

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

RESPONSE IN OPPOSITION TO MOTION TO DISMISS OF CITIZENS
ACTION COALITION OF INDIANA,
CLEAN GRID ALLIANCE, AND LAPORTE COUNTY

NIPSCO Generation LLC ("GenCo"), by counsel, hereby responds in opposition to and asks the Indiana Utility Regulatory Commission ("Commission") to deny the Motion to Dismiss ("Motion") filed March 24, 2025 by Citizens Action Coalition of Indiana ("CAC"), Clean Grid Alliance, and Board of County Commissioners of LaPorte County, Indiana (collectively, "Movants").

I. Introduction

As further discussed below, when evaluating the Motion based upon the controlling legal standard—which mandates that the Commission accept the allegations of the Verified Petition as true, consider the pleadings in the light most favorable to GenCo, and draw every reasonable inference in favor of GenCo—there can be no doubt that GenCo has offered evidence sufficient to demonstrate on a *prima facie* basis that approval of its request for limited declination of

jurisdiction is in the public interest.

What claims has GenCo made that must be accepted as true? First, data center development by megaload customers presents potential “unprecedented economic benefits to Indiana and to northern Indiana[.]”¹ Second, “development of the facilities necessary to serve [megaload customer] load — if left unmitigated — could pose risks to NIPSCO and its customers.”² Next, “the risks associated with the purchase, ownership, development, financing, construction, and operation of the necessary generation to serve these potential customers will be isolated to NIPSCO GenCo.”³ Additionally, GenCo “also provides a vehicle to attract the necessary capital to undertake the construction of the necessary generation facilities, provides optionality and flexibility for financing arrangements, and allows for expedited development and construction of the required facilities, which is necessary to attract the megaload developers and begin providing service to them under the required timelines.” *Id.* Taking only these claims from a mere two paragraphs of an extensive case-in-chief⁴ *and accepting them as true and viewing them in the light most favorable to GenCo* — as they must be in a motion to dismiss —

¹ Verified Petition at ¶4.

² *Id.*

³ *Id.* at ¶5.

⁴ Paragraph 9, which is block quoted below, is another example of claims that if accepted as true would sufficiently demonstrate that the Motion should be denied.

demonstrates approval is in the public interest. When combined with the additional evidence submitted by GenCo, it is indisputable that GenCo sufficiently stated a claim upon which relief can be granted and the Motion should be denied.

II. The Verified Petition is Sufficient as a Matter of Law

The Motion was filed pursuant to Indiana Trial Rule 12(B)(6) (failure to state a claim) and T.R. 56 (summary judgment). The Motion fails under both rules. Further, GenCo has submitted a *prima facie* case, and the case should be allowed to proceed so that the evidentiary record can be further developed, and the Commission can weigh all evidence in reaching a decision.

A. GenCo has sufficiently stated a claim upon which relief can be granted.

The Verified Petition (¶10) plainly asserts that GenCo is seeking declination or disclaimer of jurisdiction and that such relief “will serve the public interest.” Furthermore, the Verified Petition (¶9) expands on this consideration by stating that:

the public interest will be served by a limited declination of the Commission’s jurisdiction, as this 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. Having NIPSCO GenCo construct, own, and operate the generation facilities and related assets isolates 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. NIPSCO GenCo will be a non-

retail provider, and its only customer will be a sophisticated utility, NIPSCO. Further, because this structure supports NIPSCO's service to highly sophisticated megaload customers, competitive forces will demand reliable service at competitive prices.

Petition Attachment A is a 15-page document delineating each provision (chapter or section) of the Indiana Code for which declination is sought, together with an explanation as to why declination is in the public interest for that provision with reference to the factors to be considered in Ind. Code § 8-1-2.5-5 ("Declination Statute"). The Verified Petition and Petition Attachment A are provided by GenCo under oath.⁵ GenCo has narrowly crafted the relief sought in this proceeding. Commission declination of the limited statutes enumerated in Petition Attachment A serves the public interest considerations in the Declination Statute. Movants refer to this Attachment as merely a "list"⁶ of the sections while completely ignoring the column labeled "Public Interest Explanation." By ignoring this column, Movants ignore the portion of that document that provides why the public interest requires declination, which is fatal to the Motion.

For purposes of a motion for failure to state a claim, there is no disagreement between GenCo and Movants as to the standard: When evaluating a motion to dismiss for failure to state a claim, the Commission must accept the

⁵ See Petition Verification page 11.

⁶ Motion at 2, 12.

allegations of the Petition as true and consider the pleadings in the light most favorable to Petitioner and draw every reasonable inference in favor of Petitioner.⁷ Despite agreeing on the standard, Movants reach an illogical conclusion. To argue that the Verified Petition (together with its Attachment) fails to state a claim is simply without reason.

Petition Attachment A includes plain and concise statements of fact relevant to each of the public interest considerations enumerated in the Declination Statute. Movants' contention that "GenCo has failed to show that the Commission's declination of jurisdiction will serve the public interest" must be rejected.⁸ Movants' criticism of Petitioners' filing does not concern the "public interest" considerations as discussed further below. Rather, Movants appear to focus on issues and parties that are outside the scope of GenCo's request from limited Commission declination. The Declination Statute requires the Commission to *consider* the enumerated factors; it does not require all of the factors to be specifically satisfied for relief to be granted.

Unquestionably, GenCo has stated a claim upon which relief can be granted. Detail was provided in GenCo's *verified* petition and *verified* direct

⁷ Motion at 4-5. See also *Re Porter County Alliance*, Cause No. 42526, 2004 WL 2697260, *2 (IURC Aug. 18, 2004) and *City of East Chicago v. East Chicago Second Century*, 908 N.E.2d 611, 617 (Ind. 2009).

⁸ Motion at 6.

testimony as to what GenCo is seeking and how it would support the public interest as articulated in Ind. Code § 8-1-2.5-5(b). Therefore, the Motion should be denied.

B. Movants failed to support their motion as required by Ind. T.R. 56.

Movants' argument under T.R. 56 stands on even weaker footing. Again, Movants correctly note that when a T.R. 12(B)(6) motion relies on matters outside the petition it becomes a summary judgment motion. They also correctly state the standard under T.R. 56 – it is only to be granted when there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. From that point forward, however, Movant's Motion is devoid of basis. First, Movants have not supported their Motion with any affidavits, declarations, or any other form of sworn statement. Instead, Movants rely almost exclusively on unsworn data request responses and conclusory statements from counsel. Movants' request for summary judgment fails for the same reason SIGECO's request for summary judgment failed in *Southern Ind. Gas & Elec. Co. v. Indiana Farm Gas*, 543 N.E.2d 1063 (Ind. Ct. App. 1990), *trans. denied*. There, SIGECO sought summary judgment against Indiana Farm Gas ("IFG"), but submitted no affidavits of its own, instead

relying on prefiled testimony that was not submitted under oath.⁹ The Court of Appeals held:

[I]t was erroneous to rely upon the prefiled testimony as a basis for ordering judgment against IFG. The prefiled testimony was not given under oath. It may be changed or withdrawn until the witness appears at a hearing and swears that the prefiled testimony is his true testimony.

The Commission should hold a hearing upon the issues presented by IFG's petition including a determination of jurisdiction.

543 N.E.2d at 1064. The pending Motion stands on precisely the same footing, relying almost exclusively on responses to informal data requests that have not been submitted under oath. The Court of Appeals' directive is clear that a summary judgment motion before the Commission must be supported by sworn evidence.

Even had Movants submitted sworn statements with the data request responses, the Motion would still fail because, again, Movants have utterly ignored a large portion of Petition Attachment A. This Attachment sets forth, under oath, the detailed explanation for why the public interest is supported by declination as to each requested statute. If Movants had submitted their own sworn statements disputing Petition Attachment A,¹⁰ the Commission would, at

⁹ As noted above, GenCo's Verified Petition and Witness Whitehead's testimony were both submitted under oath.

¹⁰ As just one example of the lack of factual support, on page 10 of the Motion Movants claim that "NIPSCO would benefit from strict Commission oversight over GenCo's generation projects." No sworn evidence is offered in support of

the very least, have a genuine issue of material fact. Mere disagreement with the requested relief and apparent frustration with responses to informal data requests that are outside the scope of the proceeding does not rise to insufficiency or entitlement to dismissal of this proceeding.

The Motion is not based on a good faith review of the facts or the law, is frivolous, and should be denied.

C. GenCo has presented a *prima facie* case.

Finally, while this proceeding has not yet progressed to the evidentiary hearing, Petitioner's burden is to present a *prima facie* case.¹¹ Once a Petitioner has presented a *prima facie* case for relief, the opponents of the requested relief, such as the Movants, have the burden of going forward with their evidence.¹² In other words, the sworn testimony presented by GenCo is not overcome by conclusory assertions or opposing argument of counsel that the Petitioner's case-in-chief is

this claim.

¹¹ "[A] petitioner's obligation is to submit 'substantial evidence' sufficient for a *prima facie* case, not to satisfy a 'clear and convincing' or 'beyond a reasonable doubt' standard." *Re NIPSCO*, Cause No. 43526 at 76, 2010 WL 3444546 at *66 (IURC Aug. 25, 2010) (denying motion for involuntary dismissal). "A 'prima facie case' is one which presents 'such evidence as is sufficient to establish a given fact and which if not contradicted will remain sufficient.'" *Re Indiana Mich. Power Co.*, Cause No. 39314 at 4, 1993 WL 602559 at *3 (IURC Nov. 12, 1993). See also *Plough v. Farmers State Bank of Henry County*, 437 N.E.2d 471, 475 (Ind. Ct. App. 1982); *Floyd v. Jay County Rural Elec. Membership Corp.*, 405 N.E.2d 630, 633 (Ind. Ct. App. 1980); *Rene's Restaurant Corp. v. Fro-Du-Co Corp.*, 210 N.E.2d 385, 387 (Ind. Ct. App. 1965).

¹² *City of Terre Haute v. Terre Haute Water Works Corp.*, 133 Ind. App. 232, 180 N.E.2d 110, 117, 43 P.U.R.3d 278 (1962), citing *Cleveland, etc., R. Co. v. Miller* (1905), 165 Ind. 381, 385, 74 N.E. 509, 510 ("The general rule in Indiana is that 'a *prima facie* case must always stand until it is broken by the defendant's evidence.'"). *Zakutansky v. State Bd. of Tax Comm'rs*, 758 N.E.2d 103, 105 (Ind. Tax Ct. 2001) ("Once the taxpayer carries the burden of establishing a *prima facie* case, the burden shifts to the State Board to rebut the taxpayer's evidence and justify its decision with substantial evidence." (quoting *Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230, 1233 (Ind. Tax Ct. 1998))).

not sufficient. Moreover, where questions are raised by other parties, Petitioner has the opportunity to explain or rehabilitate its position and rebut the evidence submitted by its opposition. This is exactly the process that is set to play out over the coming days,¹³ and this process should not be bypassed based on a legally infirm motion.

While the Commission may weigh the evidence, refusing to consider competent, uncontradicted evidence and making reasoned findings upon it, is not weighing the evidence, it is ignoring it.¹⁴

III. The Relief Sought in This Proceeding is Limited, Well Defined, and within the Commission's Authority.

GenCo requests the Commission decline to exercise its jurisdiction only with respect to certain statutes as further provided in Petition Attachment A and find such limited declination of jurisdiction will serve the public interest.¹⁵ Petition Attachment A delineates specific Indiana Code chapters and sections in detail, each with its own public interest explanation tied to Ind. Code § 8-1-2.5-5(b). The requested relief is well within the Commission's statutory authority and is consistent with prior Commission practice. As discussed in GenCo's case-in-chief

¹³ Since filing of the Motion, intervenors in the proceeding have now offered testimony on April 1, GenCo is set to offer rebuttal on April 14, and an evidentiary hearing is scheduled for May 9.

¹⁴ *Hancock Rural Tel. Corp. v. Pub. Serv. Comm'n*, 137 Ind. App. 14, 201 N.E.2d 573, 588 n.1 (Ind. Ct. App. 1964) (en banc), *reh'g denied* 203 N.E.2d 204 (Ind. Ct. App. 1964).

¹⁵ Verified Petition ¶10.

filing and highlighted above, the requested relief serves the public interest.¹⁶

Although Movants would lead the Commission to believe that GenCo asks the Commission to “broadly decline jurisdiction,”¹⁷ GenCo’s requested relief is more specific and defined than any wholesale power supplier’s declination of jurisdiction request that counsel is aware of, which are routinely approved by this Commission with limited or no opposition. It is Movants who are actually making and asking for “broad” declarations. While GenCo’s requested relief is focused, section-by-section support with public interest explanations, Movants ask the Verified Petition to be “dismissed” entirely. Movants make no attempt to meet GenCo’s level of detail and precision, nor do they go through section-by-section disputing any of the public interest support provided by GenCo.

Throughout the Motion, Movants misconstrue the relief sought and misstate the effect of a Commission order in this proceeding. Despite correctly citing from GenCo’s case-in-chief and certain data request responses, the Motion incorrectly presumes that NIPSCO, in its entirety, is meant to be “ringfenced” from GenCo.¹⁸ GenCo made clear in its case-in-chief that the “ringfence” was more

¹⁶ See also Verified Petition ¶9.

¹⁷ Motion at 1.

¹⁸ Motion at 7-8. One such instance: “Asked directly *how* NIPSCO will be “ringfenced” and “protected” from GenCo, NIPSCO referred only to the fact that existing retail ratepayers will not initially take any cost responsibility for the new generation projects.” (*Emphasis added*).

precise stating “[t]his separation will allow the assets used to serve megaload customers to be ‘ringfenced’ from the assets owned and operated by NIPSCO to serve its current retail customers.”¹⁹

Despite the Commission’s February 27, 2025, docket entry clearly reiterating the scope of this proceeding, much of the Motion addresses issues that are not properly before the Commission in this proceeding, and thus the Motion fails to justify dismissal. As discussed above, when viewed in the light most favorable to Petitioner (as required by Indiana law), the Verified Petition is legally sufficient, and Petitioner’s case-in-chief presents a *prima facie* case explaining and justifying the relief sought by Petitioner. The Motion to Dismiss should be denied.

IV. The Commission Has Broad Authority under Ind. Code. § 8-1-2.5-5 to Decline to Exercise Jurisdiction and the Clear and Unambiguous Language of Ind. Code § 8-1-2.5-5 Permits the Commission to Decline to Exercise Jurisdiction as Requested by GenCo.

The Declination Statute reads:

(a) Notwithstanding any other law or rule adopted by the commission, except those cited, or rules adopted that pertain to those cited, in section 11 of this chapter, on the request of an energy utility electing to become subject to this section, 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 either the energy utility or the retail energy service of the energy utility, or both.

¹⁹ Petitioner’s Exhibit No. 1, the Verified Direct Testimony of Erin Whitehead, at 13.

(b) In determining whether the public interest will be served, the commission shall consider the following:

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

Movants read into the statute a requirement that the Commission must find satisfaction of every one of these factors when no such requirement exists.²⁰

Movants correctly cite that the Commission "must *consider* each of the following four factors."²¹ (Emphasis added). Movants' logic-leap to a requirement that all four factors must be *specifically satisfied* is nowhere to be found in the plain language of the statute.

"A statute that is clear and unambiguous must be read to mean what it plainly expresses, and its plain and obvious meaning may not be enlarged or

²⁰ Movants in the Motion at 6 state: "Evaluating GenCo's petition and case-in-chief under each factor, GenCo has failed to show that the Commission's declination of jurisdiction will serve the public interest."

²¹ Motion at 5.

restricted.”²² While the Commission must *consider* the four enumerated factors when determining whether or not the public interest is served by declining to exercise its jurisdiction, it is not required to specifically *find* each of the four factors has been undisputably proven, just like it is not limited to those four factors alone and routinely considers other areas of public interest.

V. NIPSCO is a Party to This Proceeding, and the Commission is Free to Order Whatever Relief It Deems Necessary and Fit.

NIPSCO is a party to this proceeding, and assuming *arguendo* that NIPSCO should be a joint petitioner, dismissal would not be the proper remedy under Ind. Tr. R. 21.²³ Movants’ arguments are more akin to Tr. R. 17(A), which still fails. While GenCo’s relief is limited in scope to its activities, after initial data requests by the participating parties, it became clear to NIPSCO that it would be helpful for NIPSCO to intervene to: “[...] allow NIPSCO to respond to discovery on issues within the scope of this proceeding, *but related to information that may not be in NIPSCO GenCo’s possession.*” (Emphasis added).²⁴

²² *Indiana Mun. Power Agency v. Town of Edinburgh*, 769 N.E.2d 222, 226 (Ind. Ct. App. 2002) (citing *Dep’t of State Revenue v. Horizon Bancorp*, 644 N.E.2d 870, 872 (Ind. 1994)).

²³ The Trial Rules do not provide for “dismissal” for failure to join an indispensable party. They merely provide that a motion can be filed related to this issue, but the Trial Rules do not specify that it is a motion to “dismiss.” Instead, the remedy for the trial court is to force the unnamed party to join; and if the party will not join or cannot be joined, the trial court has discretion to proceed without them. Ind. Tr. R. 12(B)(7) and 19. How to proceed with respect to a motion for failure to join a necessary party is “generally within a trial court’s discretion.” *LBLHA, LLC v. Town of Long Beach*, 28 N.E.3d at 1086. The Commission’s rules are consistent with this process, permitting parties to file a motion to add additional parties and also permitting interested parties to intervene, just as NIPSCO has already done.

²⁴ NIPSCO Petition to Intervene ¶4.

Movants' focus on NIPSCO is perplexing, as NIPSCO is not seeking any relief in this case. It is difficult to imagine why a party who is seeking no relief is a proper "petitioner." Movants' apparent *desire* for the Commission to "include proactive allocation, as between GenCo and NIPSCO" (Motion at 15) or any other binding directive upon NIPSCO does not create a legal requirement that does not otherwise exist.

Further, the relief *GenCo* seeks from the Commission will not impair or affect NIPSCO's rights or the Commission's jurisdiction over NIPSCO. Movants acknowledge that: "the Commission has plenary authority over a public utility such as NIPSCO and may open investigations into a utility's operations on the Commission's own motion..."²⁵ It does not follow that NIPSCO is somehow such an indispensable party to this Commission proceeding that it cannot participate as an intervenor but must participate as a joint petitioner. To the extent Movants seek to force NIPSCO be a joint petitioner rather than just an intervenor in order to seek to have the Commission determine issues not presented in this Cause, such requests must be summarily dismissed.²⁶

²⁵ *Id.*

²⁶ *See In re Old State Utility Corporation*, Cause No. 39068, 1991 Ind. PUC LEXIS 142, *17-18 (IURC 5/1/1991) (concluding that the Commission did not have jurisdiction over City of Evansville Municipal Sewer Utility with respect to the matters in the complaint and therefore finding that the request to join the City of Evansville and its municipal sewer utility must be denied).

VI. Conclusion

Motions to dismiss are disfavored by the law and are properly granted only when the allegations present no possible set of facts upon which the petitioner can obtain the requested relief. The Commission has express authority to grant the relief sought by GenCo in this Cause and has repeatedly declined to exercise its jurisdiction with respect to other similarly-situated energy utilities. Based on Petitioner's case-in-chief, including the Verified Petition and the claims for relief stated therein, Petitioner is in compliance with Ind. Code § 8-1-2.5-5. The Motion fails to show *insufficiency* of Petitioner's case-in-chief on any point.

The Verified Petition and accompanying Attachment and Petitioner's case-in-chief satisfy the requirements under the Commission's rules for petitions and are otherwise consistent with practice before the Commission, and they present sufficient information for the requested relief to be considered and approved. Accordingly, the Motion to Dismiss should be denied, thereby allowing for further development of the evidentiary record in the proceeding and for a Commission order to be issued after full consideration of that record.

Respectfully submitted,



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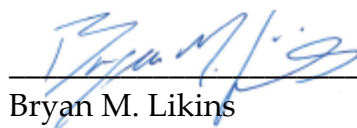
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Dated this 3rd day of April, 2025.



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