

STATE OF INDIANA
INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION)
OF LONE OAK SOLAR LLC)
REQUESTING THE COMMISSION)
REASSERT JURISDICTION, IN PART,)
PURSUANT TO IND. CODE § 8-1-2.5-7)
AND FIX REASONABLE CONDITIONS) CAUSE NO. 45883
FOR THE CONSTRUCTION AND)
OPERATION OF LONE OAK'S SOLAR)
FACILITY PURSUANT TO IND. CODE)
§§ 8-1-2-61, 8-1-2-69, 8-1-2-101, 8-1-2-)
101.2, 8-1-2-115, 36-7-2-8 AND)
RELATED STATUTES)

LONE OAK SOLAR LLC'S RESPONSE TO THE MOTION TO STRIKE
THE PREFILED DIRECT TESTIMONY OF MICHAEL HILL

Lone Oak Solar Energy LLC ("Lone Oak" or "Petitioner"), by counsel, hereby submits its Response to the Madison County Board of Zoning Appeals' ("BZA") and Madison County Board of Commissioners' (collectively, "Madison County" or the "County") objections to the prefiled testimony of Michael Hill (the "Motion"). While any party has the absolute right to object to evidence, the Commission has discretion regarding whether to admit that evidence. This case is not limited to the issues that were before the BZA. Rather, at its heart, this case is about whether a county zoning authority can regulate the commercial operations of a public utility.

The County should not now be permitted to strike the majority of Lone Oak's testimony in this Cause, to which it could have responded substantively but did not. Attached as Exhibit A is a redlined version of Mr. Hill's testimony that reflects that if the Motion is granted, little would be left of Mr. Hill's testimony. The Trial Rules should not be used to prevent Lone Oak from presenting evidence relevant to the larger issue of how federal, state, and local regulation impacts its own operations, as well as the renewable energy industry as a whole. The County had the

opportunity to conduct discovery, issue data requests, and file substantive direct testimony to address Lone Oak’s testimony and arguments. Instead of taking any of those actions or presenting their own testimony regarding the propriety of reassertion of the Commission’s jurisdiction, the County filed only portions of the BZA records and an explanation of its solar ordinance. Rather than striking Lone Oak’s testimony, the County may challenge Mr. Hill’s expertise, credibility, and opinions via cross-examination at the evidentiary hearing.

1. Introduction.

If the Commission grants the County’s motions, the prefiled evidence would be effectively limited to the BZA record. This and other pending evidentiary objections from the County reveal that it continues the approach it began in “Lone Oak I”¹ to try to limit the evidence in this case to the issues before the BZA.² The County’s premise that the Commission should limit itself only to the (incomplete)³ BZA record is based upon a faulty understanding of the Commission’s jurisdiction and the scope of this proceeding. The Presiding Officers’ July 3, 2023 Docket Entry in this proceeding states that the case should be considered in two phases, and that “Phase I will consider whether, and to what extent, the Commission should reassert its jurisdiction over Petitioner.” Mr. Hill’s testimony describes how reassertion of Commission jurisdiction is consistent with the public interest given the statutes that define criteria for considering when declination of jurisdiction is appropriate pursuant to Ind. Code ch. 8-1-2.5. The County’s Motion

¹ Cause No. 45793.

² There is a pending motion to strike the prefiled testimony of Michael Kaplan and Hannah Pawelczyk in Lone Oak I that is attached to Mr. Hill’s direct testimony as MAH-1. There is also a pending objection to Lone Oak’s Request for Administrative Notice. Many of the arguments and caselaw regarding why this evidence is admissible, relevant and probative are the same as those for Mr. Hill’s testimony. Rather than repeating those arguments in full herein, Lone Oak incorporates those arguments by reference.

³ Lone Oak notes that there is a pending Motion to Strike the County’s witness Stacey Hinton’s testimony, on the basis that she is the keeper of the County’s records, and the BZA records she has submitted are incomplete.

would leave the record devoid of the evidence the Presiding Officers asked Lone Oak to provide in support of its Phase I request.

2. Mr. Hill Qualifies as an Expert and His Testimony is Relevant to the Ultimate Facts at Issue in Phase I of this Case.

A witness's qualifications to testify as an expert are not often successfully challenged in Commission's proceedings. Few seem willing to testify under oath to the complex issues surrounding utility regulation without the proper knowledge to do so. "To qualify as an expert, it has been said that two requirements must be met: (1) the subject matter must be related to some scientific field beyond the knowledge of the average lay person, and (2) the witness must be shown to have sufficient skill in that area so that his opinion probably will aid the trier of fact in its search for the truth." *Grimes v. State*, 450 N.E.2d 512 (Ind. 1983). The County ignores many of Mr. Hill's qualifications. Mr. Hill has practiced law for 17 years, and has deep experience in planning, land use, and zoning issues for public utilities, as well as experience as an urban planner. The County makes the assertion, for which there is no factual basis, that Mr. Hill's knowledge is limited just to the Lone Oak project. The reality is that Mr. Hill works on the development of numerous solar projects across the country and thus has personal knowledge of the broad industry issues that he addresses. The County also makes much of the fact that Mr. Hill has only worked at Invenenergy for a year, and fails to recognize that he has more than a decade of experience in the telecommunications industry. Telecommunications is a highly regulated public utility service that is often impacted by land use laws. Lone Oak would be hard pressed to find a witness with experience more relevant to this case than Mr. Hill has.

3. Mr. Hill's Testimony Does Not Include Improper Legal Conclusions.

This case is about whether a County can unreasonably regulate the commercial operations of a public utility in Indiana. Mr. Hill's testimony describes *why* reassertion of Commission

jurisdiction is aligned with public policy and is in the public interest. Thus, the entirety of Mr. Hill's testimony is relevant to the ultimate decision of the Commission in this proceeding. Indiana courts have explained:

It is true that, at one time, experts were not allowed to express an opinion as to an "ultimate fact in issue." *E.g., Ellis v. State*, 250 N.E.2d 364 (Ind. 1969). This rigid rule, however, has been abrogated in Indiana. *DeVaney v. State*, 288 N.E.2d 732 (Ind. 1972); *State v. Bouras*, 423 N.E.2d 741 (Ind. Ct. App. 1981). Thus, a qualified attorney's legal opinion as to an ultimate fact in issue is admissible, unless it addresses matters within the common knowledge and experience of ordinary persons. *Rosenbalm v. Winski*, 332 N.E.2d 249, 254 (Ind. Ct. App. 1974); *Bouras, supra*, at 745.

McCullough v. Allen, 449 N.E.2d 1168, 1170 (Ind. Ct. App. 1983).

A legal conclusion is where an expert states his opinion as to how the case should be decided. The mere recitation of a statute does not constitute the rendering of a legal conclusion. An expert may not state legal conclusions drawn by applying the law to the facts, but an expert may refer to the law in expressing his or her opinion. *United States v. Richter*, 796 F.3d 1173, 1195 (10th Cir. 2015) (quoting *United States v. Bedford*, 536 F.3d 1148, 1158 (10th Cir. 2008)); *see, e.g., Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 592 (6th Cir. 2014); *Lake Irwin Coalition v. Smith*, 2021 U.S. Dist. LEXIS 210968, *10, 2021 WL 4927549.

"In Indiana, expert opinion on the ultimate fact in issue is not objectionable." *City of Columbia City v. Ind. Util. Regulatory Comm'n*, 618 N.E.2d 21, 28 (Ind. Ct. App. 1993) (internal citations omitted). In that case, Leslie Duvall, a former Chairman of the Commission and an attorney, testified regarding the scope of those proceedings, including statutory requirements of, and his opinions on, the scope of the Commission's determinations regarding the statutory standard of what is in the "public convenience and necessity". *Id.* Columbia City asked the Court of Appeals to reverse and remand the case, arguing that the Commission abused its discretion by not excluding from evidence the legal opinion testimony of Mr. Duvall. The Court of Appeals declined

to find any error, holding that Mr. Duvall “. . . did not testify as to ‘who should win’ – he testified as to what facts might be relevant to the Commission's decision as to ‘who should win.’” *Id.* What Mr. Hill does is precisely the same—he testified as to what facts might be relevant to the Commission’s decision on whether to reassert jurisdiction under Ind. Code ch. 8-1-2.5. If the former Chairman of the Commission can testify regarding the relevant statutory analysis, surely another attorney in utility practice can do the same.

The Commission has stated repeatedly in ruling on Motions involving the limitation of testimony that it applies a flexible standard for prefiled testimony, with most rulings going to the weight, and not the admissibility, of evidence. As the Commission has explained:

Pursuant to 170 LAC 1-1.1-26(a), the Commission may be guided generally by relevant provisions of the Indiana Rules of Trial Procedure and the Indiana Rules of Evidence to the extent they are consistent with that rule. However, the Commission is not a judicial body, and the Rules of Trial Procedure and Rules of Evidence are not specifically controlling over the Commission's administrative rules of practice and procedure. The Commission generally proceeds with a looser application”

Complaint of Northcrest R.V. Park, et al. Against the Lakeland Regional Sewer District Concerning the Provision of Sewer Utility Service, Cause No. 44973 (May 16, 2018), 2018 WL 2329328 (Ind. U.R.C.) at 6.

4. Hearsay is Admissible in Commission Proceedings, So Long As the Commission’s Decision Is Not Based Solely on Hearsay Evidence.

Hearsay is a statement that is not made by the declarant while testifying at the hearing and is offered into evidence to prove the truth of the matter asserted. Ind. Evid. R. 801(c). Records, reports, and data of a public agency concerning its regularly conducted and recorded activities are a recognized exception to the hearsay rule, and are admissible into evidence unless the sources of information or other circumstances indicate that the records or reports lack trustworthiness. Ind. R. Evid. 803(8).

Even if the Commission agreed that some of Lone Oak's prefiled evidence is hearsay, that is not automatically a basis to exclude this evidence. Hearsay is admissible in Commission proceedings, but the Commission's decision may not be based solely on hearsay evidence. *Ram Broadcasting of Ind., Inc. v. MCI Airsignal of Ind., Inc.*, 484 N.E.2d 26, 34 (Ind. Ct. App. 1985). Lone Oak presents other evidence that is not hearsay, which exists to corroborate testimony based upon Mr. Hill's personal knowledge and experience developing and permitting solar and telecommunications projects across the country. Based on this, it is premature to strike Lone Oak's evidence until the Commission has reviewed the entire record to see whether, as here, the evidence is corroborated by other competent evidence. The Commission's rule of thumb that objections "go to the weight, and not to the admissibility" of evidence is also a recognition that the issues before it often involve complex public policy considerations and are highly technical in nature. Public utility regulation is generally beyond the expertise of a layperson, including most local boards and officials.

5. Lone Oak's Responses to the Specific Objections to Mr. Hill's Pre-Filed Testimony.

Please see Exhibit B for Lone Oak's specific responses to each of the objections to Mr. Hill's prefiled testimony.

6. Conclusion.

Respectfully, the substance of the Motion reveals much about the County's lack of experience with utility regulation and its understanding of the operation of electric utilities. This is precisely why a county should not be permitted to regulate the commercial operations of public utility service that are impressed with a statewide interest, and should instead limit county oversight to traditional zoning issues that protect public health and safety. It is appropriate for

these reasons to allow Mr. Hill to present his complete direct testimony as filed, which is directly related to the statutory factors the Commission should consider when determining whether to reassert jurisdiction.

For all the foregoing reasons, the Commission should deny Madison County's Objection and admit the testimonies of Mr. Hill in its entirety.

Dated: September 11, 2023

Respectfully submitted,

A handwritten signature in blue ink that reads "Kristina Kern Wheeler". The signature is written in a cursive style and is followed by a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on the following on September 11, 2023, by electronic transmission.

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STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION)
OF LONE OAK SOLAR ENERGY LLC)
REQUESTING THE COMMISSION REASSERT)
JURISDICTION, IN PART, PURSUANT TO)
IND. CODE § 8-1-2.5-7 AND FIX REASONABLE) CAUSE NO. 45883
CONDITIONS FOR THE CONSTRUCTION)
AND OPERATION OF LONE OAK'S SOLAR)
FACILITY PURSUANT TO IND. CODE)
§§ 8-1-2-61, 8-1-2-69, 8-1-2-101, 8-1-2-101.2,)
8-1-2-115, 36-7-2-8 AND RELATED STATUTES)

VERIFIED PRE-FILED DIRECT PHASE I TESTIMONY

OF

MICHAEL A. HILL

Respectfully Submitted,



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VERIFIED PREFILED PHASE I DIRECT TESTIMONY OF MICHAEL A. HILL

I. INTRODUCTION

Q1. PLEASE STATE YOUR NAME AND ON WHOSE BEHALF YOU ARE TESTIFYING.

A. My name is Michael A. Hill, and I am testifying on behalf of Lone Oak Solar LLC (“Petitioner” or “Lone Oak”). My business address is One South Wacker Drive, Suite 1800, Chicago, Illinois 60606.

Q2. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?

A. I am employed by Invenergy LLC as Associate General Counsel, Permitting and Local Affairs. I am familiar with Invenergy’s activities to date to develop the Lone Oak Project (the “Project”), including the Indiana Utility Regulatory Commission’s (“IURC’s” or “Commission’s”) Final Order in Cause No. 45255 (“Order”) granting Lone Oak’s request for declination of jurisdiction over the construction of Lone Oak’s solar project in Madison County, Indiana. I am also familiar with the filings and Commission Order issued in Cause No. 45793 (“Lone Oak I”) where the Commission dismissed Lone Oak’s request for Commission review of a Madison County, Indiana ordinance on the grounds that the Commission must first determine whether, and to what extent, it should reassert jurisdiction over Lone Oak pursuant to Ind. Code § 8-1-2.5-7.

Q3. PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND.

A. I joined Invenergy as Associate General Counsel, Permitting and Local Affairs in June, 2022. Prior to joining Invenergy, I served as Vice President and Associate General Counsel for Regulatory Affairs for ExteNet Systems, Inc., where I led a team of attorneys and

1 government relations professionals responsible for securing all agreements, rights, and
2 approvals needed to construct ExteNet's small cell and distributed wireless
3 telecommunications networks nationwide. During my time with ExteNet, I reviewed and
4 secured over 700 pole attachment, right-of-way access, franchise, easement, and other
5 agreements with utilities, municipalities, private landowners, and other parties. I also
6 directed ExteNet's lobbying efforts in a rapidly-changing regulatory and statutory
7 environment in anticipation of the coming 5G deployment.

8 Prior to joining ExteNet, I was employed with American Tower Corporation, a
9 telecommunications infrastructure company, as a Project Manager in the DAS Strategic
10 Relations and Network Policy division. I was responsible for securing all rights (municipal,
11 state, federal, utility, etc.) necessary to successfully deploy wireless telecommunication
12 facilities throughout the United States. My work involved preparation and management of
13 zoning relief applications and negotiation of any necessary lease, easement, or other
14 agreements. I served as the primary contact with elected officials, municipal staff, and
15 community groups and I routinely appeared before zoning boards of appeal, planning
16 commissions, and legislative bodies in support of wireless facility projects. Before joining
17 American Tower Corporation, I practiced real estate and land use law in the Chicago office
18 of Thompson Coburn LLP, where I handled a wide variety of real estate, zoning, licensing,
19 and land use matters on behalf of private clients for projects throughout the United States.

20 Prior to becoming an attorney, I worked as an urban planner with both public
21 agencies and private consultancies. I earned my Bachelor of Arts degree in History and
22 graduated with honors from The Johns Hopkins University. I received my Juris Doctor

1 degree from Chicago-Kent College of Law, Illinois Institute of Technology where I was
2 an honors scholar and earned a Certificate in Environmental and Energy Law.

3 **Q4. PLEASE DESCRIBE THE BACKGROUND AND PROCEDURAL APPROACH**
4 **FOR THIS PROCEEDING.**

5 A. After being unable to proceed with construction of the Project in part due to Madison
6 County's Regulations,¹ Lone Oak initiated Lone Oak I seeking a Commission finding that
7 the Regulations are unreasonable.² Before reaching the merits of Lone Oak I, the
8 Commission dismissed the proceeding, finding that it lacks jurisdiction to consider the
9 merits of Lone Oak I unless and until it reasserts jurisdiction on the request of the Petitioner
10 as provided by Ind. Code § 8-1-2.5-7.³ Lone Oak filed this proceeding ("Lone Oak II")
11 formally requesting that the Commission reassert jurisdiction to the extent necessary to
12 rule on the merits of Lone Oak's complaint on the Regulations. The Verified Petition in

¹ Upon reassertion of jurisdiction, Lone Oak requests that the Commission review and determine that Madison County Solar Energy Ordinance No. 2017-BC-0-01 passed by the Madison County Board of Commissioners ("Board") (the "Ordinance") and the decisions thereunder by the Madison County Board of Zoning Appeals ("BZA"), (together, the "Regulations") are unreasonable and void pursuant to Ind. Code § 8-1-2-101 and related statutes.

² In its Verified Petition in this proceeding, Petitioner has attached and incorporated by reference the complaint, amended complaint, and pre-filed testimony filed by all parties to Cause No. 45793.

³ Lone Oak respectfully preserves its ongoing position that the Commission's jurisdiction is not discretionary when a public utility asks the Commission to determine the reasonableness of local government regulations in accordance with Ind. Code § 8-1-2-101 and related statutes.

We hold that Section 101(a)(1) and Section 115 unambiguously establish exclusive jurisdiction in the IURC to hear Duke's complaint on the validity of the Ordinance. Section 115 explicitly says that it "shall be [the IURC's] duty" to "enforce . . . all . . . laws[] relating to public utilities." I.C. § 8-1-2-115. Section 115 further expressly directs the IURC to "inquire into *any* . . . violation" of a local ordinance by a public utility. *Id.* (emphasis added). And Section 101 specifically contemplates disputes between towns and utilities regarding access to rights-of-way or other access to public property by a utility. I.C. § 8-1-2-101(a)(1). Accordingly, Indiana law directs that the subject matter of the dispute between Avon and Duke be decided by the IURC.

Duke Energy Ind., LLC v. Town of Avon, Ind., 82 N.E.3d 319, 325 (Ind. Ct. App. 2017). Additionally, Lone Oak respectfully preserves its ongoing position that the Commission had authority pursuant to Ind. Code § 8-1-2.5-7 to reassert jurisdiction on its own motion in order to consider the merits in Cause No. 45793.

1 this proceeding is incorporated herein as Attachment MAH-1. I understand that this
2 proceeding will be decided in two phases. In Phase I, the Commission will determine
3 whether and to what extent the Commission should reassert jurisdiction pursuant to Ind.
4 Code § 8-1-2.5-7 over Lone Oak in order to consider the merits of Lone Oak's complaint
5 about Madison County's Regulations. If the Commission reasserts jurisdiction in Phase I,
6 the Commission will consider in Phase II the merits of Lone Oak's request to find the
7 Regulations unreasonable and void.

8 **Q5. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

9 A. My testimony provides the factual and public policy reasons explaining why it is in the
10 public interest for the Commission to reassert jurisdiction as requested by Lone Oak in
11 order to review the merits in Phase II. My testimony describes how reassertion of
12 Commission jurisdiction is consistent with the public interest given the statutes that define
13 criteria for considering when declination of jurisdiction is appropriate, including:

- 14 1. Indiana retail customers will benefit from the reassertion of jurisdiction by allowing
15 the Commission to evaluate the state interest in the generation of power to be
16 provided by the Project (Ind. Code § 8-1-2.5-1(1)).
- 17 2. Reassertion of Commission jurisdiction is consistent with the public interest in
18 ensuring the continued availability of adequate energy service statewide. The
19 Commission – and not the local government – is uniquely suited to determine this
20 issue (Ind. Code § 8-1-2.5-1(6)).
- 21 3. Absent reassertion of jurisdiction, no technological, operating conditions,
22 competitive forces or regulation by other state or regulatory bodies will serve as a
23 check on unreasonable local regulations that effectively eliminate a needed power

1 supply from Indiana. (Ind. Code § 8-1-2.5-5(b)(1)).

2 4. Reassertion of Commission jurisdiction is beneficial to Lone Oak, its customers,
3 and the State. (Ind. Code § 8-1-2.5-5(b)(2)).

4 5. Reassertion of Commission jurisdiction will promote energy utility efficiency. (Ind.
5 Code § 8-1-2.5-5(b)(3)).

6 6. Absent reassertion of Commission jurisdiction, Lone Oak will be prevented from
7 competing with other providers of functionally similar energy services. (Ind. Code
8 § 8-1-2.5-5(b)(4)).

9 My testimony also describes why reassertion of Commission jurisdiction is aligned
10 with public policy and is in the public interest:

11 1. Reassertion of Commission jurisdiction is necessary to give effect to the public
12 policy that local regulation must not have the effect of prohibiting a public utility
13 from furnishing service based on fuel source (Ind. Code § 8-1-2-101.2).

14 2. Reassertion of Commission jurisdiction aligns with the public policy favoring
15 Commission oversight over the siting of public utility facilities where a local
16 regulation conflicts with the larger state interest in ensuring an adequate energy
17 supply.

18 3. No Indiana statute requires Lone Oak to demonstrate compliance with local zoning
19 as a condition of a declination of Commission jurisdiction.

20 4. Reassertion of Commission jurisdiction will allow for examination of the
21 appropriate regulatory paradigm for wholesale energy generation public utilities in
22 matters where local regulation threatens a project.

23 5. Reassertion of Commission jurisdiction is in the public interest to establish a

consistent and efficient regulatory scheme for Wholesale Public Utilities instead of the current patchwork of local regulation.

6. Given the importance of creating regulatory certainty and attracting investment in Indiana energy projects, reassertion of jurisdiction by the Commission in this proceeding is in the public interest.

7. It is in the public interest to reassert jurisdiction to eliminate the contradictory deadlines imposed by the Commission and the local regulations for the Project's commencement of construction and commercial operation dates.

II. THE COMMISSION SHOULD REASSERT JURISDICTION OVER LONE OAK FOR THE PURPOSES OF REVIEWING THE MERITS OF ITS CLAIMS

Q6. WHAT GUIDES THE COMMISSION FOR PURPOSES OF DETERMINING WHETHER AND TO WHAT EXTENT IT SHOULD REASSERT JURISDICTION OVER LONE OAK IN ORDER TO CONSIDER THE MERITS OF LONE OAK'S COMPLAINT?

A. I understand that the Commission has asked the parties to present evidence establishing whether and to what extent it is in the public interest to reassert jurisdiction. I understand that Ind. Code 8-1-2.5-7 provides in pertinent part that:

The commission may . . . at the request of the affected energy utility . . . enter an order notifying an energy utility . . . over which jurisdiction was either limited or not exercised under this chapter that the commission will proceed to . . . exercise jurisdiction over the energy utility or its retail energy service to the extent the public interest requires, unless a formal request for a hearing is filed by the energy utility with the commission not more than fifteen (15) days after the date of the order. In the event that such a formal request is timely filed, the commission shall hold a hearing concerning such matters and issue its order thereon based upon the evidence introduced at the hearing.

1 Based on this provision, it appears that the Commission is permitted to reassert jurisdiction
2 in whole or in part “to the extent the public interest requires.”

3 **Q7. HAS THE COMMISSION EVER REASSERTED JURISDICTION PURSUANT TO**
4 **THIS STATUTE UNDER FACTS SIMILAR TO THOSE PRESENTED IN THIS**
5 **PROCEEDING?**

6 A. Not to my knowledge.

7 **Q8. WHAT FACTORS SHOULD THE COMMISSION CONSIDER IN**
8 **DETERMINING WHETHER REASSERTION OF JURISDICTION IS IN THE**
9 **PUBLIC INTEREST?**

10 A. ~~With the caveat that there appears to be no precedent for making a determination whether~~
11 ~~to reassert jurisdiction that was previously declined, it seems logical to me that the~~
12 ~~Commission should consider the same relevant factors that it considers when it decides~~
13 ~~whether to decline jurisdiction, but through the lens of determining whether a reassertion~~
14 ~~of jurisdiction is appropriate under the facts and circumstances presented by the energy~~
15 ~~utility seeking reassertion of jurisdiction.~~ Using that framework, I provide testimony below
16 on the applicable sections of Ind. Code Chapter 8-1-2.5 that are relevant to whether the
17 public interest will be served by reasserting jurisdiction over Lone Oak, which include
18 Sections 1(1), 1(6), and Sections 5(b)(1) through 5(b)(4). I also provide several public
19 policy reasons establishing that it is in the public interest for the Commission to reassert
20 jurisdiction over Lone Oak to consider the merits of Lone Oak’s complaint.

21 **A. GENERATION FROM THE LONE OAK PROJECT WILL ULTIMATELY**
22 **BENEFIT RETAIL CUSTOMERS IN INDIANA**
23

24 **Q9. PLEASE DESCRIBE THE FIRST FACTOR, UNDER INDIANA CODE § 8-1-2.5-**
25 **1(1).**

1 A. Indiana Code § 8-1-2.5-1(1) provides that a continuing goal of the Commission in the
2 exercise of its jurisdiction is the provision of retail energy service. ~~Reassertion of~~
3 ~~Commission jurisdiction over Lone Oak is consistent with the public interest in attaining~~
4 ~~the goal to provide retail energy service to Hoosiers because Lone Oak will provide much~~
5 ~~needed energy that will be consumed by retail customers. Ultimately, the power generated~~
6 ~~by the Project will be consumed at the retail level, whether through a direct sale of the~~
7 ~~Project to a retail utility, through a Power Purchase Agreement with a retail utility, or~~
8 ~~through resale of the power to a retail customer after being provided to the grid.~~

9 The Commission has identified a need for additional electric supply in Indiana in
10 order to provide retail energy service to Hoosiers, and the Project will help meet that need.
11 Relying on the Purdue University State Utility Forecast Group's Indiana Projections, the
12 Commission's 2022 Annual Report ("Report") indicates that Indiana will require
13 additional energy resources in 2026 or earlier. The Report notes that long-term resource
14 needs are projected to be about 4,185 MW by 2030, and that by 2039, Indiana will need an
15 additional 22,172 MW, which includes projected retirements.⁴ ~~In its May 17, 2023 press~~
16 ~~release on the most recent planning reserve auction results, MISO's President and CEO~~
17 ~~Clair Moeller cautioned: "With the rapid change of the generation fleet, we continue to see~~
18 ~~uncertainty and volatility in the auction results year-over-year, and managing the system~~
19 ~~in real-time is becoming more challenging," Moeller adds, "Actions taken by market~~
20 ~~participants this year, such as delaying resource retirements and making additional, existing~~

⁴ 2022 Commission Annual Report at 44: <https://www.in.gov/iurc/files/IURC-2022-AR-WEB.pdf>; 2021 SUFG Report: <https://www.purdue.edu/discoverypark/sufg/docs/publications/2021%20forecast%20final.pdf>

1 capacity available via imports may not be repeatable in the future, and this year we are still
2 susceptible to supply shortages in extreme situations.⁵

3 Indiana's energy market is in a transition state where many of its retail utilities,
4 including NIPSCO, Indiana Michigan Power, AES, CenterPoint, and Duke Energy, as well
5 as municipal utilities and rural electric membership cooperatives, are retiring large amounts
6 of coal fired electric generation resources, but many of those utilities plan to buy
7 replacement generation from suppliers like Lone Oak rather than building new generation
8 themselves. If the Commission reasserts jurisdiction and finds in Lone Oak's favor, the
9 Project is poised to contribute up to 120 MW of power supply⁶ available for Indiana retail
10 consumers through their local utilities. If the Commission declines to exercise jurisdiction,
11 the Regulations effectively kill the Project and eliminate its opportunity to contribute
12 additional needed power for the state's retail energy service.

13 **B. THE COMMISSION, AND NOT A LOCAL GOVERNMENT, SHOULD REGULATE**
14 **WHEN NECESSARY TO ENSURE THERE IS CONTINUED AVAILABILITY OF**
15 **ADEQUATE ENERGY SERVICE STATEWIDE.**
16

17 **Q10. WHAT IS THE NEXT RELEVANT FACTOR FOR THE COMMISSION'S**
18 **CONSIDERATION IN DETERMINING WHETHER REASSERTION OF**
19 **JURISDICTION IS IN THE PUBLIC INTEREST?**

20 A. Indiana Code § 8-1-2.5-1(6) states that the public interest requires the Commission be
21 authorized to issue orders and formulate and adopt rules and policies that will permit the
22 Commission in the exercise of its expertise to flexibly regulate and control the provision

⁵ <https://www.misoenergy.org/about/media-center/new-approach-to-planning-resource-auction-delivers-positive-results/>

⁶ The Project has a nameplate capacity of 120 MW.

1 ~~of energy services to the public in an increasingly competitive environment, giving due~~
2 ~~regard to the interests of consumers and the public and the continued availability of safe,~~
3 ~~adequate, efficient and economical energy service. Relevant to whether the Commission~~
4 ~~should reassert jurisdiction over Lone Oak to consider the merits of Lone Oak's complaint,~~
5 ~~this provision suggests that the Commission (and not a local government) should exercise~~
6 ~~its expertise and regulate flexibly where necessary to control the provision of energy~~
7 ~~services so that there is continued availability of adequate energy service. Here, the public~~
8 ~~interest is served by having the Commission decide whether the Regulations are reasonable~~
9 ~~in light of several factors about which the local government may be unaware, uninformed,~~
10 ~~or lack expertise.~~

11 ~~The Commission – and not the local government – has unique expertise on the~~
12 ~~current market conditions impacting the development, construction and approval timelines~~
13 ~~for an energy project. The Commission also has unique expertise on the current power~~
14 ~~supply needs for Indiana and the region. Most importantly, the Commission is uniquely~~
15 ~~suited to determine whether the Regulations are reasonable in light of several competing~~
16 ~~factors. Unless the Commission reasserts jurisdiction, there is no chance that the Project~~
17 ~~will be developed. The Commission, and not the local government, is the agency uniquely~~
18 ~~empowered to determine whether the Regulations are reasonably tailored to protect a~~
19 ~~legitimate local interest and if they are, whether the state's interest in ensuring an adequate~~
20 ~~power supply is superior to the local interest. Unless the Commission reasserts jurisdiction,~~
21 ~~the local Regulations will effectively take control of power supply in Indiana, which is not~~
22 ~~in the public interest. Local enforcement of unreasonable commercial operations deadlines~~
23 ~~ignores the reality that the power produced by a renewable energy project flows to the grid~~

1 ~~to the benefit of all, and that the flow of electrons cannot be tracked with precision from~~
2 ~~the source to the end-use customer. Utility-scale renewable energy projects provide electric~~
3 ~~service far beyond the territory of any given local zoning authority.~~

4 **Q11. IS LONE OAK RETRACTING ITS INTENT TO COMPLY WITH OTHER**
5 **LOCAL ZONING CONDITIONS AND COMMITMENTS IT MADE TO THE**
6 **COUNTY?**

7 A. Absolutely not. Lone Oak is only asking to be released from Condition #18 of the BZA
8 Special Use authorization, which requires the Project to be complete by the end of this
9 year. As Mr. Kaplan explained in his testimony in Lone Oak I (included herein as part of
10 Attachment MAH-1, this is simply impossible due to the delays that were outside Lone
11 Oak's control.

12 **III. THE COMMISSION SHOULD CONSIDER THE SAME FACTORS IT USES TO**
13 **DECLINE JURISDICTION WHEN IT REASSERTS JURISDICTION.**
14

15 ~~**Q12. WHAT OTHER FACTORS SHOULD THE COMMISSION EVALUATE IN**~~
16 ~~**DETERMINING WHETHER REASSERTING JURISDICTION IS IN THE**~~
17 ~~**PUBLIC INTEREST?**~~

18 A. ~~It seems appropriate that the Commission should consider whether to reassert jurisdiction~~
19 ~~by evaluating the same factors it analyzes when it is asked to decline to exercise jurisdiction~~
20 ~~as provided in Ind. Code § 8-1-2.5(b). Those factors, which I address in turn below, are:~~

21 ~~1. Whether technological or operating conditions, competitive forces, or the extent of~~
22 ~~regulation by other state or federal regulatory bodies render the exercise, in whole~~
23 ~~or in part, of jurisdiction by the Commission unnecessary or wasteful.~~

24 ~~2. Whether the Commission's declining to exercise its jurisdiction, in whole or in part,~~
25 ~~will be beneficial for the energy utility, the energy utility's customers, or the State.~~

1 3. ~~Whether the Commission's declining to exercise, in whole or in part, its jurisdiction~~
2 ~~will promote energy utility efficiency.~~

3 4. ~~Whether the exercise of Commission jurisdiction inhibits an energy utility from~~
4 ~~competing with other providers of functionally similar energy services or~~
5 ~~equipment.~~

6 **A. REASSERTION OF JURISDICTION BY THE COMMISSION IN THIS CASE**
7 **IS NECESSARY AND PRODUCTIVE**

8
9 **Q13. REFERENCING THE FIRST FACTOR, PLEASE EXPLAIN WHY**
10 **REASSERTION OF JURISDICTION BY THE COMMISSION AS REQUESTED**
11 **BY LONE OAK NECESSARY AND PRODUCTIVE.**

12 A. Notably, when the Commission declined to exercise jurisdiction in part over Lone Oak in
13 Cause No. 45255, the Commission concluded: "Pursuant to the provisions set forth in Ind.
14 Code § 8-1-2.5-5, the Commission finds that declining to exercise jurisdiction over
15 Petitioner and the Facility *will facilitate the immediate construction of the proposed*
16 *Facility and will add generation capacity in Indiana. This should be beneficial for public*
17 *utilities that may indirectly have access to the power produced and to the state of*
18 *Indiana.*"⁷ (Emphasis added).

19 ~~The Regulations at issue have the practical effect of ending the Project and~~
20 ~~preventing the production of power that is needed by the electric grid, which is precisely~~
21 ~~opposite of the outcomes the Commission found to be in the public interest. No~~
22 ~~technological or operating conditions or competitive forces or jurisdiction by other bodies~~

⁷ *In the Matter of the Petition by Lone Oak Solar Energy LLC for Certain Determinations by the Commission with Respect to Its Jurisdiction Over Petitioner's Activities as a Generator of Electric Power*, IURC Cause No. 45255, 2019 WL 5820560, October 29, 2019 at 10.

1 ~~have the effect of making the Commission's jurisdiction unnecessary or wasteful. The~~
2 ~~single most effective tool for evaluating the Regulations is consideration by the~~
3 ~~Commission using its unique expertise after reasserting jurisdiction.~~

4 **B. REASSERTION OF JURISDICTION BY THE COMMISSION IN THIS CASE**
5 **BENEFITS CUSTOMERS AND THE STATE AS A WHOLE**
6

7 **Q14. REFERENCING THE SECOND FACTOR, PLEASE EXPLAIN WHY**
8 **REASSERTION OF JURISDICTION BY THE COMMISSION AS REQUESTED**
9 **BY LONE OAK WILL BENEFIT LONE OAK, ITS CUSTOMERS, OR THE**
10 **STATE.**

11 A. The Commission has the unique expertise to determine the reasonableness of the
12 Regulations. Assuming the Commission finds that the Regulations are unreasonable as
13 applied to the facts presented, Lone Oak will benefit by having the obstacle removed that
14 has effectively killed its Project. Lone Oak's direct customer will either be a retail utility
15 or the wholesale market, and the ultimate customer will be the retail customers of Indiana
16 or the region. Those customers, as well as the State as a whole, will benefit by reassertion
17 of Commission jurisdiction so that the agency with unique insight and experience with the
18 energy markets and the state's interest in energy supply can evaluate the merits of Lone
19 Oak's request in Phase II.

20 Lone Oak will also benefit financially if the Commission reasserts jurisdiction and
21 determines that the Regulations are an unreasonable barrier to the Project. As of June 30,
22 2023, Lone Oak has invested approximately \$4.7 Million in efforts to develop the Project,
23 which include costs for staffing, studies, permitting, litigation, lease acquisitions and
24 payments, permitting consultants, legal fees to obtain various government permits and
25 approvals, a vegetative plan, continuous title updates and refreshments, an environmental

1 site assessment report, engineering and geotechnical work, a cultural resource survey and
2 analysis, a noise study, and procurement. Many of these studies and reports will need to be
3 refreshed given the time that has passed, and some costs are ongoing (such as lease
4 payments to landowners). There are also losses to Lone Oak that are difficult to quantify,
5 like the many missed opportunities to respond to requests for proposals for new generation
6 and negotiate an offtaker agreement for the project.

7 **Q15. HOW DOES REASSERTION OF THE COMMISSION'S JURISDICTION**
8 **BENEFIT TO THE STATE AS A WHOLE?**

9 A. ~~The vast majority of new generation in the State is being built by independent, competitive,~~
10 ~~wholesale public utilities ("Wholesale Public Utilities") like Lone Oak, and are either~~
11 ~~purchased by investor-owned utilities under build-transfer agreements ("BTAs") or~~
12 ~~purchased power agreements ("PPAs").~~ According to the State Utility Forecasting Group
13 ("SUGF"), the currently installed solar capacity in Indiana connected to the grid is 61%
14 (415 MW) through direct utility ownership (including through BTAs) or PPAs. According
15 to SUGF, if all the 25 solar projects which have received approval (including Lone Oak)
16 are completed, Indiana's solar capacity will increase by another 5,445 MW to make a total
17 of 7,686 MW. SUGF also reports that Indiana utilities have a total 2,363 MW of wind
18 capacity contracted through power purchase agreements, with 1,844 MW of that from wind
19 farms in Indiana. ~~It is most efficient and cost-effective for retail load serving utilities to~~
20 ~~issue requests for proposals for new generation and have Wholesale Public Utilities~~
21 ~~compete for these opportunities. This results in lower costs for retail customers because~~
22 ~~there is competition among Wholesale Public Utilities that does not exist among Indiana's~~
23 ~~retail public utilities. If the Commission refuses to reassert jurisdiction, and Wholesale~~

1 ~~Public Utilities like Lone Oak are forced to comply with unreasonable local zoning~~
2 ~~restrictions, both planned and future Indiana electric generation resources will be in~~
3 ~~jeopardy.~~

4 **C. COMMISSION DETERMINATION OF THE REASONABLENESS OF LOCAL**
5 **REGULATION OF ELECTRIC UTILITIES IS EFFICIENT.**
6

7 **Q16. REFERENCING THE THIRD FACTOR, PLEASE EXPLAIN WHY**
8 **REASSERTION OF JURISDICTION BY THE COMMISSION AS REQUESTED**
9 **BY LONE OAK WILL IMPACT LONE OAK’S EFFICIENCY.**

10 A. ~~This factor implies that it is appropriate to decline jurisdiction of an energy utility if the~~
11 ~~public utility will be more efficient by virtue of the declination of jurisdiction. Merriam-~~
12 ~~Webster Dictionary~~ defines “efficient” as “capable of producing desired results with little
13 or no waste (as of time or materials).”⁸ Applied here, Lone Oak is and will remain
14 completely inefficient (and effectively out of business) unless the Commission reasserts
15 jurisdiction to evaluate the Regulations. The only way for Lone Oak to produce the desired
16 result of producing power for the ultimate consumption of the public is for the Commission
17 to reassert jurisdiction and determine that the Regulations are unreasonable.

18 **Q17. WHAT IS THE STATUS OF THE PROJECT’S INTERCONNECTION SERVICE**
19 **AGREEMENT (“ISA”) WITH PJM INTERCONNECTION (“PJM”) AND**
20 **AMERICAN ELECTRIC POWER COMPANY (“AEP”)?**

21 A. Lone Oak, AEP, and PJM executed the ISA. A fully executed copy of the ISA was attached
22 to the Fourth Quarter 2022 report that Lone Oak filed with the Commission on January 30,
23 2023 (see Michael Kaplan’s Direct, Attachment MRK-2, at pp. 5-19, included herein as

⁸ Definition can be found at: <https://www.merriam-webster.com/dictionary/efficient>

1 part of Attachment MAH-1). However, since PJM included the incorrect corporate entity
2 for Lone Oak Solar, the ISA needs to be corrected. Nonetheless, the ISA was considered
3 effective and the effective date/milestone dates in the ISA would not have changed when
4 the entity error is corrected. Simultaneously with executing the ISA, Lone Oak posted
5 \$1,486,380 in cash as security on July 5, 2022. Per the ISA, Lone Oak's total
6 interconnection costs for the project are expected to be \$2,245,666, which includes an
7 Attachment Facilities Charge of \$1,012,381 and a Network Upgrades Charge of
8 \$1,233,285. This amount represents the sum of the estimated interconnection costs,
9 determined in accordance with Sections 212 and 217 of the PJM tariff, for which Lone Oak
10 will be responsible, less any costs already paid by Lone Oak. Lone Oak's ultimate cost
11 responsibility in accordance with Section 217 of the Tariff will be based upon the actual
12 costs of the facilities described in the specifications, regardless of whether greater or lesser
13 than the amount of the payment security provided under the ISA.

14 **Q18. WHAT PROJECT DEADLINES ARE INCLUDED IN THE ISA AS AGREED TO**
15 **BY PJM AND AEP?**

16 A. Pursuant to the ISA, the Project has the following deadlines, which Lone Oak must prove
17 to PJM's "reasonable satisfaction." As discussed in more detail below, Lone Oak expects
18 these deadlines to be extended:

- 19 ○ July 1, 2023 - Lone Oak must demonstrate that it has obtained all necessary local,
20 county, and state site permits, as well as that it has signed a memorandum of
21 understanding for the acquisition of major equipment.
- 22 ○ March 1, 2024 – Lone Oak must demonstrate completion of at least 20% of project
23 site construction.

1 ○ May 1, 2025 – Lone Oak must demonstrate that all generating units have been
2 delivered to the project site.

3 ○ ~~July 1, 2025 – Lone Oak must demonstrate commercial operation of all generating~~
4 ~~units (this was the same date Lone Oak asked the BZA to extend zoning approval~~
5 ~~to, and they declined – this shows that not only is the county stumbling into IURC~~
6 ~~jurisdictional issues relating to utility operations, it has also tried to trump the~~
7 ~~provisions in PJM's FERC approved tariff).~~

8 PJM may reasonably extend any such milestone dates, in the event of delays that
9 Interconnection Customer (i) did not cause and (ii) could not have remedied through the
10 exercise of due diligence. The milestone dates stated in this ISA shall be deemed to be
11 extended coextensively with any suspension of work initiated by Interconnection Customer
12 in accordance with the ISA.

13 **Q19. HOW DOES LONE OAK GO ABOUT EXTENDING THE DEADLINES IN THE**
14 **ISA?**

15 A. Given that the Lone Oak Project is grandfathered under the PJM rules pre-queue reform
16 and already has its ISA, the Project would not have any impacts on lower projects in the
17 queue, and thus should be eligible for suspension up to 3 years. Since the ISA deadlines
18 were rapidly approaching while this case is still pending, on June 28, 2023, Lone Oak
19 notified PJM and AEP of its intent to suspend work on the projects. (See Attachment MAH-
20 2). PJM has preliminarily notified Lone Oak that the suspension is granted for one year.
21 The PJM analysis team has yet to determine if suspension can be extended to three (3)
22 years. PJM has indicated that it will notify Lone Oak once that decision is made. (See
23 Attachment MAH-3).

Q20. WHAT IS THE ECONOMIC CONSEQUENCE OF SUSPENDING THE ISA TO LONE OAK?

A. The overall project costs would increase along with delays in project schedule as Lone Oak faces increased holding costs for keeping the project's land control and for needing to continually update some engineering and environmental project studies and title work. While the scope of the interconnection upgrades are unlikely to change, a delay could increase interconnection costs somewhat if the materials needed by AEP to upgrade the existing substation for Lone Oak increase in price. We have seen materials costs increase across the board recently. While the ISA upgrade costs and charges are refundable under the terms of the agreement if the project is cancelled, other Lone Oak development expenses are sunk costs.

D. IF THE COMMISSION REFUSES TO REASSERT JURISDICTION, LONE OAK WILL BE UNABLE TO COMPETE WITH OTHER PROVIDERS OF FUNCTIONALLY SIMILAR ENERGY SERVICES.

~~**Q21. REFERENCING THE FOURTH FACTOR, PLEASE EXPLAIN HOW REASSERTION OF JURISDICTION AS REQUESTED BY LONE OAK WILL PROMOTE LONE OAK'S ABILITY TO COMPETE WITH OTHER PROVIDERS OF FUNCTIONALLY SIMILAR ENERGY SERVICES.**~~

~~A. The Regulations have placed Lone Oak on unequal footing with its competitors by effectively killing the Project and eliminating Lone Oak's ability to provide solar energy in the marketplace. It is in the public interest to promote competition in the energy market because it results in additional needed energy at prices that are lower as the result of competitive pressures. Reassertion of Commission jurisdiction is necessary and~~

1 appropriate in order to restore Lone Oak's opportunity to compete with providers of
2 functionally similar energy services.

3 ~~Q22. PLEASE PROVIDE MORE DETAIL REGARDING YOUR ASSERTION THAT~~
4 ~~THE REGULATIONS HAVE PLACED LONE OAK ON AN UNEQUAL FOOTING~~
5 ~~WITH ITS COMPETITORS.~~

6 A. Lone Oak's competitors are other Wholesale Public Utilities and to a lesser degree, retail
7 public utilities that elect to build solar generation themselves. Absent reassertion of
8 jurisdiction by the Commission and a finding that the Regulations are unreasonable, Lone
9 Oak's competitors have an advantage over Lone Oak when their projects are located in
10 "friendly" counties that do not directly or indirectly ban solar projects. Unless the
11 Commission reasserts jurisdiction, Lone Oak will have no opportunity for the regulator of
12 public utilities to determine whether it is appropriate to level the playing field.

13 **III. OTHER IMPORTANT PUBLIC INTEREST FACTORS JUSTIFY**
14 **THE COMMISSION'S ASSERTION OF JURISDICTION IN THIS CASE**
15

16 ~~Q23. ARE THERE OTHER REASONS WHY IT IS IN THE PUBLIC INTEREST FOR~~
17 ~~THE COMMISSION TO REASSERT JURISDICTION AS REQUESTED BY~~
18 ~~LONE OAK?~~

19 A. Yes, there are several public policy reasons suggesting that it is in the public interest for
20 the Commission to reassert jurisdiction as requested by Lone Oak. First, it is essential that
21 the Commission reassert jurisdiction to give effect to the relief from unreasonable local
22 government regulations contemplated by the Indiana General Assembly when it enacted
23 Ind. Code §§ 8-1-2-101 and 8-1-2-101.2. To find otherwise would mean that an energy
24 utility that receives a declination of Commission jurisdiction also surrenders to

1 ~~unreasonable and project-killing local regulations, which does not square with the plain~~
2 ~~language of the statutes. Here, that outcome is especially troublesome given that Lone Oak~~
3 ~~had no way to foresee or control the circumstances that led to its inability to commence~~
4 ~~construction and achieve operation on the timeline required by the Regulations.~~

5 ~~**Q24. WHAT OTHER PUBLIC POLICY CONSIDERATIONS SHOULD BE**~~
6 ~~**CONSIDERED?**~~

7 ~~A. No other tribunal is as qualified as the Commission to evaluate the merits of this~~
8 ~~proceeding. The Indiana General Assembly made this clear when it provided in Ind. Code~~
9 ~~§ 8-1-2-101 that public utilities should seek Commission review when local regulations~~
10 ~~threaten projects. That statute made no exception to this Commission's obligation for~~
11 ~~public utilities over which the Commission declined to exercise full jurisdiction under Ind.~~
12 ~~Code § 8-1-2.5-5. Local regulations that protect the public health and safety should be~~
13 ~~upheld, such as road use agreements and requirements for project decommissioning.~~
14 ~~However, when Regulations create barriers to entry for solar projects without consideration~~
15 ~~of the interests of the general public in the provision of utility service, Commission~~
16 ~~jurisdiction is essential. Here, the Regulations go far beyond the County's interests in~~
17 ~~protecting public health and safety and local land use, and have the distinct ability to curtail~~
18 ~~much needed energy capacity and supply in obstruction of the wider public interest.~~

19 ~~**Q25. WHAT OTHER PUBLIC POLICY REASON SUPPORTS THE REASSERTION**~~
20 ~~**OF COMMISSION AS REQUESTED BY LONE OAK?**~~

21 ~~A. The Indiana General Assembly has established clear public policy that local regulations~~
22 ~~must not prohibit, or have the effect of prohibiting, utility service based on the energy~~
23 ~~source. Indiana Code § 8-1-2-101.2(b) provides:~~

~~A municipal council or county executive does not have the power to enact any code, ordinance, or land use regulation that would prohibit or have the effect of prohibiting, or to otherwise regulate in a manner that would prohibit or have the effect of prohibiting . . . a public utility . . . from furnishing utility service to a utility customer; or . . . a public utility . . . from: (A) purchasing; (B) using; or (C) connecting or reconnecting to; a utility service; based on the energy source of the utility service. (emphasis added.)~~

~~Under Section 101, “energy source” is defined as regulation related to either the method of generation or the fuel source. Ind. Code § 8-1-2-101.2(a)(1). These statutes establish public policy goals that the Commission is uniquely suited to consider by reasserting jurisdiction as requested by Lone Oak. If the Commission were to refuse to reassert jurisdiction to consider the merits in Phase II, it would effectively allow the Regulations – which have the effect of prohibiting service by the Project’s solar energy – to go unchecked. Accordingly, reassertion of jurisdiction to consider the merits is in the public interest and consistent with public policy requiring non-discriminatory regulations.~~

Q26. WHAT OTHER PUBLIC POLICY IS SUPPORTED BY THE COMMISSION’S REASSERTION OF JURISDICTION AS REQUESTED BY LONE OAK?

A. Reassertion of jurisdiction by the Commission in this proceeding is consistent with the public policy encouraging Indiana to fulfill its energy needs without undue preference for a fuel source. ~~The energy market and regional coordination of the flow of energy is very different today than it was when the Commission created a regulatory paradigm over 20 years ago.~~ Unfortunately, absent the reassertion of jurisdiction by the Commission, a local government has the ability to create a blockade preventing the construction of new energy resources that are desperately needed. This shift is not consistent with the public interest in assuring adequate energy supply for Hoosiers.

1 **Q27. WAS LONE OAK REQUIRED TO DEMONSTRATE TO THE COMMISSION ITS**
2 **COMPLIANCE WITH LOCAL ZONING AUTHORITY?**

3 A. ~~Consistent with its historic treatment of other solar developers seeking a declination of~~
4 ~~jurisdiction, when the Commission initially analyzed whether and to what extent it would~~
5 ~~decline to exercise jurisdiction over Lone Oak in Cause No. 45255, the Commission~~
6 ~~engaged in a public interest analysis that considered, among other factors, whether the~~
7 ~~location of the Project was compatible with the surrounding land uses. As part of that~~
8 ~~analysis, the Commission considered evidence of compliance with local zoning and land~~
9 ~~use requirements. The Commission noted that in deciding whether to decline jurisdiction,~~
10 ~~it has authority to consider whether the public interest will be served by the Project being~~
11 ~~in its planned location. In making that determination, the Commission considered the~~
12 ~~potential adverse effects on Indiana “electricity suppliers” (as the term is used in Ind. Code~~
13 ~~ch. 8-1-2.3), their customers, or a local community. The Commission noted that if a~~
14 ~~proposed new generating facility will significantly and negatively impact an electricity~~
15 ~~supplier, its consumers, or a local community, the Commission may refuse to decline~~
16 ~~jurisdiction under Ind. Code chs. 8-1-2.5 and 8-1-8.5. In finding that the Project’s location~~
17 ~~is compatible with surrounding land uses, the Commission followed the same approach it~~
18 ~~used in several cases where it considered whether the petitioner complied with local zoning~~
19 ~~and land use requirements. By using this approach, for years the Commission has~~
20 ~~effectively required wholesale solar developers to obtain local zoning approvals as a~~
21 ~~condition of a declination of jurisdiction and authorization to build new projects.~~

1 **Q28. IS THE COMMISSION REQUIRED TO FIND THAT WHOLESALE SOLAR**
2 **DEVELOPERS OBTAIN LOCAL ZONING APPROVAL AS A CONDITION OF A**
3 **DECLINATION OF JURISDICTION?**

4 A. ~~No. It does not appear that Commission is required (or authorized) by statute consider the~~
5 ~~potential for a negative impact of planned construction on an Indiana electricity supplier,~~
6 ~~its customers, or the local community.~~

7 ~~**Q29. PLEASE DESCRIBE THE EVOLUTION OF THE COMMISSION'S**~~
8 ~~**REQUIREMENT THAT WHOLESALE SOLAR DEVELOPERS COMPLY WITH**~~
9 ~~**LOCAL ZONING AUTHORITY.**~~

10 A. ~~When one attempts to discern how this requirement emerged, the Commission's Order in~~
11 ~~the 2001 CinCap case is instructive. In Cause No. 42145, CinCap sought approval to build~~
12 ~~a natural-gas fired Exempt Wholesale Generator facility (also known as a "merchant~~
13 ~~plant") whose output would be sold into the wholesale market for peaking power needs.~~
14 ~~CinCap was an indirect subsidiary of several companies, including Cinergy Corp. (a~~
15 ~~traditionally regulated investor owned Indiana utility) and Duke Energy (which was not an~~
16 ~~Indiana utility until Cinergy later merged with Duke). CinCap asked the IURC to decline~~
17 ~~to exercise its full jurisdiction because the facility would only produce electricity for~~
18 ~~wholesale customers. In evaluating the four elements identified in Ind. Code § 8-1-2.5-~~
19 ~~5(b), the IURC declared that as part of its public interest analysis, the Commission must~~
20 ~~"... consider whether the location of a proposed facility is compatible with surrounding~~
21 ~~land uses. In determining compatibility, the Commission may evaluate and consider any~~

1 evidence of compliance with local zoning and land use requirements.”⁹ Notably, however,
2 nothing in Ind. Code § 8-1-2.5 requires or allows the Commission to consider local zoning
3 compliance or compatibility with surrounding land use. In fact, the statute states that “A
4 request for relief by an energy utility under section 6 of this chapter shall be limited to
5 approval of its energy services or the establishment of its rates and charges, or both.” That
6 statute does not speak to local zoning approval at all.

7 **Q30. IS THERE ANY EXPLANATION FOR THE COMMISSION’S CREATION OF**
8 **THIS STANDARD IN 2001?**

9 A. Based on the facts presented in the CinCap case, it appears that a significant number of
10 local citizens opposed the facility’s planned location. The Commissions noted: “Although
11 the Henry County Commissioners were not anxious to intervene in what they considered
12 to be a state matter . . . , they submitted a report to the IURC that revealed that, on balance,
13 the County Commissioners believed that if approved with certain conditions, the CinCap
14 project would not unreasonably tax the existing infrastructure in the County or adversely
15 affect the land use management controls.”¹⁰ Ultimately, the IURC “determined the public
16 interest will be served if the facility is located as planned” and conditioned its declination
17 of jurisdiction on CinCap’s performance of its commitments to Henry County.¹¹

18 Following the *CinCap* case, requests for declination of IURC jurisdiction over
19 renewable projects by wholesale energy developers routinely included an evaluation of
20 compliance with local zoning requirements, even when those projects will later be

⁹ *In the Matter of the Petition of CinCap VII, LLC*, Cause No. 41569, 2001 WL 798066, at *18 (IURC Apr. 23, 2001).

¹⁰ *Id.*, at *20-21.

¹¹ *Id.*, at *25.

1 transferred to one of the State's traditionally regulated utilities. The Commission
2 commonly grants these requests to decline full jurisdiction only after considering whether
3 the location of a proposed facility is compatible with surrounding land uses by considering
4 evidence of compliance with local zoning and land use requirements. Just as it did in its
5 original declination of Lone Oak in Cause No. 45255, the Commission routinely notes that
6 if a proposed facility would "... significantly and negatively impact an electricity supplier,
7 its consumer, or a local community, the Commission may refuse to decline jurisdiction
8 under Indiana Code chs. 8-1-2.5 and 8-1-8.5."¹² However, neither of these statutes mention
9 local zoning, local communities, or the "impact" of the project on those communities.
10 Indiana Code ch. 8-1-2.5 does not require or authorize the Commission to consider
11 compliance with local zoning regulations, and Indiana Code § 8-1-8.5-5(b)(3) simply
12 requires a Commission finding that that public convenience and necessity require or will
13 require the facility's construction.

14 **Q31. IS THE COMMISSION'S APPROACH APPROPRIATE TODAY?**

15 A. Respectfully, no. The Commission's approach creates a discriminatory double-standard
16 where Wholesale Public Utilities must comply with local zoning and demonstrate there are
17 no negative community impacts of a project, but traditional incumbent retail energy
18 developers do not. However, public policy favors state, not local, oversight of the siting of
19 utility facilities. This is especially true today, in light of the dramatic changes in the state
20 and national electric industry. With the creation of Regional Transmission Organizations
21 ("RTOs"), the nation's energy grid has become more interconnected and regionally
22 coordinated. Since the Commission first began its foray into local zoning issues in the

¹² *Elliott Solar LLC*, IURC Cause No. 45543, 2021 WL 4052614, at *5 (Sept. 1, 2021).

1 ~~CinCap~~ case 22 years ago, the RTO markets have developed and matured. These energy
2 markets centrally dispatch generating units throughout Indiana and much of the United
3 States based on bids and offers cleared in the markets. Indiana's energy market has also
4 recently undergone a major transition away from reliance on coal and toward renewables.
5 Over the last five (5) years, Indiana regulated utilities have moved to retire coal plants and
6 obtain renewable energy, often from projects constructed by Wholesale Public Utilities.
7 This emphasizes the regional nature of the electric grid, and how Lone Oak is a part of the
8 larger effort to provide reliable energy in Indiana and across the Midwest.

9 **~~Q32. WHAT RELIEF DO LOCAL CITIZENS HAVE IF THEY OBJECT TO THE~~**
10 **~~SITING OF A SOLAR FACILITY IN THEIR COMMUNITY?~~**

11 A. ~~As an initial matter, it is important to realize that like other solar developments, Lone Oak~~
12 ~~only places its facilities on land that a landowner consensually conveys for compensation.~~
13 ~~Where there are surrounding landowners that object to the siting of an energy facility, I~~
14 ~~understand that Indiana courts have determined that rather than constrain a public utility to~~
15 ~~obey local zoning authority, if landowners believe a utility has engaged in fraud in siting~~
16 ~~of a facility, they may file a complaint with the Commission under Indiana Code § 8-1-2-~~
17 ~~54 claiming that the public utility's siting decision is unjust or unreasonable.¹³ I also~~
18 ~~understand there is significant case law establishing that a public utility has discretion in~~
19 ~~siting its facilities.¹⁴ In light of Indiana's statutes and case law, the development of the our~~
20 ~~nation's energy markets, and the need for more capacity, there is a compelling public~~

¹³ ~~Graham Farms, Inc. v. Indianapolis Power & Light Co., 233 N.E.2d 656, 667 (Ind. 1968).~~

¹⁴ ~~Alabach v. Northern Ind. Pub. Service Co., 329 N.E.2d 645, 649 (Ind. Ct. App. 1975). See also, Dahl v. Northern Ind. Pub. Service Co., 157 N.E.2d 194 (1959); Darlage v. East Bartholomew Water Corp., 379 N.E.2d 1018, 1020-21 (Ind. Ct. App. 1978).~~

1 interest in Commission jurisdiction that balances the local concerns with the state's need
2 for energy. As I noted above, local zoning over a generation project is appropriate where
3 it ensures the public safety, but not where it has the effect of an outright ban on a particular
4 project or fuel source. Reassertion of jurisdiction to consider those issues in this case is
5 consistent with those considerations.

6 **Q33. SHOULD WHOLESALE AND RETAIL ELECTRIC GENERATION PROJECT**
7 **DEVELOPERS HAVE DIFFERENT REGULATORY PARADIGMS?**

8 A. It does not appear that the Indiana General Assembly has explicitly created separate
9 regulatory paradigms, and Indiana Courts have not endorsed a regulatory scheme that treats
10 Wholesale Public Utilities differently than generation developers that sell the generation at
11 retail to end user customers. Rather, there is longstanding public policy that once an entity
12 is declared a public utility — regardless of whether it is a wholesale or retail energy
13 generator — the state's interest in ensuring the orderly placement of utility facilities and the
14 provision of adequate and reliable electric service to the state as a whole, is greater than
15 the local interest of prohibiting or restraining the development of energy projects. The
16 Commission (through its predecessor the Public Service Commission) was created by the
17 legislature to relieve public utilities from the burden of local regulation.¹⁵ Indiana courts
18 have been clear that “when local regulation attempts to control an activity in which the
19 whole state or a large segment thereof is interested, local regulation must fall.”¹⁶

20 It is also important to apply Commission policy in a manner consistent with the
21 United States Constitution. The production and sale of electricity has long been held to be

¹⁵ *City of Huntington v. Northern Indiana Power Co.*, 5 N. E. 2d 889, 6 N. E. 2d 335 (1937).

¹⁶ *Graham Farms, Inc. v. Indianapolis Power & Light Co.*, 233 N.E.2d 656, at 667-668.

1 ~~an activity in interstate commerce. Any state regulatory or legislative mandate that favors~~
2 ~~retail public utilities over their out-of-state Wholesale Public Utility competitors by~~
3 ~~exempting those retail utilities from local zoning regulation is a violation of the Dormant~~
4 ~~Commerce Clause. The Commerce Clause of the United States Constitution provides that~~
5 ~~“[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States.”~~
6 ~~U.S. Const. Art. 1, § 8. This constitutional language “also directly limits the power of the~~
7 ~~States to discriminate against interstate commerce.” *Wyoming v. Oklahoma*, 502 U.S. 437,~~
8 ~~454 (1994). This “negative” or “dormant” feature of the Commerce Clause “prohibits~~
9 ~~economic protectionism--that is, regulatory measures designed to benefit in-state economic~~
10 ~~interests by burdening out-of-state competitors.” *Id.* (internal citations omitted); *see*~~
11 ~~*also Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287-288 (1997).~~

12 **Q34. SHOULD THE COMMISSION CONTINUE TO DECLINE TO EXERCISE ITS**
13 **JURISDICTION OVER WHOLESALE PUBLIC UTILITIES?**

14 A. The Commission’s approach to declining to exercise its jurisdiction over Wholesale Public
15 Utilities continues to be appropriate. In particular, as it relates to Lone Oak, all of the
16 reasons that the Commission declined to regulate Lone Oak’s rates and service continue to
17 exist. It is not necessary for the Commission to return Lone Oak to full regulation in order
18 to address the limited relief that Lone Oak has requested in this Cause.

19 **Q35. ARE THERE ANY OTHER REASONS WHY REASSERTION OF COMMISSION**
20 **JURISDICTION OVER LONE OAK IS IN THE PUBLIC INTEREST?**

21 A. ~~Reassertion of Commission jurisdiction is in the public interest to establish a consistent~~
22 ~~and efficient regulatory scheme for Wholesale Public Utilities instead of the current~~
23 ~~patchwork. All 92 Indiana counties have the legal right to regulate land use planning and~~

1 zoning in unincorporated areas (outside municipalities) under Ind. Code 36-7-4-1 *et seq.*
2 Of those, 82 counties have adopted planning and zoning ordinances.¹⁷ In addition, cities
3 and towns have the ability to exercise zoning authority under Title 36 inside their municipal
4 boundaries, as well as two miles outside those boundaries, which is referred to as municipal
5 “extraterritorial zoning authority”. Ind. Code 36-7-4-205. There are 569 municipalities in
6 Indiana. That means that energy developers must navigate the possibility of *661 different*
7 *local government zoning policies for renewable projects in Indiana*. This is the pinnacle of
8 regulatory inefficiency. The current patchwork allows cities and counties to pick winners
9 and losers with no consideration of the overall need for additional, affordable power
10 generation in the State and region. If every Indiana county vetoed solar development by
11 Wholesale Public Utilities, the only way Indiana would receive additional solar energy
12 would be through retail utility projects built using eminent domain, or through purchases
13 of solar energy produced in other states via the wholesale market. Both of these options are
14 inconsistent with the public interest. Current projections show there will be insufficient
15 energy in the wholesale market to serve Indiana’s long-term needs. Retail public utilities
16 cannot build solar projects quickly enough to fill the projected need, and Indiana ratepayers
17 pay more for solar projects developed outside the competitive landscape of Wholesale
18 Public Utilities. In short, Wholesale Public Utilities are critical to Indiana’s energy supply.
19 The Commission should reassert jurisdiction in cases like Lone Oak’s to protect against
20 unreasonable Regulations that threaten Indiana’s energy supply.

¹⁷ See “Status of County Planning in Indiana” map from the Indiana Farm Bureau at: <https://www.infarmbureau.org/news/news-article/2017/11/17/with-or-without-zoning-counties-need-to-consider-what-s-right-for-them> (accessed July 21, 2023).

Q36. ARE THERE ANY OTHER REASONS WHY REASSERTION OF COMMISSION JURISDICTION OVER LONE OAK IS IN THE PUBLIC INTEREST?

A. ~~Yes. Wholesale Public Utilities are reluctant to invest in projects where there is regulatory uncertainty. Understandably, Lone Oak's experience may have a chilling effect on the development of similar projects. Some Wholesale Public Utilities may not be willing to risk millions of dollars on a project when it can be killed at the whim of local regulations after initially securing local zoning approval. Given the importance of creating regulatory certainty and attracting investment in Indiana energy projects, reassertion of jurisdiction by the Commission in this proceeding is in the public interest.~~

Q37. ARE THERE ANY OTHER REASONS WHY REASSERTION OF COMMISSION JURISDICTION OVER LONE OAK IS IN THE PUBLIC INTEREST?

A. Yes. There is presently an overlap between the Commission and the local government with regard to the Project's commencement of construction and commercial operation. The Commission's Order in Cause No. 45255 speaks to the timing for construction and commercial operation, and under the terms of that Order, the Project remains permitted to proceed with construction and commercial operation. ~~As discussed above, the ISA also provides deadlines for project construction and operation, as approved by PJM. Yet, the Regulations conflict and attempt to trump the Commission and PJM, by imposing a more prescriptive timeline for the commencement of construction and commercial operation that is, through no fault of its own, impossible for Lone Oak to achieve. The public interest is not served by this conflict. Reassertion of Commission jurisdiction is appropriate to determine the reasonableness of the Regulations given the circumstances, the state's need~~

1 ~~for energy, and the presence or absence of a compelling local interest in regulating the~~
2 ~~Project's timing.~~

3 **Q38. IF THE COMMISSION REASSERTS JURISDICTION AS REQUESTED BY**
4 **LONE OAK, DOES LONE OAK INTEND TO COMPLY WITH THE REMAINING**
5 **ASPECTS OF MADISON COUNTY'S ZONING AUTHORITY?**

6 A. Lone Oak still intends to meet all of the conditions of its Special Use (except for the
7 commercial operation date), as well as its contractual obligations to landowners and the
8 County itself.

9 **Q39. ASSUMING THE COMMISSION DECIDES TO REASSERT JURISDICTION**
10 **OVER LONE OAK, TO WHAT EXTENT SHOULD IT DO SO?**

11 A. Lone Oak respectfully requests that the Commission reassert jurisdiction, in part, pursuant
12 to IC 8-1-2.5-7, to authorize and establish the conditions consistent with Ind. Code §§ 8-1-
13 2-101 and -101.2 governing the construction, maintenance and operation of Lone Oak's
14 solar facility, specifically the dates by which Lone Oak must commence construction and
15 achieve commercial operation of the solar facility. Lone Oak respectfully requests the
16 Commission reassert jurisdiction to the extent necessary for the Commission to consider
17 the issues presented in Lone Oak's complaint in Cause No. 45793. Lone Oak requests that
18 the Commission continue to decline its jurisdictions in all other respects consistent with
19 the Commission's Order in Cause No. 45255.

20 **Q40. DOES THIS CONCLUDE YOUR TESTIMONY?**

21 A. Yes.

4609995_1

VERIFICATION

I affirm under the penalties of perjury that the foregoing Prefiled Verified Direct Testimony is true to the best of my knowledge, information and belief as of the date here filed.

DocuSigned by:

7C5ACB859C93426...
Michael A. Hill

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on the following on July 21, 2023, by electronic transmission.

Kevin D. Koons, Attorney No. 27915-49
Adam R. Doerr, Attorney No. 31949-53
KROGER, GARDIS & REGAS, LLP
111 Monument Circle, Suite 900
Indianapolis, IN 46204-5125
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Jason Haas
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115 W. Washington Street
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Indianapolis, Indiana 46204
jhaas@oucc.in.gov
infomgt@oucc.in.gov



Kristina Kern Wheeler
Bose McKinney & Evans LLP

Attachment MAH-1

Cause No. 45883

Verified Petition

(Note: The Verified Petition, including all attachments, is not duplicated herein, but will be fully reproduced as an attachment in the version of the testimony submitted at the evidentiary hearing.)

Invenergy Solar Development North America LLC

VIA EMAIL

June 28, 2023

PJM Interconnection, L.L.C.
2750 Monroe Blvd.
Audubon, PA 19403

Interconnection Services
American Electric Power Service Corporation
1 Riverside Plaza, 24th Floor
Columbus, OH 43215
pjmrequest@aep.com

Re: Invenergy Solar Development North America LLC, ISA/ICSA Suspension
(PJM Queue #AD1-043)

Dear Sir/Madam:

Reference is made to: (i) Interconnection Service Agreement among PJM Interconnection, L.L.C. (“**PJM**”), Invenergy Solar Development North America LLC (“**Invenergy**”) and AEP Indiana Michigan Transmission Company, Inc. (“**AEP**”) for PJM Queue #AD1-043, dated December 15, 2022 (the “**ISA**”), and (ii) Interconnection Construction Service Agreement among PJM, AEP and Invenergy, dated February 7, 2023 (“**ICSA**” and, together with the ISA, the “**Agreements**”).

Pursuant to Section 3.4 of Appendix 2 for the ICSA, Invenergy hereby suspends the ICSA and thereby acknowledges the suspension of all work contemplated by the Agreements in aggregate and associated with the construction and installation of the necessary Transmission Owner Interconnection Facilities under the ICSA.

Invenergy therefore deems all obligations under the Agreements to be suspended and hereby agrees to work in good faith with AEP and PJM during this suspension to execute such other documents and/or amendments to the Agreements as may be necessary to ensure that the spirit and intent of the PJM Open Access Transmission Tariff and the obligations of Invenergy under the Agreements are upheld.

The requested duration of the suspension is 1095 days (3 calendar years) from the date of this notice.

Sincerely,

DocuSigned by:

9FF3157597F0439...

6/28/2023

Michael Kaplan
Senior Vice President
Invenergy Solar Development North America LLC
One South Wacker, Suite 1800
Chicago, IL 60606
Tel: (312) 224-1400
Fax: (312) 224-1444

From: White, Travis <Travis.White@pjm.com>
Sent: Monday, July 17, 2023 10:46 AM
To: Singh, Harliv <HSingh@invenenergy.com>
Subject: [EXTERNAL] RE: Lone Oak Solar (AD1-043) : Notice to Suspend

Hi Harliv,

Suspension is granted for a year. The analysis team has yet to determine if suspension is can be extended to 3 years. I will notify you and the team once that decision is made.

Thanks,
Travis White
Contractor, Interconnection Projects

Travis.White@pjm.com
PJM Interconnection | 2750 Monroe Blvd. | Audubon, PA 19403
Phone:724-742-3447

From: Singh, Harliv <HSingh@invenenergy.com>
Sent: Wednesday, July 12, 2023 4:32 PM
To: White, Travis <Travis.White@pjm.com>; Mitchell P Rice <MPRice@aep.com>; Liu, Jay <Jay.Liu@pjm.com>; Rich Lester <[rl Ester@aep.com](mailto:rl Lester@aep.com)>; William M Sigler <wmsigler@aep.com>; Ziya Movsumov <zmovsumov@aep.com>; Thomas M Glusich Jr. <tmglusich@aep.com>; Rountree, Robert <Robert.Rountree@pjm.com>; Caixeta Moreira, Daniel <Daniel.CaixetaMoreira@pjm.com>; pjmrequest@aep.com
Cc: Soorya, Radha <RSoorya@invenenergy.com>; Luckey, Nicole <NLuckey@invenenergy.com>; Stupar, Rob <RStupar@invenenergy.com>; Pawelczyk, Hannah <HPawelczyk@invenenergy.com>; Smith, Holly Rachel <HSmith@invenenergy.com>; Kricher, Erin <EKricher@invenenergy.com>; Kaplan, Michael <MKaplan@invenenergy.com>; Hoerbert, Lance <LHoerbert@invenenergy.com>; Johnson, Sarah <SRJohnson@invenenergy.com>; Nurse, Andrew <ANurse@invenenergy.com>
Subject: RE: Lone Oak Solar (AD1-043) : Notice to Suspend



External Email! Think before clicking links or attachments.

Contact the Support Center immediately if you click on a link or open an attachment that appears malicious.

Travis,

Any updates on the suspension request ?

Thanks,

Harliv Singh | Manager, Interconnections and Grid Analysis |
Invenergy | One South Wacker Drive, Suite 1800, Chicago, IL 60606 (PA remote office)
HSingh@invenenergy.com | C 630-540-8863

From: Singh, Harliv <HSingh@invenenergy.com>

Cause No. 45883

Cause No. 45883

Sent: Wednesday, June 28, 2023 2:24 PM

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Page 2 of 2

To: White, Travis <Travis.White@pjm.com>; Mitchell P Rice <MPRice@aep.com>; Liu, Jay <Jay.Liu@pjm.com>; Rich Lester <rlester@aep.com>; William M Sigler <wmsigler@aep.com>; Ziya Movsumov <zmovsumov@aep.com>; Thomas M Glusich Jr. <tmglusich@aep.com>; Rountree, Robert <Robert.Rountree@pjm.com>; Caixeta Moreira, Daniel <Daniel.CaixetaMoreira@pjm.com>; pjmrequest@aep.com

Cc: Soorya, Radha <RSoorya@invenenergy.com>; Luckey, Nicole <NLuckey@invenenergy.com>; Stupar, Rob <RStupar@invenenergy.com>; Pawelczyk, Hannah <HPawelczyk@invenenergy.com>; Smith, Holly Rachel <HSmith@invenenergy.com>; Kricher, Erin <EKricher@invenenergy.com>; Kaplan, Michael <MKaplan@invenenergy.com>; Hoerbert, Lance <LHoerbert@invenenergy.com>; Johnson, Sarah <SRJohnson@invenenergy.com>; Nurse, Andrew <ANurse@invenenergy.com>

Subject: Lone Oak Solar (AD1-043) : Notice to Suspend

PJM/AEP,

Please find attached the notice to suspend work under the ISA/CSA for Lone Oak Solar (AD1-043).

Please let us know if any additional information is needed at this time.

Thanks,

Harliv Singh | Manager, Interconnections and Grid Analysis |
Invenenergy | One South Wacker Drive, Suite 1800, Chicago, IL 60606 (PA remote office)

Citation	Objection to Hill Testimony	Response to Objection
Q8. (p. 8:10-15)	<p>IRE 702: Opinions on the legal standard the Commission should use to decide the case. No foundation laid for qualifying Mr. Hill to offer opinions on such issues.</p> <p>IRE 704(b): Legal conclusion: Testimony includes legal conclusions about what factors are “relevant” for the Commission to consider.</p>	<p>As an attorney and a utility expert, Mr. Hill is qualified to render these types of opinions. Mr. Hill did not testify as to “who should win” – he testified as to what facts might be relevant to the Commission’s decision on whether to reassert jurisdiction under Ind. Code ch. 8-1-2.5, which is permissible under <i>Columbia City</i>, 618 N.E.2d at 28. Expert opinion on the ultimate fact in issue is not objectionable.</p>
Q9 (p. 9:2–10)	<p>IRE 702, 602: Unqualified expert opinion and speculation: Offers improper opinion and speculation that the energy generated at the Lone Oak facility “will be consumed by retail customers.”</p>	<p>As noted above, Mr. Hill has deep experience in the public utility industry, as well as in local planning and zoning matters which qualify him to give expert opinion. It is common knowledge among industry experts that while wholesale market transactions are the basis of the electric market, the power bought and sold in those markets is for the ultimate consumption of retail customers. The entire purpose of the wholesale markets is to ensure reliable supply for load serving entities.</p>
Q9 (pp. 9:15–10:2)	<p>IRE 801. The MISO president’s statements are hearsay.</p>	<p>Witness explains other industry issues impacting the need for energy supply in Indiana. Footnotes provide web links to MISO’s statements. MISO is a quasi-public agency created by federal law and orders of the Federal Energy Regulatory Commission. Therefore, Mr. Moeller’s statement on behalf of MISO is within the public records and business records exception to the hearsay rule. Hearsay is not per se inadmissible, objection goes to the weight, not admissibility of the evidence.</p>

Q9 (p. 10:3–10)	IRE 602, 702: Speculation and improper expert opinion (not qualified) about Indiana’s energy market, utilities’ future plans, and how much electricity produced by the Lone Oak project will be consumed in Indiana.	As noted above, Mr. Hill has deep experience in the public utility industry, as well as in local planning and zoning matters which qualify him to give expert opinion. As such, he is an expert in the field of renewable project development and local zoning issues. This experience qualifies him to opine on the issues. See <i>Cincinnati SMSA Ltd. P’ship v. Ind. Dep’t of State Revenue</i> , 2009 Ind. Tax LEXIS 32, *11-12 (testimony not speculative where supported by witness’s 25 years of experience within the wireless telecommunications industry). Mr. Hill’s statement is not a legal conclusion, he is an expert witness opining on how the Lone Oak project fits into Indiana’s energy portfolio.
Q9 (p. 10:10–12)	IRE 704(b). Legal conclusion about the effect of a Commission decision to continue declining to exercise jurisdiction over the project.	The witness provides his perspective on the balance between local concerns and the larger public interest. Witness does not speculate on how the Commission should decide the case. Witness provides an observation on the practical effect of the BZA’s actions and compares the policy implications.
Q10 (pp. 10:20–11:10)	IRE 704(b) Legal conclusions and improper opinions about what “this provision [IC 8-1-2.5-1(6)] suggests” how the “public interest” is served by the Commission exercising jurisdiction and what factors are “relevant” to the Commission exercising jurisdiction.	The mere recitation of a statute does not constitute the rendering of a legal conclusion. An expert may not state legal conclusions drawn by applying the law to the facts, but an expert may refer to the law in expressing his or her opinion. <i>Richter</i> , 796 F.3d at 1195; <i>see also, Columbia City</i> , 618 N.E.2d at 28.
Q10 (p. 11:7–20)	IRE 602, 702: Speculation and improper opinion about how the local government “may be unaware, uninformed, or lack expertise” and whether the Commission’s expertise, empowerment, and decision-making are “unique” to the exclusion of local governments and the judiciary.	The witness provides his observation of the basis for the BZA decision given the comments provided at the hearing, which are provided in the transcript. Witness does not offer statements regarding the expertise of the judiciary. However, the courts have stated that “Insofar as the order involves a subject within the Commission’s special competence, courts should give it greater deference. <i>N. Ind. Pub. Serv. Co. v. United States Steel Corp.</i> , 907 N.E.2d 1012, 1016 (Ind. 2009).

Q10 (pp. 11:20–12:3)	IRE 702: Improper opinions about the impact of the Commission’s continued declination of jurisdiction, and how local zoning laws “ignore[]” the “reality” that power sent to the grid “cannot be tracked with precision from the source to end-use customer.” No foundation laid qualifying Mr. Hill to offer opinions on such issues.	As an attorney and a utility expert, Mr. Hill is qualified to render these types of opinions. It is commonly known among experts in the energy industry that the physics of electricity is such that electronics cannot be tracked with precision, and the exact source of the energy provided to the customer cannot be known with certainty.
Q12 (pp. 12:15–13:5)	IRE 704. Improper legal conclusion about what factors the Commission should or should not consider in this cause.	The mere recitation of a statute does not constitute the rendering of a legal conclusion.
Q13 (pp. 13:19–14:3)	<p>IRE 702, 704, 602: Improper legal conclusion, opinion, and speculation what effect the County’s regulations (and thus any resulting judicial review action of the County’s actions) may or may not have on the Project or the overall electric grid.</p> <p>Improper legal conclusion, opinion, and speculation about whether “technological or operating conditions or competitive forces or jurisdiction by other bodies” make the Commission’s exercise of jurisdiction unnecessary or wasteful, or whether the Commission is the “single most effective tool” as compared to other regulatory and/or adjudicative bodies. No foundation laid qualifying Mr. Hill to offer opinions on such issues.</p>	Mr. Hill is a qualified expert and may render his opinions. An expert may not state legal conclusions drawn by applying the law to the facts, but an expert may refer to the law in expressing his or her opinion. <i>Richter</i> , 796 F.3d at 1195; <i>see also</i> , <i>Columbia City</i> , 618 N.E.2d at 28. This is what Mr. Hill does here when discussing the statutory factors.
Q15 (p. 15:9–12)	IRE 602, 701. Speculation about the sources of new generation in Indiana. No foundation laid qualifying Mr. Hill as an expert to opine on such issues.	As an attorney and a utility expert, Mr. Hill is qualified to render these types of opinions. The SUFG’s studies cited by Mr. Hill (which are not subject to the Motion to Strike) support Mr. Hill’s statements. Thus, this is not speculation.
Q15 (pp. 15:19–16:3)	IRE 602, 702. Speculation about the most efficient and cost-effective way for utilities to procure new sources of energy and how a decision to not reassert jurisdiction would affect future electric generation. No foundation laid qualifying Mr. Hill as an expert to opine on such issues.	As an attorney and a utility expert, Mr. Hill is qualified to render these types of opinions. Ind. Code § 8-1-8.5-5(e)’s requirement that utilities seek competitive bids for new utility-scale generation resources supports Mr. Hill’s statements. Thus, this is not speculation.

Q16 (p. 16:10-11)	IRE 702, 704. Legal conclusion and improper opinion about the import and meaning of the “efficiency” factor identified in IC 8-1-2.5-5(b)(3).	As an attorney and a utility expert, Mr. Hill is qualified to render these types of opinions. An expert may not state legal conclusions drawn by applying the law to the facts, but an expert may refer to the law in expressing his or her opinion. <i>Richter</i> , 796 F.3d at 1195; <i>see also</i> , <i>Columbia City</i> , 618 N.E.2d at 28. This is what Mr. Hill does here when discussing the statutory factors.
Q18 (p. 18:4-7)	IRE 704. Legal conclusion about IURC’s jurisdiction and PJM’s tariff.	This is not a legal conclusion. It is simply a quote from the Lone Oak’s Interconnection Service Agreement, which is attached to Mr. Kaplan’s testimony as Attachment MRK-2. It is also a factual statement regarding the conflicting commercial operation date approved by PJM versus the commercial operation date as approved by the BZA.
Q21 (pp. 19:20–20:12)	IRE 702, 602. Improper expert opinions and speculation about Lone Oak’s ability to compete in the marketplace. No foundation laid qualifying Mr. Hill to offer opinions on such issues.	As an attorney and a utility expert, Mr. Hill is qualified to render these types of opinions. An expert may not state legal conclusions drawn by applying the law to the facts, but an expert may refer to the law in expressing his or her opinion. <i>Richter</i> , 796 F.3d at 1195; <i>see also</i> , <i>Columbia City</i> , 618 N.E.2d at 28. This is what Mr. Hill does here when discussing the statutory factors.
Q23–25 (pp. 20:16–22:17)	IRE 702, 704: Legal conclusions about statutory interpretation and opinions about utility public policy. No foundation laid qualifying Mr. Hill to offer opinions on such issues.	As an attorney and a utility expert, Mr. Hill is qualified to render these types of opinions. An expert may not state legal conclusions drawn by applying the law to the facts, but an expert may refer to the law in expressing his or her opinion. <i>Richter</i> , 796 F.3d at 1195; <i>see also</i> , <i>Columbia City</i> , 618 N.E.2d at 28. This is what Mr. Hill does here when discussing the “public interest” factors.
Q26: (p. 22:22–24)	IRE 602, 702: Speculation about how energy market has changed over the last 20 years. No foundation laid qualifying Mr. Hill to offer opinion on energy market.	As an attorney and a utility expert, Mr. Hill is qualified to render these types of opinions. An expert may not state legal conclusions drawn by applying the law to the facts, but an expert may refer to the law in expressing his or her opinion. <i>Richter</i> , 796 F.3d at 1195; <i>see also</i> , <i>Columbia City</i> , 618 N.E.2d at 28. This is not speculation, but Mr. Hill’s opinion regarding how the energy industry has changed in the last 20 years.

Q27 (p. 23:3–4)	IRE 702. Improper opinion. Mr. Hill is not qualified to opine on the Commission’s historic treatment of other solar developers.	These are not the opinions of Mr. Hill. Rather, this is a recitation of the legal conclusions that the Commission has made in its Final Orders with regard to the regulation of Lone Oak and other solar developers.
Q27 (p. 23:3–21)	IRE 704. Legal conclusions and argument more appropriate for post-hearing briefing.	These are not the legal conclusions of Mr. Hill. Rather, this is a recitation of the legal conclusions that the Commission has made in its Final Orders with regard to the regulation of Lone Oak and other solar developers.
Q28: (p. 24:4–6)	IRE 702, 704: Legal conclusion and opinion regarding the Commission’s authority. No foundation laid qualifying Mr. Hill to offer opinions on these issues.	As an attorney and a utility expert, Mr. Hill is qualified to render these types of opinions. An expert may not state legal conclusions drawn by applying the law to the facts, but an expert may refer to the law in expressing his or her opinion. <i>Richter</i> , 796 F.3d at 1195; <i>see also</i> , <i>Columbia City</i> , 618 N.E.2d at 28. The mere recitation of a statute (or the lack of one) does not constitute the rendering of a legal conclusion.
Q29–30 (pp. 24:7–26:13)	IRE 704, 702, 602. Improper legal conclusion and argument more appropriate for post-hearing briefing. No foundation laid for Mr. Hill’s personal knowledge or expertise to opine on this topic.	These are not the legal conclusions of Mr. Hill. Rather, this is a recitation of the legal conclusions that the Commission has made in its Final Orders with regard to the <i>CinCap</i> case and the regulation of Lone Oak and other solar developers. As an attorney and a utility expert, Mr. Hill is qualified to render these types of opinions. An expert may not state legal conclusions drawn by applying the law to the facts, but an expert may refer to the law in expressing his or her opinion. <i>Richter</i> , 796 F.3d at 1195; <i>see also</i> , <i>Columbia City</i> , 618 N.E.2d at 28. The mere recitation of a statute (or the lack of one) does not constitute the rendering of a legal conclusion.
Q31 (pp. 26:15–27:8)	IRE 704, 702, 602: Improper legal conclusion and argument more appropriate for post-hearing briefing. No foundation laid for Mr. Hill’s personal knowledge or expertise to opine on this topic. Speculation and improper opinion testimony regarding changes in energy markets and energy generation and the connectivity of the nation’s electrical grid. No foundation laid qualifying Mr. Hill to offer opinions on these topics.	These are not the legal conclusions of Mr. Hill. Rather, this is a recitation of the legal conclusions that the Commission has made in its Final Orders with regard to the <i>CinCap</i> case and the regulation of Lone Oak and other solar developers. As an attorney and a utility expert, Mr. Hill is qualified to render these types of opinions. The mere recitation of a statute (or the lack of one) does not constitute the rendering of a legal conclusion.

Q32 (pp. 27:9–28:5)	IRE 702, 704: Improper legal conclusion and argument more appropriate for post-hearing briefing regarding the relief available under Indiana law to surrounding landowners. No foundation laid qualifying Mr. Hill to offer opinions on these issues.	As an attorney and a utility expert, Mr. Hill is qualified to render these types of opinions. An expert may not state legal conclusions drawn by applying the law to the facts, but an expert may refer to the law in expressing his or her opinion. <i>Richter</i> , 796 F.3d at 1195; <i>see also</i> , <i>Columbia City</i> , 618 N.E.2d at 28. The mere recitation of a statute (or the lack of one) does not constitute the rendering of a legal conclusion.
Q32-33 (pp. 28:8–29:11)	IRE 702, 704: Legal conclusion and argument more appropriate for post-hearing briefing regarding Wholesale Public Utility regulations, public policy being promoted by those regulations, Indiana caselaw, and interpretation of the commerce clause. No foundation laid qualifying Mr. Hill to offer opinions on these issues.	As an attorney and a utility expert, Mr. Hill is qualified to render these types of opinions. An expert may not state legal conclusions drawn by applying the law to the facts, but an expert may refer to the law in expressing his or her opinion. <i>Richter</i> , 796 F.3d at 1195; <i>see also</i> , <i>Columbia City</i> , 618 N.E.2d at 28. The mere recitation of a statute (or the lack of one) does not constitute the rendering of a legal conclusion.
Q35: (pp. 29:21–30:20)	IRE 702, 704: Legal conclusion and argument more appropriate for post-hearing briefing regarding Indiana zoning regulations and the public interest. No foundation laid qualifying Mr. Hill to offer opinions on these issues.	Mr. Hill’s factual statements and opinions, which is qualified to make as an expert, are supported by the citation to the business records of the Indiana Farm Bureau and several are common knowledge of renewable energy industry experts.
Q35: (p. 30:14–18)	IRE 602, 702: Speculation and improper expert opinions regarding the ability of public utilities to build solar projects and the cost of those projects versus Wholesale Public Utilities. No foundation laid qualifying Mr. Hill to offer opinions on these issues.	Mr. Hill’s factual statements and opinions, which is qualified to make as an expert, are supported by the citation to the business records of the Indiana Farm Bureau and several are common knowledge of renewable energy industry experts.
Q36 (p. 31:3–9)	IRE 602, 702: Speculation and improper expert opinions on whether Wholesale Public Utilities are or are not reluctant to invest in solar projects or whether Lone Oak’s experience will have a “chilling effect” on other developers. No foundation laid qualifying Mr. Hill to offer opinions on these issues.	Mr. Hill’s factual statements and opinions, which is qualified to make as an expert, are supported by the documents provided in Lone Oak’s Request for Administrative Notice and several are common knowledge of renewable energy industry experts.

Q38 (pp. 31:17–32:2)	IRE 702, 704: Improper legal conclusions and argument more appropriate for post-hearing briefing regarding about the any conflicts between Commission and local regulations and interpretation of prior Commission orders. No foundation laid qualifying Mr. Hill to offer opinions on these issues.	This is not a legal conclusion. It is Mr. Hill’s expert opinion regarding the conflicting commercial operation date approved by PJM versus the commercial operation date as approved by the BZA, and whether the public interest is served by allowing such a conflict to continue.