. Parisi explained that sub-section (i) provides that revisions to current NIPSCO tariff provisions can be made in a 30-day filing, which is currently allowed, but clarifies that if NIPSCO intends to offer a new rate schedule or tariff solely to serve megaload customers in the future, the 30-day process cannot be used. Instead, an independent, docketed proceeding would be required. *Id.* at 19. He said also, if NIPSCO has a pending electric base rate case, this provision requires that a new rate schedule or tariff solely to serve megaload customers must be offered as part of that base rate case. This is not to say that NIPSCO currently intends to offer a new "megaload tariff," but there could come a time in the future where it is appropriate to do so. *Id.*

Mr. Gorman explained that the Settlement Agreement limits the scope of GenCo's operations in several ways. IG Ex. 1-S at 2-3. He said first, it reflects a specific agreement that GenCo will be primarily limited in its operations to serving as a provider of energy and capacity to megaload customers through purchase power agreements (PPAs) with NIPSCO subject to Commission review. Although this is how GenCo framed its expected scope of operations, the Settlement Agreement explicitly makes this status of operations a binding commitment. This effectively addresses the concern that GenCo could operate as a speculative entity in the wholesale market or otherwise take excessive risks and potentially construct or acquire excess generation to support competitive sales in the wholesale market. *Id.* He explained that GenCo will be allowed to utilize its resources in other ways under limited circumstances and subject to interrelated checks and controls meant to ensure any such usage is incidental to GenCo's core operations. *Id.* at 3. He explained that it is also important to note that this arrangement leads to the efficient use of resources, as it is unlikely that there will ever be an exact match between megaload customer needs and the capacity of GenCo's resource portfolio. In the absence of this provision, then, that mismatch would lead to the underutilization of generation resources. With the provision, however, GenCo is able to make efficient use of its full portfolio. Importantly, this use then benefits the customers for whom the resource is being utilized with margins from such sales being controlled by terms of agreements between NIPSCO and its customers, or NIPSCO and GenCo. *Id.* at 3-4. He explained that in short, absent the Settlement, GenCo could have economic incentive to speculatively construct more capacity than necessary to meet the needs of NIPSCO's megaload customers. Mr. Gorman said, he and others, identified this as a root concern with GenCo's initial fling. Under the Settlement, however, the degree of excess capacity and associated risk are both limited, while GenCo is still able utilize uncommitted capacity in defined circumstances. This is a reasonable, and efficient, economic outcome. *Id.* at 4.

Mr. Gorman also explained that the Settlement Agreement also addresses the possibility that, although NIPSCO wants to rely on GenCo to provide the capacity to serve megaload

customers, there may be situations where that is not possible. Specifically, the Agreement recognizes that in some cases temporary service under NIPSCO's existing large general service, commercial and industrial rates may be necessary or desirable. In cases where the prospective customer otherwise qualifies for the rate and such service is provided to a megaload customer, NIPSCO has committed, through the Agreement, to take account of temporary use of its legacy assets through its service offerings in the immediately subsequent electric base rate case and to make appropriate adjustments, as necessary. The precise circumstances of any arrangement will dictate how the use of NIPSCO's system ought to be reflected. Having reviewed the language in the Settlement Agreement, however, and understanding that the circumstances in which temporary service under NIPSCO's service offerings may vary significantly such that not every contingency can be addressed specifically, he believes the Agreement makes adequate and reasonable provisions for existing retail customers in the event such service is extended. IG Ex. 1-S at 7.

a. Excess Capacity and Generation and Transfer of Assets (Settlement Agreement Sections A.2.(b), (c), and (e)).

i. Settlement Opposition Testimony. Mr. O'Connell argued that Section 2 expands GenCo's scope by expressly allowing excess energy and capacity to be offered to other non-mega load NIPSCO retail customers. LaPorte Ex. 2 at 8. He also expressed concern that Rate 531 customers now have access to GenCo which will provide electricity at potentially below-market prices. LaPorte Ex. 2 at 11.

Ms. Piontek testified that Sections A.2.(b) and A.3.(c) in large part fully satisfy the concerns over IRP declination raised in her April 1st Direct Testimony. CGA Ex. 2 at 20. However, she claimed regulatory oversight would be undermined whenever GenCo and NIPSCO enter into a PPA for the purpose of serving NIPSCO's non-megaload customers, an arrangement she says Mr. Gorman characterizes as a means to avoid the "underutilization of generation resources" and make "efficient use of its full portfolio." She explained that she disagrees with Mr. Gorman's characterization. CGA Ex. 2 at 15. She believes GenCo should reasonably strive to match generation procurement with megaload demand as the Settlement Agreement dictates under A.2.(b) and (c). She said if any excess generation results despite GenCo's best efforts at alignment, the utility should do what IPPs do: offer those resources into the wholesale market or bid for off-takers by responding to RFPs issued by NIPSCO or another utility. CGA Ex. 2 at 16. She also said Sections A.2.(b), (c), and (e) only in limited part fully satisfy the concerns over the potential for excess generation she raised in her April 1, 2025, direct testimony because this Settlement Agreement term stops short of specifying whether the PPA entered into between the affiliates will be directly and only responsive to the particular special contract(s). CGA Ex. 2 at 20-21. For Section A.2.(c), NIPSCO and GenCo should not be allowed to enter into PPAs for generation beyond what is necessary to serve NIPSCO's megaload customer(s) as specified by executed special contract(s) between NIPSCO and megaload customer(s). CGA Ex. 2 at 22.

Ms. Piontek explained regarding Section A.2.(e), the Settlement Agreement states merely that such an arrangement must "be demonstrated to be a cost-effective resource decision" without specifying how such demonstration would be made, and only that it would be "subject" to third-party review without requiring such a review. In her opinion, under no circumstances should GenCo be granted non-competitive access to the non-megaload customer base of a regulated

utility. CGA Ex. 2 at 21-22. She stated that for Section A.2.(e)(v), NIPSCO and GenCo should not be allowed to enter into PPAs for resources meant to serve NIPSCO's non-megaload customers unless those resources are selected through an open, competitive process managed by an independent third-party. CGA Ex. 2 at 22. She also claimed the Settlement Agreement undermines the competitive power market because the Settlement Agreement contains no provision requiring NIPSCO or its affiliate GenCo to utilize competitive bidding when acquiring resources meant to serve NIPSCO's megaload customers. The Settlement Agreement also explicitly permits NIPSCO and GenCo to enter into agreements to serve NIPSCO's *non-megaload customers* when applicable conditions of Section A.2.(e) are met but does not require NIPSCO to utilize competitive bidding for any GenCo resources meant to serve those non-megaload retail customers through PPAs. She said Settlement Agreement term A.2.(e)(v) merely states vaguely that such energy and capacity purchases "must be demonstrated to be a cost-effective resource decision." CGA Ex. 2 at 11.

Mr. Thomas testified the Settlement Agreement does not address his concerns about the sale of GenCo assets. He alleged the negotiating parties will not allocate the potential benefits from a "fire sale" on generation to non-megaload NIPSCO customers; they will allocate those potential benefits among themselves. This leaves the Commission with the choice of making a material alteration to a negotiated agreement or leaving the public interest to private negotiation and requiring ratepayers to bear risks which could be mitigated in the ways proposed by the non-settling parties. Additionally, the Commission should retain jurisdiction over generation units for the life of the unit so as to make sure that contracts entered into after expiration of the initial contract are also in the public interest. CAC Ex. 2 at 9-10. He recommended the Commission (1) cap the purchase price of any generation unit purchased by NIPSCO from GenCo at the unrecovered plant balance, (2) provide a right of NIPSCO to match any offer made for GenCo assets, and (3) for the Commission to retain jurisdiction over generation units upon the expiration of contracts between NIPSCO and megaload customers. CAC Ex. 2 at 10-11.

Mr. Thomas said he was concerned about Settlement Agreement paragraph A.2.e.vii. He claimed it is unclear whether the Settlement Agreement proposes to expand Rate 531 requirements to non-Rate 531 customers or whether this term is meant only to apply to Rate 531 but failed to explicitly state as much. If it only applies to Rate 531, it would not be in the public interest to approve such a term that gives discriminatory access to surplus power and electricity at potentially lower costs to a small set of large industrial customers, especially when NIPSCO's residential customers are already paying the highest electric bills in the state for 1,000 kWh of monthly usage. CAC Ex. 2 at 18-19.

ii. <u>Settlement Reply Testimony</u>. Mr. Parisi restated that in Question / Answer 15 of his settlement testimony, he outlined the provisions in Section A.2.(e) of the Settlement Agreement and confirmed that the primary purpose for GenCo's creation is to serve megaload customers and that under the Settlement Agreement, GenCo would not be permitted to intentionally overbuild its generation portfolio to serve a non-megaload customer. GenCo-NIPSCO Ex. 1-S-R at 12. He also noted, however, that NIPSCO and GenCo did not want to foreclose the potential use of excess generation capacity for the benefit of NIPSCO's non-megaload retail customers. He said he has also explained that even if GenCo does not intentionally overbuild its capacity portfolio, there may be times when it has resources available which NIPSCO can utilize to meet the needs of its retail load.

Mr. Parisi testified that he agrees with Mr. Gorman's settlement testimony on behalf of the Industrial Group (at 3-4), that this would be an efficient use of those resources. *Id.* at 13. He explained that with that said, for sake of clarity, it is important to emphasize that in this case, neither NIPSCO nor GenCo are asking the Commission to prejudge that any special contract or PPA to be filed in the future—for serving megaload or non-megaload customers—is acceptable. He explained that GenCo and NIPSCO have repeatedly taken the opposite position and reaffirmed that the two entities want the Commission to independently review each PPA, special contract, or other contractual arrangement between NIPSCO and GenCo, and the Settlement Agreement does not change that. The Settlement Agreement simply does not foreclose the opportunity to present such an arrangement to serve non-megaload retail customers to the Commission in the future. *Id.* He said if the Commission approves this term in the Settlement Agreement and NIPSCO presents a PPA to be utilized to serve non-megaload customers, the Commission will have the right to reject it if it is not in the public interest. Ultimately, it is because there are potential benefits to NIPSCO's other customers that GenCo and NIPSCO do not want to completely foreclose the Commission's ability to evaluate such an arrangement in the future. *Id.* at 13-14.

iii. Commission Discussion and Findings. Under the terms of the Settlement Agreement, GenCo would only be authorized to provide to NIPSCO the energy and capacity necessary to support NIPSCO's provision of retail service to its megaload customers. The Settlement Agreement does *not* provide authorization for NIPSCO to serve non-megaload retail customers with generation procured from GenCo. Nor does the Settlement authorize the transfer of any assets between NIPSCO and GenCo. It merely preserves the optionality to do so should circumstances warrant and sets out the conditions under which any such arrangement would be brought to the Commission for review. Importantly, any transfer or arrangement of assets allowable under the Settlement would still need to be presented for review in an independently docketed proceeding for approval by the Commission. If the Settlement Agreement fully foreclosed this optionality, we would be concerned given the potential customer benefits which, under the right circumstances, might be achieved. Accordingly, we reject the arguments against these terms.

As for allegations of discriminatory access to GenCo capacity and energy by Rate 531 Tier 3 customers under the Settlement, we disagree there is any discrimination. The Settlement articulates the conditions which would allow for possible use of GenCo assets in the wholesale market which we have found reasonable. With respect to Rate 531 (now Rate 631), it is a rate structure that we have already approved on multiple occasions. Tier 3, which is materially unaltered from when we initially approved the service structure as "Rate 831," allows customers to direct the procurement of their energy needs through the use of self-selected wholesale suppliers. Among NIPSCO's retail customers, only Rate 531 Tier 3 customers have the ability to procure capacity in this fashion; and it is not, therefore, unduly discriminatory to allow those customers access to excess GenCo capacity under the limited circumstances specified in the Settlement.

b. Definition of "megaload" (Settlement Agreement Section A.2(c)).

i. Settlement Opposition Testimony. Several Parties expressed

concern with the Settlement Agreement's definition of "megaload." OUCC witness Deupree claims the change to the definition of "megaload" from 100 MW to 50 MW and removing requirement to be a new customer provides a potential advantage to Rate 531 customers as they now could qualify for megaload service through GenCo and not contribute to NIPSCO's system costs. Pub. Ex. 2 at 8-10. CAC witness Thomas also expressed concern about the Settlement Agreement's definition of "megaload" customer and believes it should be 100 MW instead of 50 MW. CAC Ex. 2 at 20. Takanock witness Davies testified that definition of "megaload" customer does not match definition in House Bill ("HB") 1007 which defines a "large load customer". (Takanock Ex. 2 at 5). CGA witness Piontek also testified that the Settlement Agreement's definition of megaload customers is inconsistent with the definition of "large load customer" under HB 1007. She recommended the definition in the Settlement Agreement should be modified to match. CGA Ex. 2 at 6; 8.

ii. <u>Settlement Reply Testimony</u>. Mr. Parisi noted the concerns the other parties had with the definition and explained the purpose of the inclusion of customers with 50 MW instead of 100 MW. GenCo-NIPSCO Ex. 1-S-R at 6-11. He said 50 MW was chosen for use in the definition in Section A.2(a)(ii) to expand the protection to NIPSCO's current retail customers provided through the GenCo structure. *Id.* at 7. He explained that he disagreed with CGA witness Piontek and noted that while it is fair to point out that HB 1007 includes a definition for "large load customers," that definition is explicitly limited to customers meeting specific criteria where a utility elects to utilize the approval and recovery pathways provided in HB 1007. Mr. Parisi said no provision in HB 1007 provides that it is controlling beyond the statute itself, and that the statute itself makes clear it is not an exclusive approval mechanism. *Id.* at 8.

Mr. Parisi provided a response to the concerns raised by OUCC witness Deupree about the definition not referring specifically to "data centers" or to "new customers." *Id.* at 9-10. He said today, NIPSCO has the ability to enter into a special contract with any customer, whether new or existing. Nothing in the Settlement Agreement impacts that. *Id.* at 9. He explained that with the exception of DX Hammond, he can confirm that NIPSCO is not currently working or negotiating with any other existing customer to potentially be served under a special contract. This includes, but is not limited to, any existing customer being served under Rate 531. *Id.* at 9-10. He further explained that there are other potential large load customers who may seek to locate in NIPSCO's service territory and whose load could put a strain on NIPSCO's capacity to serve them without utilizing GenCo. Moreover, the definition of "megaload customer" indicates that it applies to customers whose final load or characteristics mean they would not fit within an existing tariff. All the referenced tariffs, except Rate 531, have a maximum service level of 10 MWs. *Id.* at 10.

In response to the concerns raised by the other Parties, Mr. Parisi presented a modification to the definition of "megaload customer" for purposes of the Settlement Agreement. He said after discussion with the Industrial Group, the Settling Parties are willing to revise the definition of megaload customer to replace "50" with "100." *Id.* at 7.

iii. <u>Settlement Hearing Testimony</u>. During cross-examination by counsel for the OUCC at the hearing, Mr. Parisi was asked: "In the case where a [Rate] 531 customer stops taking [Rate] 531 service and enters into a special contract with NIPSCO, could NIPSCO serve that customer with GenCo assets?" And he responded, "I don't

believe so." Tr. at D-16, lines 9-12. He further clarified that qualifying as a megaload customer is a two-part test, where the customer must be at least 100 MW and not qualify for service under a current Tariff rate schedule, which is why a customer eligible for service under Rate 531 (or another rate schedule) would not qualify as a megaload customer and therefore could not be served under a special contract *utilizing GenCo assets*. Tr. at D-16-17.

iv. Commission Discussion and Findings. We agree with Mr. Parisi that it is neither unreasonable nor required for the GenCo structure definition of "megaload customer" to match the HB 1007 definition for "large load customers". As shown in Indiana Code §§ 8-1-7.9-10 and 17(b) and (c), that definition is explicitly limited to the approval and recovery pathways provided in HB 1007, and no provision of the legislation provides that it is controlling beyond the statute itself. Importantly, the statute itself makes clear it is not an exclusive approval mechanism, and, in fact, expressly states that it does not infringe upon the rights of utilities to pursue alternative solutions to meet large customer demand, including use of Indiana Code § 8-1-2.5.

The Settling Parties of their own accord confirmed that the definition of "megaload" would not apply to customers that could be served under NIPSCO's tariff, responding to concerns expressed by the non-settling parties. Based on the representation of the Settling Parties, the Commission sees no reason to revise the definition, and this portion of the Settlement Agreement is so approved.

D. Commission Oversight (Settlement Agreement Section A.3.).

i. Settling Parties' Testimony. Mr. Parisi explained the terms included in sub-sections (a) and (b) of Section A.3. GenCo-NIPSCO Ex. 1-S at 20-21. He said these two sub-sections state, respectively, that PPAs between NIPSCO and GenCo will be subject to Commission approval and that when seeking approval of special contracts, NIPSCO will disclose the financial terms related to the provision of retail electric service, including those between the customer and GenCo, if any such terms exist. *Id.* He explained the terms included in sub-section (c). *Id.* at 21. He said sub-section (c) states that for both IRP purposes and for purposes of resource adequacy reports required by Ind. Code § 8-1-8.5-13, NIPSCO will be responsible for accounting for megaload customer load and that it will also account for its contractual arrangements for capacity with GenCo in doing so. It is appropriate for NIPSCO to do so, and for GenCo to be relieved of any such requirement, since GenCo will have no retail customers or load obligations to serve. *Id.*

Mr. Parisi then explained the terms included in sub-sections (d), (e), (f), and (g). He said speed-to-market is something GenCo has emphasized throughout this proceeding, and sub-section (d) supports this need by allowing GenCo to take pre-acquisition and pre-construction steps before making filings at the Commission. *Id.* at 21. He said any such financial obligations will not be recoverable from NIPSCO's non-megaload customers and would only be recoverable from megaload customers if that customer has agreed to be responsible in a special contract. Sub-section (e) simply confirms that GenCo and NIPSCO will not object to third-party discovery directed to them in any proceeding solely on the grounds that they are not a party to a particular proceeding. Sub-sections (f) and (g) are intended to be directly responsive to concerns raised by OUCC witness Latham in his direct testimony. *Id.* at 22. He explained that specifically, GenCo

has limited its overall declination request and is conceding to more fulsome, ongoing Commission jurisdiction under Ind. Code §§ 8-1-2-50 through 60 and 8-1-2.5-7. Also, rather than seeking complete declination over Ind. Code §§ 8-1-2-76 through -80, GenCo has committed to making informational compliance filings within 30 days of each time GenCo issues debt, which is intended to allow the Commission and other interested parties to understand GenCo's financial commitments related to debt. *Id.* at 22-23.

Mr. Parisi then explained how sub-sections (h) and (i) address Commission insight into and oversight of GenCo and its generation resources and explained why these provisions are important. *Id.* at 23-24. He explained that at least two parties (IG and CGA) offered testimony arguing that the Commission should require GenCo to obtain a CPCN for its generation resources, which he responded to fully on page 36-41 of his rebuttal testimony. *Id.* at 23. He testified that GenCo heard and responded to the testimony from various parties by offering certain compliance filings in rebuttal. He explained however, as part of the settlement process, and as a concession to provide greater comfort to the parties about the level of Commission oversight of GenCo's generation decisions and operations, GenCo was willing to include these two provisions. In combination, GenCo believes they will provide substantially more insight into GenCo's planned generation and allow an appropriate level of Commission oversight of GenCo's operations, further supporting GenCo's request to have the Commission decline jurisdiction under the CPCN Statute.

He then explained what sub-section (h) requires of GenCo and/or NIPSCO. *Id.* at 24-26. He said under this term, NIPSCO and GenCo will be required to make an annual informational filing with the Commission ("Annual Informational Filing") that is intended to provide the Commission with information about (1) GenCo generation resources committed, anticipated, and under evaluation; (2) the total megaload customer demand under special contracts that has been filed with or approved by the Commission; (3) how the load will be reliably served by NIPSCO using the GenCo generation; (4) the current cost estimate for each identified generation asset; and (5) any updates to a previous Annual Informational Filing, including the final cost of generation assets that have reached commercial operation since the previous filing. *Id.* at 24-25. He said it also clarifies that to the extent that the final cost of a generation resource has increased from what was initially reported in an Annual Informational Filing, this cost increase may be sought for recovery from megaload customers under the terms of a Commission-approved special contract(s) but may not be sought for recovery from NIPSCO's other customers. Based on the sensitivity of cost information to both GenCo and the potential customers NIPSCO will be contracting with and using the GenCo generation to serve, this provision also confirms that information related to the cost of generation can be designated as highly confidential and competitively sensitive. *Id.* at 25-26.

Mr. Parisi testified that although GenCo is continuing to seek declination of the CPCN Statute, GenCo is committing to have the Commission review its generation assets before beginning construction under sub-section (i). *Id.* at 26. He said specifically, prior to the construction, purchase, or lease of a generation asset (or group of generation assets), GenCo will make a filing seeking either (a) approval of the generation resource(s) as reasonable and necessary to serve expected load growth, or (b) declination of the Commission's jurisdiction provided by the CPCN Statute as in the public interest. He explained that for either filing type, NIPSCO and/or GenCo will present evidence to demonstrate that the resource(s) are reasonable and necessary to

serve load growth consistent with the Settlement Agreement. *Id.* He explained that in terms of the information contained in the filings, either filing type will contain: (1) an identification of the expected location and estimated cost of each generation resource; (2) information supporting the reasonable expectation that the load growth justifying the resource(s) will appear; (3) information supporting the conclusion that absent the investment, GenCo will be unable to meet its obligations to NIPSCO related to the reasonable expected load growth; and (4) the steps GenCo has taken to avoid exercise of the power of eminent domain. *Id.* at 26-27. He testified that the Settling Parties have agreed to support a procedural schedule for either type of filing that would have a Commission order issued not more than 120 days after the filing of a petition and supporting testimony. This schedule is about the average time in which the Commission issues an order in a typical declination of jurisdiction proceeding. If there is a need for issuance of an order under a shorter procedural schedule, GenCo also has the opportunity to demonstrate this fact and seek issuance of an order in not more than 90 days. *Id.* at 27-28.

Mr. Parisi explained that because it will be seeking review by the Commission of each generation resource or group of resources, GenCo will retain eminent domain authority, but only for purposes of the resources that will be developed by GenCo and contracted for by NIPSCO for use to serve NIPSCO's retail customer load. Finally, PPAs, special contracts, and other proceedings related to GenCo's construction, purchase, or lease of a generation asset, or group of generation assets, may be, but do not need to be, brought in a consolidated case, unless GenCo intends to seek an expedited order, in which case, the approval or declination proceeding must be separate. *Id.* at 28.

Mr. Gorman explained that there are several provisions in the Settlement Agreement which work together to ensure Commission, and public, oversight remains in place with respect to GenCo's core functions. In particular, GenCo has agreed to obtain approval, or a specific declination, from the Commission with respect to the construction, purchase or lease of resource(s) in order to ensure the expenditure is consistent with what is needed to serve NIPSCO's megaload customers. This process will require GenCo to support the filing by identifying the proposed cost, that the expected load growth will occur, and that the resource addition is necessary to meet GenCo's obligations to NIPSCO as the provider of capacity/power. That need will be, further, demonstrated by annual filings from NIPSCO and GenCo which provide valuable information about GenCo's resource plans, the committed customer load, and the cost of the expected investment in generation resources. Importantly, the public process at the Commission contemplated by the Settlement Agreement provides a further safeguard to GenCo's commitments as to the scope of its operations. IG Ex. 1-S at 4. He explained that the Settlement Agreement provides mechanisms by which the Commission and other interested parties can review GenCo's actions and confirm that the company is acting consistent with its core purpose rather than expanding its operations without connection to a defined plan and articulated need. Mr. Gorman testified that GenCo previously emphasized the importance of its ability to develop generation resources quickly so as not to impede economic development within NIPSCO's service territory; while other parties, including the Industrial Group, emphasized the importance of a review process. The timelines proposed in the Settlement Agreement, in Mr. Gorman's opinion, represent a reasonable compromise between the competing positions. *Id.* at 4-5.

Mr. Gorman further explained that GenCo agreed to limit any exercise of eminent domain to those circumstances where a generation asset has gone through the approval or declination

process at the Commission, and in doing so, GenCo must also provide information about how it attempted to avoid the exercise of eminent domain. He said by tying any exercise of eminent domain only to instances where Commission approval has been secured, GenCo is putting itself on a level playing field with other non-retail providers. *Id.* at 5.

He also discussed additional safeguards contained in the Settlement Agreement. *Id.* at 5-6. He said GenCo has explicitly agreed to remain subject to the Commission's investigative powers, as well as re-affirming that the declination and alternative regulatory plan contemplated in the case will remain subject to later investigation and revocation. *Id.* at 5. He testified that GenCo's agreement to submit information about issuances of debt to the Commission, together with the other controls on GenCo, substantially reduces the risk to NIPSCO and its other retail ratepayers as a result of debt issuances supporting GenCo's operations. *Id.* at 5-6.

E. Eminent Domain (Settlement Agreement Section A.3.(i).).

i. Settlement Opposition Testimony. OUCC witness Deupree testified that the Commission should not allow GenCo to have eminent domain authority. He explained that if the Commission does not have jurisdiction over the facility, then the appropriate local regulatory bodies should have authority to regulate the facility, such that GenCo does not have the ability to exercise eminent domain without any regulatory oversight. He stated if the Commission declines jurisdiction while authorizing GenCo to retain eminent domain authority, then GenCo has the ability to do exactly this without regulatory oversight or compliance with all local regulations. It also creates a disadvantage for other entities seeking declination by allowing GenCo to retain this authority while eliminating it for these other entities. Pub Ex. 2 at 10-12.

Takanock witness Davies makes a similar claim about the lack of local control and exercise of condemnation powers. Takanock Ex. 2 at 8-9.

Mr. Thomas also testified that eminent domain authority should be denied. CAC Ex 2 at 26.

ii. Settlement Reply Testimony. Mr. Parisi testified that in response to concerns raised by other parties, including the Industrial Group, the Settlement limits GenCo's exercise of eminent domain to cases where the asset will be used to serve NIPSCO's retail customer load and where the Commission has approved the construction of the generation asset. GenCo-NIPSCO Ex. 1-S-R at 15. Mr. Parisi explained that eminent domain is not being retained so that GenCo can compete with IPPs in the wholesale market. He said because GenCo is primarily focused on obtaining the generation necessary to serve NIPSCO's megaload retail customers, eminent domain is only being retained to the extent that NIPSCO would have the authority if it were building the generation itself. *Id.* at 15. Mr. Parisi also explained that the parties are incorrect that the retention of eminent domain authority creates an unfair competitive advantage with respect to IPPs. GenCo-NIPSCO Ex. 1-S-R at 16-19. He said again, these parties are ignoring the purpose of the GenCo structure. GenCo was not formed so that it could enter the wholesale power markets and compete with IPPs. There are, in fact, provisions within the Settlement Agreement which curtail GenCo's ability to do so, including those provisions which tie GenCo's resource acquisition to NIPSCO's need to serve megaload customers such as making those acquisitions to reflect NIPSCO's IRP load forecasts and known contract negotiations.

Moreover, GenCo has agreed, as part of the Settlement Agreement, to subject resources to review and approval, in a manner that was not initially contemplated in the filing, to ensure that it remains focused on the primary purpose underlying its formation rather than activity in the wholesale markets. *Id.* at 17.

Mr. Parisi testified that as NIPSCO and GenCo have stated throughout this proceeding, GenCo was formed because NIPSCO wants to insulate, as best it can, its retail customer base from the risks of serving megaload customers. Without GenCo, NIPSCO would not be obtaining the power to serve megaload customers through PPAs with IPPs. *Id.*at 17. He also explained that under the Settlement Agreement (Section A.3.(f)), "GenCo will remain subject to Commission investigations and complaints by the Indiana Office of Utility Consumer Counselor ("OUCC") or others, consistent with Ind. Code §§ 8-1-2-50 through 60 . . . ." He said IPPs are typically not subject to the Commission's investigation and complaint jurisdiction, and this means a condemnation action complaint could be filed at the Commission. *Id.* at 18. He said further, a landowner would have the ability to enforce the Settlement Agreement term limiting GenCo's condemnation powers "only for purposes of the resources that will be developed by GenCo and contracted for by NIPSCO for use to serve NIPSCO's retail customer load." *Id.* and Attachment 1-S-R-B (GenCo's response to CAC Request 9-005).

Mr. Parisi also said that these arguments ignore the recent Indiana Supreme Court decision in *Duke Energy Indiana v. City of Noblesville*, 234 N.E.3d 173 (Ind. 2024). He explained that there is no longer a blanket exemption or immunity for public utilities from local regulations; instead, there is the more limited ability for a public utility to file a complaint with the Commission to challenge the reasonableness of the local regulation. GenCo must comply with reasonable local regulations but would have the ability to file a challenge to unreasonable ones. Nothing in the Settlement Agreement changes that. GenCo's intention would be to work with localities in the development of electric generation facilities, just as NIPSCO does today. But in the event GenCo is unable to do so and unreasonable restrictions or requirements are placed on GenCo, it is appropriate for GenCo to retain the ability to challenge such regulations before the Commission and potentially have them overturned. *Id.* at 19-20.

iii. <u>Settlement Hearing Testimony</u>. During cross-examination and redirect examination at the hearing, Mr. Parisi was questioned about GenCo's proposal to retain eminent domain authority and explained the distinction between a typical declination request by an IPP and the request from GenCo, noting that GenCo has been proposed to ensure financial protection of NIPSCO's non-megaload, retail customers and that eminent domain should not be lost by using GenCo to do so. He also clarified that an IPP could request to retain eminent domain authority or the exact scope of a declination that GenCo has sought—which would then be evaluated on the merits by the Commission. Tr. at D-31-33. When questioned by counsel for the OUCC, Mr. Parisi acknowledged the Commission's decision in *In re Complaint of Johnson County Concerned Citizens*, Cause No. 45943 (IURC 1/31/2024), in which the Commission indicated it would not take action that directly conflicts with condemnation proceedings pending in state court. Tr. at D-23-25. On redirect examination, he clarified that a potentially aggrieved party would, however, be able to file a complaint at the Commission if they believed GenCo was not abiding by the terms of the Settlement Agreement or otherwise was not operating in accordance with the law or the Commission's approval, as GenCo has agreed that the Commission would retain its full investigatory authority. Tr. at D-31-33.

iv. Commission Discussion and Findings. Eminent domain is a statutory power conferred by the State upon public utilities pursuant to Ind. Code 8-1-8-1 whose exercise is subject to procedures within the state court system, as likewise set out in statute. In the typical declination proceeding involving an IPP we have historically required the petitioner to cede its eminent domain authority. We recognize that in the typical proceeding, the IPP requests (and we grant) nearly complete declination of our jurisdiction, including our jurisdiction under Ind. Code § 8-1-2-101. However, as we have noted above, and as discussed by Mr. Parisi in his prefiled testimony and at the hearing, this is not the typical IPP declination proceeding. It is undisputed that NIPSCO would retain full authority to exercise eminent domain if it were to seek issuance of CPCNs for the types of generation facilities GenCo intends construct. Notably, we would also retain, not decline, jurisdiction with respect to NIPSCO. We also acknowledge that GenCo will be building generation that is explicitly tailored to serve NIPSCO's *megaload* retail customers and that GenCo has been proposed as a means to protect NIPSCO's *non-megaload* retail customers from potential financial risk. Nevertheless, this generation is being built by GenCo, not NIPSCO.

We see a distinction between the ability of GenCo to seek Commission review of local regulations under Ind. Code § 8-1-2-101 and the ability to take private property via condemnation. Even acknowledging that GenCo is developing generation assets that will ultimately be used by NIPSCO to meet the needs of NIPSCO's retail customers, GenCo will not have any retail customers. Because it will not, it likewise will not have the accompanying duty to serve customers and need to, arguably, condemn private property without regulatory oversight. We, therefore, will require GenCo to relinquish its right to condemn private property but will allow it to retain the ability to challenge local regulations it believes are not reasonable.

For sake of clarity, consistent with GenCo's request and Settlement Agreement Exhibit A, we are retaining jurisdiction under Ind. Code § 8-1-2-101. Therefore, as GenCo builds generation facilities, it will be subject to reasonable local regulations, limited only by our authority under Ind. Code § 8-1-2-101. In the event GenCo were to encounter regulations it believes to be unreasonable, it will have no right to ignore or disregard their applicability; instead, if GenCo believes a regulation is unreasonable, it will be required to challenge the regulations in question at the Commission for a decision on their reasonableness, consistent with the powers granted to us by the General Assembly. Notably and unlike the typical declination proceeding involving an IPP, GenCo has never asked us to decline our jurisdiction under this section.

Based on the foregoing, particularly our finding that GenCo must relinquish any right to condemn private property and will, therefore, not be granted the right to retain eminent domain, the Commission finds Section A.3.(i) of the Settlement Agreement shall be amended to strike the following sentence: "GenCo will retain eminent domain authority only for purposes of the resources that will be developed by GenCo and contracted for by NIPSCO for use to serve NIPSCO's retail customer load." We further find that this sentence will be replaced with the following language: "GenCo shall retain the right to challenge local regulations at the Commission under Ind. Code § 8-1-2-101 for purposes of the resources that will be developed by GenCo and contracted for by NIPSCO for use to serve NIPSCO's retail customer load but will not retain the power of eminent domain." Pursuant to Section B.3 of the Settlement Agreement, within 15 days of the date of this Order, the Settling Parties shall submit a notice to the Commission confirming whether they accept this modification. Likewise, if GenCo is willing to

accept this modification, it shall confirm in that notice that it will relinquish the right to condemn private property, consistent with this Order.

F. GenCo Generation Approval Process.

i. Settlement Opposition Testimony. Ms. Piontek opined that Section A.3.(i) does not fully satisfy CGA's concerns with the scope of GenCo's request for regulatory relief from project approval raised in her Direct Testimony. CGA Ex. 2 at 19. She claimed the Settlement Agreement proposes an entirely new project approval filing which is less comprehensive than a CPCN application or request for declination of IURC jurisdiction from Ind. Code 8-1-8.5 would be. She said Mr. Parisi failed to justify the merits of this proposed new filing for any reason other than speed. CGA Ex. 2 at 17. Ms. Piontek said GenCo's strategy is unnecessary given HB 1007. CGA Ex. 2 at 3-4. She said the Settlement Agreement has GenCo providing less information than the "robust" expedited generation resource ("EGR") Plan under HB 1007. CGA Ex. 2 at 5. She testified at minimum, the Commission should reject the abbreviated approval process proposed in the Settlement Agreement and instead require GenCo to utilize existing legal avenues for all project approvals. CGA Ex. 2 at 8.

Mr. Thomas expressed dissatisfaction with the project-specific approval structure proposed in the Settlement Agreement as well, arguing it does not include an evaluation of the factors that the Commission normally considers for new power generation projects under CPCNs. CAC Ex. 2 at 20-22. He also discussed the new EGR plan under HB 1007 (IC 8-1-7.9-18 and -19) and said the Settlement Agreement does not ask the Commission to consider any of these factors under the "reasonable and necessary" review pathway. NIPSCO has disclaimed any intent to utilize this new statutory channel for review of projects to meet megaload customer needs, and presumably GenCo will rely on the Settlement Agreement's sparse approval standard for its new projects. CAC Ex. 2 at 22-23. He also expressed dissatisfaction that NIPSCO does not intend to use the approval of a project to serve a large load customer under HB 1007 in lieu of an EGR Plan or a CPCN. CAC Ex. 2 at 23-24.

Mr. Davies discussed his preference for the HB 1007 EGR pathway. Takanock Ex. 2 at 4-5. Mr. Davies also took issue with a statement in Gorman's settlement testimony (at 5) that that there's a "level playing field" with IPPs now because GenCo has to get IURC approval for each generation project. *Id.* at 8. Mr. Davies opined that the Commission should require NIPSCO to use competitive procurement to serve megaload customers. Takanock Ex. 2 at. 6. He said requiring NIPSCO to procure generation via true market competition is the only meaningful way to ensure NIPSCO is serving its customers with least-cost resources. At a minimum, NIPSCO should be required to use an open and independent RFP process before being allowed to purchase "extra" GenCo capacity for its non-megaload customers. Takanock Ex. 2 at 6.

Mr. Deupree testified regarding Sec. A.3(i), that if GenCo is seeking declination of Commission jurisdiction, there is no need for Commission approval of GenCo's generation resources as "reasonable and necessary," and this portion of the Settlement Agreement should be rejected. Pub. Ex. 2 at 12.

ii. Settlement Reply Testimony. In response to the arguments raised by the non-settling parties, Mr. Parisi testified that it is fair for witnesses to note that the proposed

generation approval pathway under the Settlement Agreement is different than what is currently required under the CPCN Statute or HB 1007, but also stated that this should be no surprise, as GenCo's request for relief in this proceeding is specifically to be relieved of certain aspects of the Commission's jurisdiction under the CPCN Statute. In demonstrating this, he directly from a discovery response GenCo provided in response to discovery from CAC, which is attached to CAC Witness Thomas's testimony as Attachment TT-1. GenCo-NIPSCO Ex. 1-S-R at 21. When asked to "provide the legal authority that the Settlement Agreement relies on to propose a new, non-statutory Commission approval structure for generation projects of a public utility via this quoted Settlement Agreement provision," GenCo responded as follows:

> Ind. Code § 8-1-2.5-5 provides authority for the "commission to commence an orderly process to decline to exercise, in whole or in part, its jurisdiction over either the energy utility or the retail energy service of the energy utility, or both." (Emphasis added.) The Commission has broad discretion whether to completely or partially decline any aspect of its jurisdiction, which includes discretion to not require any future review of a generation resource or to require some review of a generation resource that is not as extensive as that required under Ind. Code § 8-1-8.5. As shown in Settlement Agreement Exhibit A, Revised Petition Attachment A, p. 14, this is not a "new, non-statutory Commission approval structure"; this is a partial declination of jurisdiction.

Id. at 22. He also explained that Section B.3.(i) was included in the Settlement Agreement in direct response to concerns raised by various parties in their direct testimony about complete declination of jurisdiction for generation projects, and the admittedly more limited review provided for under the Settlement is a reasonable compromise. *Id.* at 22-23. He also cited to Section 17(c) of chapter 7.9 of HB 1007, which provides: "This chapter does not preclude an energy utility from petitioning the commission under, or in conjunction with, other applicable statutes, including: (1) IC 8-1-2-24; (2) IC 8-1-2-42; (3) IC 8-1-2.5; (4) IC 8-1-8.5; (5) IC 8-1-8.8; or (6) IC 8-1-39; for approval of a project to meet the needs of large load customers." He then testified that use of an ARP and a request for declination under Ind. Code ch. 8-1-2.59 and use of special contracts under Ind. Code ch. 8-1-2-24 are explicitly called out in HB 1007 itself as appropriate means "to meet the needs of large load customers."

iii. <u>Settlement Hearing Testimony</u>. During cross-examination at the hearing, Mr. Parisi testified that use of the phrase "reasonable and necessary" was a result of Settlement Agreement negotiations and was not intended to create a new, non-statutory legal standard for review and approval of generation projects. He also confirmed that the approval GenCo may obtain under Section A.3 of the Settlement Agreement would not be a "preapproval" of any kind that could be later used by GenCo or NIPSCO to seek cost recovery from its non-megaload customers. Instead, any potential use of GenCo assets to serve non-megaload customers would be independently presented to the Commission in the future, consistent with the terms of the Settlement Agreement. Tr. at D-28-29.

iv. <u>Commission Discussion and Findings</u>. The Commission has previously declined jurisdiction for specific projects with respect to the CPCN Statute, so this is not a novel concept. *See Indianapolis Power & Light Company d/b/a AES Indiana*, Cause No. 45729 (IURC 10/21/2022). Indeed, under Indiana Code §8-1-2.5-5, the Commission has the

authority to decline jurisdiction "in whole" under the CPCN Statute, and the statute also explicitly provides for the Commission to partially decline to exercise our jurisdiction. While the approval process in the Settlement Agreement is not the same as any other statutory process, such as the ordinary CPCN process, an alternative is within the scope of the Commission's statutory authority.

When combined with the ongoing review of generation resources under Section A.1.(a) (Construction Compliance Filings) and the provisions of the Settlement Agreement that require GenCo's acquisition activities to reflect NIPSCO's expected load growth as shown in the IRP and negotiation processes, the Settlement Agreement appropriately balances the interests of GenCo in receiving expedited project review with the interests of other stakeholders in having access to relevant and important information when the Commission is reviewing a proposed generation project for approval. GenCo shall comply with all reporting requirements and otherwise follow the approval process for any future projects in accordance with the Settlement Agreement. Accordingly, the Commission approves this Section of the Agreement.

Additionally, consistent with the terms of the Settlement Agreement and Mr. Parisi's representations at the hearing, while the Commission will be reviewing and approving generation resources to be developed by GenCo as "reasonable and necessary" for NIPSCO to meet the load obligations of its megaload customers, any approval we provide under Section A.3 of the Settlement Agreement shall not be construed as a preapproval of cost recovery from any of NIPSCO's non-megaload customers or prejudgment of the prudency of a decision or need for a resource by NIPSCO should NIPSCO seek future approval of use of a GenCo resource to serve its non-megaload customers. Instead, any potential use or cost responsibility on the part of non-megaload customers will be independently presented to the Commission in a new proceeding and will be judged based on the merits of the proposal at that time.

G. General Principles for Affiliate Guidelines (Settlement Agreement Section A.4.).

i. Settling Parties' Testimony. Mr. Parisi explained that sub-section (b) of Section A.4 notes that NIPSCO currently has written procedures that relate to FERC's Standard of Conduct and ensures that non-public transmission function information is not shared with NIPSCO's marketing function employees. Assuming approval of GenCo's application and this Settlement Agreement, he testified GenCo will begin operating as an energy utility, and in accordance with sub-section (a), NIPSCO will be required to appropriately modify its current affiliate guidelines to reflect this fact and address how NIPSCO and GenCo may (and may not) interact. A copy of these affiliate guidelines will be provided to other Settling Parties and the OUCC in advance of submission to the Commission to allow a reasonable opportunity for those parties to comment on the affiliate guidelines before submission. GenCo-NIPSCO Ex. 1-S at 29.

Mr. Parisi said sub-section (c) confirms that GenCo will not have preferential access to NIPSCO assets or resources that are used for the generation, transmission, or delivery of electricity, and that access to or use of NIPSCO employees, assets, or resources will be consistent with any approved intercompany service agreement. Mr. Parisi further explained that based on the potential that GenCo may build future generation at the site of a retiring NIPSCO generation resource, this term is not to be construed to prevent GenCo from building, owning, or operating a

generation resource at a site where a retiring NIPSCO generation resource is currently located. He said however, if this were to occur, any remuneration from GenCo to NIPSCO associated with the lease or sale of such land will be accounted for appropriately and credited to NIPSCO's current retail electric customers. *Id.* at 30.

Mr. Parisi further testified about sub-section (d), explaining that it confirm what GenCo and NIPSCO have noted in the proceeding—special contracts will be used by NIPSCO to serve megaload customers, but GenCo will be the means through which energy and capacity is procured by NIPSCO to enable provide this service. It then provides that (1) GenCo and NIPSCO will not condition or tie any other agreement with a customer to a service provided by the other and that (2) no preference will be given, or discriminatory action taken, as a result of failure to use services provided by GenCo or NIPSCO. *Id.* at 31.

Mr. Parisi then described the remaining sub-section of Section 4. *Id.* at 31-32. He said sub-section (e) provides that GenCo will disclose information related to officers and directors and equity investors. This may be accomplished through reporting in a FERC Form 1, if required, or disclosure in the Annual Informational Filing required in Section 3(h). *Id.* at 31. He explained that sub-section (f) requires GenCo to enter into and file with the Commission for approval of affiliate services agreements and appropriately allocate shared services functions, which is specifically intended to ensure there is no cross-subsidization and the costs of all services to the benefit of GenCo are appropriately allocated to GenCo. *Id.* at 31-32. Sub-sections (g) and (h) simply state, respectively, that GenCo and NIPSCO will maintain separate financial records according to the applicable rules of accounting, which will be subject to regulatory review consistent with Ind. Code § 8-1-2-18, -49, -50, and -62 and that GenCo and NIPSCO will not intermingle funds. Sub-section (i) completes Section 4 of the Settlement Agreement and requires that all affiliate contracts and agreements between NIPSCO and GenCo be submitted for Commission approval using a procedure similar to the Commission's 30-day filing procedure, or as part of a regularly docketed proceeding. *Id.* at 32.

Mr. Gorman testified that NIPSCO and GenCo agreed to the establishment of affiliate guidelines. IG Ex. 1-S at 6-7. He explained that NIPSCO and GenCo both agreed to the development of affiliate guidelines to protect customers and competitive markets conditions. These include provisions to limit access to non-public information and separation of personnel to ensure neither GenCo nor NIPSCO obtain a competitive advantage over other providers. *Id.* Mr. Gorman testified that NIPSCO and GenCo have agreed that neither can "tie" customer agreements beyond retail electric service to service by the other. *Id.* He said this helps ensure that neither company can act discriminatorily against a customer who seeks to utilize services offered on the open market by other entities. The development of these guidelines is an important step in ensuring that the two companies do not interact in ways that would be detrimental to customers or competitive markets. *Id.* at 6-7.

ii. <u>Settlement Opposition Testimony</u>. Mr. Davies said affiliate standards should be imposed by the Commission now, not in a future proceeding and not just "shared" but vetted in a public forum. Meaningful affiliate guidelines are in the public interest because it protects customers from a utility's tendency toward self-dealing. Takanock Ex. 2 at 7-8.

iii. Commission Discussion and Findings. The Commission is not persuaded by Mr. Davies' recommendation. As we will explain, many parties have attempted to force into this docket issues that will be addressed in a future docket pursuant to the specific terms of the Settlement Agreement. We see no reason to mandate the development and submission of the actual affiliate guidelines before GenCo and NIPSCO know that the base GenCo framework that has been proposed is acceptable. In making these findings, the Commission approves this Section of the Agreement. Consistent with the Settlement Agreement, GenCo and NIPSCO must submit to the Commission a copy of appropriately revised affiliate guidelines no later than the date on which the first GenCo-NIPSCO PPA is proposed for Commission approval.

H. Settling Parties' Commitments (Settlement Agreement Section A.5.) and Procedural Aspects and Presentation of the Settlement Agreement (Section B).

i. Settling Parties' Testimony. Mr. Parisi explained that Section 5 outlines the Settling Parties' commitments, which are to (a) support the GenCo declination request as modified by the terms of the Settlement Agreement, and (b) support the format and procedural timelines for filings outlined in the Settlement Agreement in any proceeding in which they participate. GenCo-NIPSCO Ex. 1-S at 32-33. He also explained that Section B includes general terms and conditions that are consistent with the terms ordinarily included in Commission-approved settlement agreements, including a term in Section B.9. that the communications and discussions during the negotiations and conferences which produced the Settlement Agreement have been conducted on the explicit understanding that they are or relate to offers of settlement and contained the mental impressions and work product of attorneys present and shall therefore be confidential and privileged communications. *Id.* at 33.

ii. Settlement Opposition Testimony. Mr. Deupree took issue with Sec. B.4. Mr. Deupree testified the current proceeding before the Commission does not address the recovery or allocation of any costs; therefore, it is inappropriate for the Settlement Agreement to incorrectly reference that it does so. Pub. Ex. 2 at 13. CAC Witness Thomas expressed a similar concern. CAC Ex. 2 at 17-18.

iii. Settlement Reply Testimony. Mr. Parisi explained that this was simply a scrivener's error, an inadvertent carry-over of a traditional term in a settlement. Once the issue was raised in testimony, the Settling Parties conferred and immediately agreed to its removal. He then referred to the revised Settlement Agreement which reflects the deletion.

iv. Commission Discussion and Findings. The Commission is satisfied with this explanation as to the scrivener's error and believes no further action regarding this issue is necessary. This section of the Settlement Agreement is thus approved.

I. Other Opposition.

i. Settlement Opposition Testimony. Ms. Piontek discussed her belief that the competitive market would be undermined by the lack of a requirement in the Settlement Agreement for competitive procurement for any level of generation or capacity sourced by GenCo and meant to serve NIPSCO's megaload customers or even NIPSCO's non-megaload customers. CGA Ex. 2 at 9. She also claimed in restricting the Rate 531 Tier 3 option

to customers up to 50 MW and simultaneously shunting customers at or above 50 MW into its GenCo construct, NIPSCO will effectively reduce both the pool of future customers participating in the competitive market or independently contracting with IPPs and the pool of future customers to be served via the competitive procurement process employed pursuant to NIPSCO's IRP. CGA Ex. 2 at 14. She recommended if the IURC is inclined to approve the Settlement Agreement, it should require GenCo to procure a percentage of generation using competitive all-source bidding and require NIPSCO to participate in competitive bidding run by an independent third-party when utilizing GenCo assets to serve non-megaload customers. CGA Ex. 2 at 12.

Ms. Piontek also claimed the Settlement Agreement undermines regulatory oversight in numerous ways, including by continuing GenCo's original request for blanket, unbounded relief from IURC jurisdiction (*i.e.*, for all presently unplanned future projects) over a sweeping range of statutes, requests which CGA finds entirely inappropriate insofar as these involve the CPCN statutes (including the Clean Coal Statute) and the Enforcement Statutes. CGA Ex. 2 at 14. She further claimed if GenCo never intended to procure coal-fired generation at all, then declination from the Clean Coal Statute would be irrelevant and unnecessary. GenCo should seek declination on a case-by-case basis, utilize the IURC's existing CPCN proceeding, or pursue project approval through the new expedited generation proceeding pursuant to HB 1007. CGA Ex. 2 at 15. She claimed regulatory oversight would be undermined based on the Settling Parties' request for indefinite relief from the Clean Coal Statute and from Ind. Code 8-1-2-64 (witnesses; depositions), Ind. Code 8-1-2-68 (rates and charges; order fixing), Ind. Code 8-1-2-69 (complaints against utilities; orders of commission) and Ind. Code 8-1-2-115 (enforcement of law; recovery of forfeiture or penalties), collectively "the Enforcement Statutes." Further, regulatory oversight would be undermined insofar as GenCo assets could be utilized by NIPSCO to serve its non-megaload customers. CGA Ex. 2 at 10.

Mr. Thomas said he believed the Settlement Agreement should have addressed the costs incurred to serve megaload customers being shifted to existing customers and the financial risk related to ownership of generation assets should megaload customers' demand diminish or disappear before the expiration of the useful life of the generation assets. CAC Ex. 2 at 3. He said the Settlement Agreement doesn't address concern about "ringfencing" because NIPSCO's existing retail customers could be subject to significant costs if (a) the amounts paid by the megaload customer under the special contract are insufficient on an annual basis to cover the cost of the PPA to serve that megaload for the year, and/or (b) the duration of the special contract is shorter than the PPA which could leave NIPSCO's retail customers holding the bag if the special contract is not renewed or extended. He claimed there is insufficient detail regarding the PPAs and specifical contracts. CAC Ex. 2 at 3-4. He said he is still concerned that neither NIPSCO nor GenCo specify what terms and conditions will be or commit to standardized terms across similarly situated megaload customers to address the risk that a megaload customer departs from its special contract early. His desire is that requirements similar to the tariff from I&M Cause No. 46097 be utilized. CAC Ex. 2 at 5-6. Mr. Thomas said he is still concerned about the risk of a lower credit rating and higher debt costs from GenCo's use of NIPSCO's credit and testified that it is inadequate to have the parties litigate this case before the commission is presented the first PPA/special contract filing. He further opined that the Commission should first determine in this proceeding the customer protections necessary to serve the public interest, and then let private parties negotiate in the light of the Commission directive. CAC Ex. 2 at 7-8. He also argued that NIPSCO should have a right to match any offer to purchase GenCo assets and argues that NIPSCO and GenCo

should be required to address how Accumulated Deferred Income Tax ("ADIT") will be handled in the future if there is a transfer of assets from GenCo to NIPSCO. *Id.* at 8-9; 17.

ii. Settlement Reply Testimony. In response to Ms. Piontek, Mr. Parisi reiterated that GenCo was not created to be an IPP or to compete with IPPs, and there are provisions in the Settlement Agreement that ensure this is the case. GenCo-NIPSCO Ex. 1-S-R at 31. He said while it is true that NIPSCO has historically used RFPs as part of its IRP to procure generation for many projects, NIPSCO has also recently elected to self-build a 400 MW gas-fired peaking facility, which received Commission approval in Cause No. 45947 (IURC 7 10/16/2024), and if GenCo is not approved, NIPSCO has the discretion to self-build generation projects to serve megaload customer needs and to propose to utilize construction work in progress ("CWIP") ratemaking, with costs recovered from all customers under the CPCN Statute. It has no obligation to allow any IPP to compete to serve its retail load if it does not desire to do so. The key distinction with GenCo is that it allows NIPSCO to provide needed energy and capacity in a way that protects its current customers from risk. This is what GenCo is about. *Id.* at 32.

He also responded to Ms. Piontek by confirming that GenCo has no intention to procure coal-fired generation; however, in the unlikely event GenCo were to propose to acquire a coal-fired generation asset, any issues related to the Clean Coal Statute would be addressed in the proceedings the Settlement Agreement contemplates, as GenCo would either file an asset-specific declination request or propose Commission approval of the asset. GenCo-NIPSCO Ex. 1-S-R at 36. He said as noted in his rebuttal testimony (at 29), since GenCo owns no coal-fired generation and has no plans to, he fails to understand how the Clean Coal Statute would have application. *Id*.

As to Mr. Thomas, Mr. Parisi explained that he largely addressed these issues in his rebuttal testimony at Questions / Answers 8 and 9, but in light of the scope of the proceeding reiterated by the Presiding Officers in the May 22 docket entry (at par. 6), he reiterated that the CAC's desire to address contracts that have not been proposed and are not pending before the Commission is outside of the scope of this declination of jurisdiction proceeding—plain and simple. Despite the fact that many, if not most, declination of jurisdiction proceedings involve an underlying PPA or build transfer agreement ("BTA") with an Indiana utility, Mr. Parisi said he was unaware of any instance in which the Commission has addressed substantive issues related to a PPA or BTA in a declination proceeding. Instead, as is logical, the Commission waits until the PPA or BTA is presented for approval and then addresses the contract at that time. He went on to explain that he noted it would be unreasonable to mandate that GenCo first offer any assets to NIPSCO, unless there is an accompanying guarantee of cost recovery from current NIPSCO customers, which GenCo is not seeking. He also emphasized the scope of this declination proceeding. *Id.* at 35. He said while the Settlement Agreement provides for the potential transfer of assets between GenCo and NIPSCO, this is by no means a certainty or even a likelihood. In the event this were to occur at some point in the future, the Commission will be presented with the relevant evidence—including related to all accounting matters—and can make its decision about a proposed transfer at that time. *Id.* at 35-36.

iii. Commission Discussion and Findings. As to the clean coal statutes, so long as GenCo does not intend to procure coal-fired generation, there is no need for the Commission to retain jurisdiction under this statute, especially since the CPCN and Clean

Energy Statute deal with cost recovery for which the GenCo structure does not provide. Should GenCo in the future depart from this commitment, the Commission could reassert its jurisdiction with respect to this statute. Exhibit A to the Settlement Agreement reasonably deals with this issue and lists the statutes for which GenCo seeks declination; the Commission is satisfied that all statutes provided in this list will serve the public interest (as more thoroughly discussed below) and Settlement Agreement, inclusive of Exhibit A, is therefore approved, with one modification that is discussed above.

With regard to Ms. Piontek's concerns about competitive procurement for the benefit of IPPs, we note that this Commission's public interest concerns are focused on protecting the interests of existing retail customers while meeting the demand of new megaload customers. The GenCo structure was created to serve this focus. Without the GenCo structure, NIPSCO would have no obligation to satisfy its load needs through competitive procurement with IPPs. NIPSCO, like any public utility, has the discretion to self-build generation projects to serve megaload customer needs, provided it meets all applicable statutory requirements. NIPSCO, as noted by Mr. Parisi, recently used that discretion when it proposed to self-build a generation project in Cause No. 45947 and demonstrated significant savings to customers based on that decision. Indiana Code § 8-1-8.5-5 imposes an obligation to competitively bid construction activities when practicable, but it does not require a public utility to solicit bids for capacity and energy from other sources. So, the competitive procurement commitment Ms. Piontek seeks is not one which already exists. And as we have noted previously, GenCo is not being created to compete with IPPs – GenCo's resources will be tailored to serve NIPSCO's retail megaload customers' needs. We therefore reject Ms. Piontek's arguments, but still caution NIPSCO that we expect it to continue to use prudent utility practices in securing agreements to serve its retail load, including considering factors, such as cost, when making decisions with respect to its resource selections.

Mr. Thomas is simply attempting to expand the scope of these proceedings to address issues that will arise and be addressed in future proceedings before this Commission. While on redirect examination at the hearing Mr. Thomas tried to distinguish between "broader policy terms" (Tr. at D-81, line 6) that the Commission should mandate be included in all special contracts or PPAs versus terms that parties should be able to negotiate, he ultimately conceded that "I don't think we should have a standard contract, and those kinds – that to me is of litigation that should happen contract by contract with contract specific terms[.]" Tr. at D-81, lines 1-4. CAC's desire to interject itself into commercial negotiations and limit the flexibility GenCo and NIPSCO have in addressing the needs of customers of various types, sizes, and business models, is rejected. Each special contract and PPA will be independently presented to the Commission for review, parties will have every opportunity to offer their perspectives and arguments about the substantive terms at that time, and the Commission can make its decision at the point when it actually has an agreement before it to review. CAC's concerns regarding cost recovery and discriminatory treatment are hypothetical and premature at this time, and would be more appropriately raised and addressed in a regulatory filing related to the approval of any special contract, just like the GenCo and the Settling Parties have recommended. For these reasons, we reject the request from Mr. Thomas to mandate certain terms and conditions that must be included in every retail special contract NIPSCO negotiates with a megaload customer, as that is beyond the scope of GenCo's request for declination of jurisdiction.

J. <u>Alternatives to the Settlement Agreement and GenCo Structure</u>.

i. Settlement Opposition Testimony. The non-settling parties who oppose approval of the Settlement Agreement did not challenge the need for a regulatory strategy to address potential challenges related to serving new megaload customers, but, instead, they offered other alternative means to address their particular concerns. There were two main alternatives discussed by the other parties: (1) use of the EGR path provided for in HB 1007, or (2) creation of a large load tariff, similar to the one recently approved by the Commission through an approved settlement for Indiana Michigan Power ("I&M") in Cause No. 46097.

With respect to HB 1007, Ms. Piontek claimed the GenCo strategy is no longer necessary based on this newly-enacted law, and Mr. Davies argued that NIPSCO should be required to use the EGR pathway. CGA Ex. 2 at 3-4; Takanock Ex. 2 at 4-5. Mr. O'Connell offered similar testimony, pointing to HB 1007 as an alternative path that could address the speed-to-market concern GenCo has noted. LaPorte Ex. 2 at 3.

Mr. Thomas, on the other hand, proposes NIPSCO to be required to adopt a tariff offering that is similar (if not identical) to that used by I&M, and Takanock Witness Davies expresses the opinion that I&M's tariff offering is a better option than what GenCo has proposed. CAC Ex. 2 at 5-6; Takanock Ex. 2 at 10-11. Mr. O'Connell also indicated support for a tariff offering, such as a new megaload tariff or revisions to current Rate 531 and use of HB 1007 to submit an EGR plan. LaPorte Ex. 2 at 3. Mr. O'Connell opined that the tariff established by I&M in Cause No. 46097 is a "well established regulatory path" NIPSCO should have followed. LaPorte Ex. 2 at 3. He further testified 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. LaPorte Ex. 2 at 8-10.

ii. Settlement Reply Testimony. Mr. Parisi explained that although all utilities are committed to providing our customers with safe, reliable service, there is divergence among the utilities on many factors, including, but not limited to: (1) corporate ownership structure, with some being investor owned and others not; (2) balance sheet strength or market capitalization of the utility's corporate parent; (3) total peak load; (4) geography, which can impact the seasonal peak each experiences; (5) concentration of customers and size of electric service territories; and (6) the size of certain classes of customers, with NIPSCO having the highest concentration of large industrial customers. GenCo-NIPSCO Ex. 1-S-R at 25. He said just as there are differences and variations among Indiana's electric utilities, there is a broad range of what can be just, reasonable, and in the public interest. GenCo-NIPSCO Ex. 1-S-R at 26.

He explained that I&M adopting a large load tariff does not mean that NIPSCO should be mandated to do so or that the proposed GenCo structure is not just, reasonable, and in the public interest. Conversely, if the Commission were to approve the Settlement Agreement, it would not mean that the GenCo structure should be mandatory for any other utility or that it is the only way to address the energy needs of data centers and similar customers, nor would it invalidate the means I&M chose to pursue to address the opportunity and challenge presented from large load additions. *Id.* at 26.

He explained that HB 1007 provides two additional options or alternative means for serving large load customers and that both the use of Alternative Regulatory Plans and declinations of jurisdiction under Ind. Code ch. 8-1-2.5 and use of special contracts under Ind.

Code ch. 8-1-2-24 are explicitly called out in HB 1007 itself as appropriate means "to meet the needs of large load customers." *Id.* at 27.

Mr. Parisi pointed out that the Commission's order in the I&M case approved a settlement agreement and that settlement agreements are non-precedential under *Southern Ind. Gas & Elec. Co.*, Cause No. 45990 (IURC 3/19/2025) (Order on reconsideration). *Id.* at 28. He reiterated this point at the hearing (Tr. at D-36), and Mr. Thomas also acknowledged the non-precedential nature of settlements when questioned at the hearing. Tr. at D-77. Mr. Parisi explained that furthermore, CAC's position in that case on direct (*i.e.*, before settlement) is summarized in the Cause No. 46097 Order (IURC 2/19/2025) on page 12, and the CAC recommended that, because of the risks of serving large load customers, "the portion of a new large load customer's load in excess of 150 MW be 'firewalled' from existing ratepayers with respect to cost allocation and cost recovery of generation costs." *Id.* at 28-29. He said this is what the GenCo structure is designed to do – firewall the existing customers from the cost allocation and cost recovery of generation procured to serve large load customers by having GenCo, rather than NIPSCO, procure those assets. *Id.* at 29.

He reiterated the number one objective in this proceeding has been to protect retail customers, and that seems to have been lost on other parties (or is inconsistent with their objectives). He opined as to why NIPSCO has not made a tariff offering to serve megaload customers—because if NIPSCO were to do so, then NIPSCO would need to make investment in new generation to serve them, regardless of the risk presented to other customers from doing so. *Id.* at 9. He testified that NIPSCO has a duty to prudently invest in and plan its system and to provide safe, reliable service at just and reasonable rates to those within its electric service territory. If a potential customer with a gigawatt of load were to seek service, NIPSCO would seek to make the investments required to serve this customer, while also ensuring that its other customers are appropriately protected from the potential risks of doing so. It is the protection of NIPSCO's retail customers from undue risk that led to the creation of the GenCo structure, and this protection of NIPSCO's retail customers is a key aspect of why approval of the Settlement Agreement is in the public interest. *Id.* at 30.

iii. <u>Commission Discussion and Findings</u>. In addressing challenges and opportunities in any area of utility regulation, including serving large load customers, it would be inappropriate to endorse or mandate a one-size-fits-all approach. Instead, as we historically have done, we allow each utility within the state to evaluate the situation and propose potential solutions that are tailored to the needs of the particular utility and its customers—which, as Mr. Parisi notes, are not uniform, even among Indiana's investor-owned utilities. When proposed solutions are presented to us, we evaluate each proposal based on its individual merits under the applicable legal standard.

With respect to arguments about HB 1007 specifically, the statutory text could not be clearer. As provided in chapter 7.9, Section 17(c), HB 1007 "does not preclude an energy utility from petitioning the commission under, or in conjunction with, other applicable statutes, including: (1) IC 8-1-2-24; (2) IC 8-1-2-42; (3) IC 8-1-2.5; (4) IC 8-1-8.5; (5) IC 8-1-8.8; or (6) IC 8-1-39; for approval of a project to meet the needs of large load customers." Therefore, the proposed GenCo structure and strategy is clearly contemplated by and is not inconsistent with or somehow foreclosed by HB 1007. Quite the opposite, in fact, as use of an ARP and a request for

declination under Ind. Code ch. 8-1-2.59 (as well as use of special contracts under Ind. Code ch. 8-1-2-24) are explicitly called out in HB 1007 as appropriate means "to meet the needs of large load customers."

With respect to the arguments raised by non-settling parties, it is important to bear in mind that as presented in the evidence in this case, the purpose of GenCo is to reasonably insulate retail customers from the risk of procuring the generation to serve megaload customers. This is the same overarching purpose underlying I&M's revisions to its tariff, and the provisions of HB 1007. Mr. Parisi explained that "[i]f the Settlement is rejected, there is the more traditional approach to recovery of major capital investments." GenCo-NIPSCO Ex. 1-S-R at 37. He also explained that the more traditional path "also includes the much greater protection of cost recovery (with issuance of a CPCN and ongoing review) from all NIPSCO's current and future customers, as NIPSCO's entire generation portfolio would be utilized to serve its customer base." *Id.* We find Mr. Parisi's reasoning persuasive. Without this structure, NIPSCO either potentially does not serve the new megaload customers or it serves them through special contracts or a newly created tariff offering. While, as Mr. Parisi explained, this would be acceptable to NIPSCO, he is correct to point out that this "undeniably puts incremental risk directly on current customers, even with appropriately drafted special contract terms that are intended to mitigate some of this risk." GenCo-NIPSCO Ex. 1-S-R at 37.

Absent approval of the GenCo structure, NIPSCO would be responsible for procuring, operating, and maintaining the generation resources itself. In either circumstance, however, NIPSCO could obtain generation by securing CPCNs through the more traditional approach, or the more expedited review provided under HB 1007. In either case, NIPSCO's existing retail customer base would continue to be financially responsible for at least some portion of NIPSCO's obligations, even if the load ultimately does not materialize or, if it materializes, is reduced in future years before full recovery of the costs. We appreciate NIPSCO's desire to create a structure that is designed to avoid the potential imposition of cost responsibility on existing and future non-megaload customers.

GenCo's declination request and overall structure (as modified in the Settlement Agreement) is a reasonable and appropriate response to the opportunities and challenges the electric industry is facing. The Commission will not reject GenCo's proposed declination of jurisdiction presently before us and mandate that NIPSCO abandon it for a solution that was approved by the Commission for another utility, particularly when that other utility's solution was the result of a negotiated, settled resolution that is non-precedential. Rather, for the reasons discussed immediately below, we approve the Settlement Agreement, as modified in this order, as in the public interest and decline to mandate adoption of some other solution.

K. Public Interest and Ultimate Findings Approving Settlement Agreement. Settlements presented to the Commission are not ordinary contracts between private parties. *United States Gypsum, Inc. v. Indiana Gas Co.*, 735 N.E.2d 790, 803 (Ind. 2000). When the Commission approves a settlement, that settlement "loses its status as a strictly private contract and takes on a public interest gloss." *Id.* (quoting *Citizens Action Coalition v. PSI Energy*, 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. *United States Gypsum*, 735 N.E.2d at 795 (citing *Citizens Action Coalition v. Public Service Co.*, 582 N.E.2d 330, 331 (Ind. 1991)). The Commission's own procedural rules require that settlements be supported by probative evidence. 170 IAC 1-1.1-17(d). Therefore, before the Commission can approve the Settlement Agreement, we must determine whether the evidence in this cause sufficiently supports the conclusions that it is reasonable, just, and consistent with the purpose of Ind. Code § 8-1-2-1 et seq., and that such agreement serves the public interest.

i. <u>Settling Parties' Testimony</u>. Mr. Parisi explained that the Settling Parties (a) believe that the Settlement as a whole represents a reasonable resolution of the issues in this Cause and approval of the Settlement Agreement is in the public interest, and (b) strongly encourage the Commission, after considering the evidence in support of the Settlement Agreement, to find the Settlement Agreement to be reasonable and in the public interest and promptly enter an order approving the Settlement Agreement in its entirety. GenCo-NIPSCO Ex. 1-S at 2. He said, as noted in his rebuttal testimony, the opportunity presented by megaload customers is unlike anything previously experienced in the industry. Attracting and serving these types of customers has the potential to lead to tremendous benefits for Indiana, NIPSCO, and its customers, but there are also accompanying challenges. This is where GenCo comes in, as it is being proposed in direct response to these challenges—including enabling the development of needed generation resources more quickly than under traditional regulation while providing reasonable and appropriate protections to NIPSCO and its customers. Id. at 34. Mr. Parisi testified that with the clarifications and commitments GenCo has provided in its rebuttal testimony and the Settlement Agreement, it is clear that approval of GenCo's request for limited declination of jurisdiction is in the public interest and should be approved. Id. at 35.

Mr. Gorman testified that the Settlement Agreement is a comprehensive resolution of the issues raised in this proceeding on the relief requested by GenCo. Specifically, the Settlement Agreement addresses concerns raised by himself and others with respect to the scope of GenCo's requested declination of Commission jurisdiction, Commission oversight and review of critical GenCo actions, and the potential interrelationship between GenCo and NIPSCO. With appropriate safeguards addressing these concerns embedded in the Settlement Agreement, which incorporates modifications and clarifications made in GenCo's rebuttal testimony and NIPSCO's cross-answering testimony, as well as additional terms responsive to the issues raised by the Industrial Group, he opined that the public interest will be served by the Commission declining to exercise its jurisdiction over GenCo as a public utility in the manner and to the extent delineated in the Settlement Agreement. IG Ex. 1-S at 1-2.

Mr. Gorman further testified that in his view, the Settlement Agreement implements changes to the scope of GenCo's request which provide meaningful protections to existing ratepayers and reasonably addresses the concerns raised in this proceeding. The Settlement Agreement terms retain the objective of allowing GenCo to develop and hold the capacity resources needed to meet the demands of megaload customers while protecting existing ratepayers from risk, while establishing limitations and protections responsive to the issues and concerns presented in his initial testimony. In this way, the Settlement Agreement and the agreed declination are broadly supportive of a policy in Indiana to encourage economic development by attracting new business to the state, and further, will remove barriers to NIPSCO's ability to serve

the new megaload customers. *Id.* at 8.

ii. Settlement Opposition Testimony. Mr. Deupree testified that the proposed Settlement Agreement falls short of including the fundamental requirements necessary to show the proposal is consistent with the public interest. Pub. Ex. 2 at 14. He recommended specific consumer safeguards be implemented if the Commission finds that GenCo has met its burden under Indiana Law, including retaining jurisdiction under a number of statutes, rejecting the proposal to lower the megaload definition to 50 MW, not allowing GenCo to obtain eminent domain authority, and not allowing GenCo to obtain eminent domain authority. *Id.* at 14-15.

On behalf of CAC, Mr. Thomas said he did not think the proposed Settlement Agreement is in the public interest and that it appeared to him to be an attempt to bolster a bad initial proposal with minor tweaks that fail to address most of the fundamental concerns that were raised, and that create some new problems of their own. He expressed the opinion that the structure of an affiliate under common control owning and operating generation resources and exclusively selling power for megaloads to a public utility, while also employing eminent domain, is unprecedented and requires maximum scrutiny from regulators and ratepayer representatives. CAC Ex. 2 at 18.

Ms. Piontek, on behalf of CGA, said approval of the Settlement Agreement by the Commission would be inconsistent with articulated policy principles. Not only does NIPSCO's GenCo strategy undermine the benefits of a robust, competitive power market as contemplated by Indiana's Five Pillars, but the particular terms of the Settlement Agreement would bypass critical standards for obtaining the declination of jurisdiction sought by the NIPSCO Settling Parties. She said, as she contended in her direct testimony filed in this case on April 1, 2025, GenCo's request for relief, and now the NIPSCO Settling Parties' Settlement Agreement, is not in the public interest CGA Ex. 2 at 9.

Mr. Davies on behalf of Takanock offered testimony alleging that the Settling Parties took a bad idea and made it worse. He said the GenCo structure is a "black box"—no megaload customer interested in coming to Indiana knows if or when it can get service from NIPSCO and GenCo, leaving megaload customers to negotiate for service against a monopoly without any Commission oversight and creating uncertainty and ambiguity, which in turn creates a business risk. For these reasons, Takanock recommended that the Commission reject the Settlement Agreement as it is not in the public interest. Takanock Ex. 2 at 3-4. He also said that certain terms were missing from the Settlement Agreement and that is why it is not in the public interest. *Id.* at 5-6.

iii. Settlement Reply Testimony. Mr. Parisi concluded his settlement reply testimony by explaining the potential impact and path forward if the Settlement Agreement is not approved by the Commission. *Id.* at 36-40. He explained that if the Settlement Agreement is rejected, there is the more traditional approach to recovery of major capital investments. NIPSCO can file requests under the CPCN Statute and Clean Energy Statute for approval of generation projects, including the financial incentives those statutes provide, which could allow for CWIP recovery from customers during the period when the generation project is being constructed and before it is in service. This path also includes the much greater protection of cost recovery (with issuance of a CPCN and ongoing review) from all NIPSCO's current and future customers, as NIPSCO's entire generation portfolio would be utilized to serve its customer base.

This recovery would be based on NIPSCO's regulated return on equity, which is a reasonable return under the circumstances where NIPSCO's entire customer base serves as a backstop for recovery. He noted that all of this would be acceptable to NIPSCO, but it undeniably puts incremental risk directly on current customers, even with appropriately drafted special contract terms that are intended to mitigate some of this risk and that it would also impact the speed at which generation can be developed to meet the emerging needs of megaload customers. *Id.* at 37.

He explained on the other hand, there is the path proposed in this proceeding which protects NIPSCO's current customer base and is encouraged by the Settling Parties. The Commission can approve the Settlement Agreement, which has limitations on GenCo's scope of operation, a higher level of Commission oversight than under traditional declination cases, project-specific review and approvals for generation assets, requirements to develop appropriate affiliate guidelines, and other protections and restrictions in place. He confirmed that this is the path NIPSCO desires to take and will take if the Settlement Agreement is approved. He also acknowledged some non-settling parties allege that the GenCo structure is being proposed for the purpose of allowing GenCo to realize returns that are higher than what NIPSCO traditionally realizes (*see, e.g.*, LaPorte witness O'Connell's settlement testimony at 4). He explained that as previously outlined, there is a path for traditional recovery of generation costs from all NIPSCO's retail customers that allows for earlier, more timely recovery of costs through mechanisms that are more certain, and there is, relatively speaking, more risk to GenCo presented from the proposed path when compared to traditional rate base recovery. *Id.* at 38. For this reason, he noted that in future proceedings, GenCo is likely to request the opportunity to earn a return above NIPSCO's regulated return on equity, as the return profile of an investment should be commensurate with the risk presented. *Id.* at 38-39. But GenCo would be at risk to appropriately manage its performance, given any counterparty will demand certain performance requirements and limits on their risk. However, as GenCo and NIPSCO have emphasized throughout this proceeding, the proposed GenCo structure is about protecting existing customers from risks associated with large capital investments in the infrastructure necessary to serve megaload customers—risks that the parties to this proceeding have acknowledged. It also serves as a vehicle to expedite development of the needed generation, which is desired by prospective megaload customers. *Id.* at 39. He concluded by affirming that it is the Commission's decision whether to approve the Settlement Agreement and allow utilization of GenCo as a mechanism to protect NIPSCO's retail customers, or whether to reject the Settlement Agreement, thereby signaling to NIPSCO that traditional generation approval and cost recovery is the preferred means for NIPSCO to serve these customers, despite the risks posed to other customers from doing so. *Id.* at 39-40.

iv. <u>Commission Discussion and Findings</u>. The Commission has before it substantial evidence from which to determine the reasonableness of the terms of the Settlement Agreement. All parties had an opportunity to participate in and monitor the settlement negotiations, and as the Settling Parties noted, the Settlement Agreement addresses many of the concerns and arguments raised by parties other than the NIPSCO Industrial Group. *See* GenCo-NIPSCO Ex. 1-S at 4; 7-10; and IG Ex. 1-S at 5. Nonetheless, because the Settlement Agreement is not unanimous, we must address the outstanding concerns raised by the non-settling parties which we have not elsewhere addressed in this Order.

We are not persuaded by any of the parties opposing the Settlement Agreement that the

Settlement Agreement should not be found to be in the public interest. We have recited the benefits flowing to all customers from the GenCo structure and the modification and additional protections added to the structure by the terms of the Settlement Agreement. When taken as a whole, the Settlement Agreement is a reasonable resolution to the issues raised in this proceeding and represents a fair balance between the needs and interests of GenCo, NIPSCO, and customers. We find the evidence of record supports approval of the Settlement Agreement as a reasonable resolution of the issues affecting each of the non-settling parties' concerns. Based upon our review of the record, the Commission finds that the Settlement Agreement is within the range of potential outcomes and represents a fair, just, and reasonable resolution of the issues. The Commission further finds and concludes that the Settlement Agreement is reasonable, supported by substantial evidence, and in the public interest. Accordingly, the Settlement Agreement is approved, with the one modification discussed above.

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

The Power Plant Construction Act in Ind. Code § 8-1-8.5-1(a) defines "public utility" to mean a: (1) public, municipally owned, or cooperatively owned utility; or (2) joint agency created under Ind. Code ch. 8-1-2.2. Petitioner is a limited liability company that will generate electricity for the specific purposes of ultimate consumption by NIPSCO's retail, megaload customers located in Indiana. The Commission has previously asserted jurisdiction over investor-owned public utilities pursuant to Ind. Code ch. 8-1-8.5. *See, e.g., Indianapolis Power & Light Co.*, Cause No. 43235, 2007 WL 8420716 (IURC June 13, 2007). In addition, Petitioner's property "is used in a business that is public in nature and not one that is private." *See Foltz v. City of Indianapolis*, 130 N.E.2d 650, 659 (Ind. 1955) ("Foltz"). Petitioner's business is "impressed with a public interest" and would render service "of a public character and of public consequence and concern" as also considered in *Foltz.*

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 Facilities is for the purpose of sale of the power generated these plants in the wholesale market to NIPSCO within 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, 2006 WL 4400582 (IURC Dec. 6, 2006) ("Benton County"). In *Benton County*, the Commission specifically found that it had jurisdiction over a wind energy generator with wholesale operations such as Petitioner. Consequently, based upon our application of the statutes and precedents discussed herein to the facts and circumstances in this case, we find that Petitioner is a "public utility" within the meaning of Ind. Code § 8-1-2-1 and Ind. Code § 8-1-8.5-1 and is an "energy utility" within the meaning of Ind. Code § 8-1-2.5-2 for purposes of the

ownership, development, financing, construction, and operation of the Facilities.[8]

Once the Commission concludes Petitioner is a public utility as defined in the Public Service Commission Act and in the Power Plant Act, the Commission is authorized to decline to exercise, in whole or in part, jurisdiction over an energy utility if certain conditions are satisfied. Under Ind. Code § 8-1-2.5-5, the Commission may enter an Order, after notice and hearing, that the public interest requires the Commission "to commence an orderly process to decline to exercise, in whole or in part, its jurisdiction over ... the energy utility ..." Ind. Code § 8-1- 2.5-5(a).

In determining whether the public interest will be served by a declination of jurisdiction, the Commission will consider the following:

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

Ind. Code § 8-1-2.5-5(b).

Further, as noted by the Commission in *Indianapolis Power & Light Co.*, Cause No. 45729 (IURC 10/21/2022), p. 13, "while the statute directs the Commission to consider the enumerated factors, the statute does not require that all factors be applicable. The Commission has previously declined jurisdiction where only a couple of statutory considerations were applicable. *See e.g.*, *Calvary Energy Center, LLC,* Cause No. 45474, pp. 20-21 (IURC May 26, 2021)."

Indiana Code § 8-1-2.5-2 defines "energy utility," in part, as a public utility within the meaning of Ind. Code § 8-1-2-1. As described in the Petition initiating this Cause and Mr. Parisi's testimony, NIPSCO GenCo intends to construct, own, and operate generation facilities and related assets and to enter into certain contracts with NIPSCO to enable NIPSCO to supply retail service to megaload customers in its service territory. Pet. Ex 1 at 29. This request is further refined by the Settlement Agreement the Commission is approving as part of this proceeding. Accordingly, we find GenCo to be a "public utility" within the meaning of Ind. Code § 8-1-2-1. This determination means it is an "energy utility" under Ind. Code § 8-1-2.5-2 as well. Based on this

[8] Ind. Code § 8-1-2.5-2 defines "energy utility" to mean, among other things, a public utility or municipally owned utility within the meaning of Ind. Code § 8-1-2-1. Because we have determined that Petitioner is a "public utility" under Ind. Code § 8-1-2-1, Petitioner is also an "energy utility."

evidence and consistent with the Settlement Agreement, we find that GenCo is a public utility.

Further, the evidence in this Cause, most notably, Settlement Agreement Exhibit A, provides substantial evidence to support a Commission determination that it is in the public interest to decline to exercise its jurisdiction of the identified statutes in conformance with the Settlement Agreement. As shown in Settlement Agreement Exhibit A, the sections of which we will declined jurisdiction were carefully evaluated, chapter-by-chapter and section-by-section, to determine applicability to GenCo's intended activities and seeks only declination of jurisdiction of those that are necessary to further the public interest, anchored in the principles of: (1) protecting existing customers; (2) serving new customers with speed and flexibility; and (3) maintaining NIPSCO's financial integrity. Settlement Agreement Exhibit A lists each statute for which at least partial declination is sought and provides support for why declination is appropriate. It also specifically explains how the public interest would be served by the declination of each chapter or section as framed by the public interest considerations of Ind. Code § 8-1-2.5-5(b).

The exemptions from the various provisions of Ind. Code ch. 8-1-8.5, as further refined from the Settlement Agreement and presented in Settlement Agreement Exhibit A, are to eliminate provisions that have limited application to this structure and are also to assure speed-to-market, which is important to attract these megaload customers. Because GenCo will not provide service at the retail level, other sections listed in Settlement Agreement Exhibit A (*e.g.*, Ind. Code § 8-1-2-42) simply have no application. Other sections would be unnecessary and wasteful to apply to GenCo given the sophistication of the megaload customers, which is illustrated by DX Hammond and Takanock's participation in this proceeding. Other proposed exemptions are important to attract the capital necessary, do so quickly enough, and provide flexibility to accomplish the needed speed-to-market. The Commission's exercise of jurisdiction under many of the chapters or sections identified in Settlement Agreement Exhibit A are unnecessary and wasteful as contemplated by Ind. Code § 8-1-2.5-5(b)(1). Because this structure supports NIPSCO's service to highly sophisticated megaload customers, competitive forces will demand reliable service at competitive prices, making declination of many of the chapters or sections identified in Settlement Agreement Exhibit A beneficial for GenCo and its customer NIPSCO and will promote energy utility efficiency as contemplated by Ind. Code §§ 8-1-2.5-5(b)(2) and (3).

The Commission will continue to maintain visibility into NIPSCO as the only customer of GenCo and will have visibility into important aspects of GenCo's activities because of the Settlement Agreement's requirements for certain compliance filings and additional approvals. This includes independent review and approval of any proposed contract for retail service between NIPSCO and a megaload customer and any PPA (or similar agreement) between GenCo and NIPSCO to be utilized to serve a megaload customer. Importantly, the full exercise of Commission jurisdiction would inhibit GenCo and NIPSCO from competing with other potential suppliers to megaload customers as contemplated by Ind. Code § 8-1-2.5-5(b)(4). The evidence shows that megaload customers are highly sophisticated, demand high service, and have many choices available to them when determining where to make developments—both inside and outside of the State of Indiana. The requested limited declination of jurisdiction will enable NIPSCO to support Indiana's efforts to position itself to compete effectively with other states to attract this economic development by providing a vehicle for speed-to-market, which GenCo and the participating data center parties have explained is critical to megaload customers. It is important that NIPSCO be able to insulate current NIPSCO customers from any attendant risks while still attracting new

customers, and also allowing interested stakeholders, including NIPSCO customers and the State of Indiana, to enjoy the benefits of such unprecedented economic development. After decades of flat or modest increase in demand for electricity in the State of Indiana, demand is now increasing significantly due to these data center deployments. The GenCo structure is the type of alternative regulatory policies and practices contemplated by Ind. Code. ch. 8-1-2.5 that the Commission has been authorized to permit. *Id.* at 33.

While it is not an explicit factor under Ind. Code § 8-1-2.5, it is important that approval of GenCo's petition will further the public policy goals of the State of Indiana to attract these kinds of project developers and further Indiana's economic development pipeline. This public policy is clear from the passage of Ind. Code § 6-2.5-15, which provides significant incentives to data centers who locate in Indiana in the form of sales and use tax exemptions for anywhere between 25 and 50 years. NIPSCO has expressed that it shares the desire to encourage economic growth and development and bring the attendant benefits to northern Indiana and throughout the state, and the formation and utilization of GenCo will allow NIPSCO to do so without placing undue risk on NIPSCO's other customers.

In addition, although not explicitly applicable, GenCo's structure will support the Five Pillars. Reliable and stable energy will be demanded by any megaload customer based on its load characteristics. So long as accredited generation capacity is brought online to match all MWs of load from such new customers, the net result should be a more reliable, resilient, and stable system—for the benefit of all NIPSCO's customers. As shown by the evidence, customer protections are one of the key drivers of formation and utilization of GenCo and were further improved by the Settlement Agreement. These protections are in direct furtherance of customer affordability, as it ensures NIPSCO's customers are not burdened with the costs of the assets needed to serve megaload customers during the time the customers are on NIPSCO's system and at the time of exit, whether it be the end of a contract term or termination of a contract. Thus, affordability is an integral part of the purpose of GenCo. As megaload customers come online, renewable/carbon free energy resources will likely be an element of the solution, furthering environmental sustainability. As explained by Witness Parisi in his direct testimony, there is also a strong interest by these customers in partnering to develop solutions to reduce carbon emissions—including carbon capture, utilization, and storage hydrogen fuel, and other potential technologies. Partnership with these customers in exploring and developing carbon solutions for gas-fired generation has the further potential to support environmental sustainability. Pet. Ex. 1 at 27-28.

The Commission finds that it is in the public interest to decline to exercise jurisdiction under the Statutes noted in Settlement Agreement Exhibit A (Revised Petition Attachment A).

6. Effect of Settlement Agreement. The Settlement Agreement is not to be used as precedent in any other proceeding or for any other purpose except to the extent necessary to implement or enforce its terms; consequently, with regard to future citation of the Settlement Agreement or of this order, we find our approval herein should be treated in a manner consistent with our finding in *Richmond Power & Light*, Cause No. 40434, 1997 WL 34880849 at *7-8 (March 19, 1997).

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 all such information is trade secret as defined by Ind. Code § 24-2-3-2. This 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 Settlement Agreement, a copy of which is attached to this order, is approved, as modified by Section 5.E.v of this order. Within 15 days of this order, the Settling Parties shall file a notice with the Commission confirming whether they are willing to accept this modification.

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

3. The Facilities are "utility" within the meaning of Ind. Code § 8-1-2-1.

4. The Commission declines to exercise its jurisdiction under the statutes identified in Settlement Agreement Exhibit A over Petitioner and its construction, operation, and financing of the Facilities, except as specifically stated within this Order.

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

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

7. 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.

8. 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