

OFFICIAL EXHIBITS

STATE OF INDIANA ORIGINAL INDIANA UTILITY REGULATORY COMMISSION

Handwritten initials and signatures: DWH, AK, WDM

PETITION OF PSEG LAWRENCEBURG ENERGY COMPANY LLC FOR (A) A DETERMINATION OF THE COMMISSION'S JURISDICTION WITH RESPECT TO A 1150 MW POWER GENERATING FACILITY; (B) FOR DECLINATION OF THE COMMISSION'S JURISDICTION OVER THE CONSTRUCTION; OWNERSHIP, OPERATION AND FINANCING OF THE FACILITY PURSUANT TO IND. CODE 8-1-2.5; AND (C) TO THE EXTENT THE COMMISSION DOES NOT DECLINE ITS JURISDICTION, SUCH APPROVALS AND AUTHORIZATIONS AS ARE NECESSARY TO CONSTRUCT, OWN AND OPERATE THE FACILITY, INCLUDING ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY UNDER IND. CODE 8-1-8.5.

CAUSE NO. 41757

APPROVED:

DEC 20 2000

BY THE COMMISSION:

William D. McCarty, Chairman
David W. Hadley, Commissioner
Scott R. Storms, Administrative Law Judge

IURC Joint PETITIONER'S - AEP EXHIBIT NO. Ad Nts 3 DATE 12-8-16 REPORTER AT

On June 14, 2000, PSEG Lawrenceburg Energy Company LLC ("Petitioner" or "PSEG Lawrenceburg") filed its Petition in this Cause for certain determinations, declinations of jurisdiction and approvals relating to its proposed construction of a 1150 MW power generating facility in Lawrenceburg, Indiana (the "Facility").

Pursuant to the Prehearing Conference on July 19, 2000, the Prehearing Conference Order dated August 2, 2000, and notice of hearing given as provided by law, proof of which was incorporated into the record by reference and placed in the official files of the Commission, a public hearing in this Cause was held on October 26, 2000 in Room E306, Indiana Government Center South, Indianapolis, Indiana. At the hearing, evidence was submitted by Petitioner, the Office of Utility Consumer Counselor (the "OUCC" or the "Public") and Intervenor Citizens Action Coalition of Indiana, Inc. (the "CAC"). No members of the general public appeared at the evidentiary hearing.

Based upon the applicable law and evidence herein, the Commission now finds:

1. Notice and Jurisdiction. Notice of the hearing in this cause was duly given and published more than ten (10) days prior to the hearing in newspapers of general circulation published in the English language as required by law.

Petitioner intends to own, operate, and control plant and equipment within this State for the production of electricity. The Indiana Court of Appeals has held that the Commission has the authority and duty, when requested under appropriate circumstances, to determine whether a business is a public utility. *Hidden Valley Lake Property Owners v. HVL Utilities*, 408 N.E.2d 622, at 629 (Ind. App. 1980) (*reh'g den.*, 411 N.E.2d 1262). Further, the Commission has jurisdiction to decline to exercise, in whole or in part, its jurisdiction over an "energy utility." Ind. Code § 8-1-2.5. Therefore, the Commission has jurisdiction over Petitioner and the subject matter of the Petition.

2. **Petitioner's Characteristics and Business.** Petitioner is a limited liability company organized under the laws of the State of Delaware. Petitioner is registered with the Indiana Secretary of State to do business in the State of Indiana. There are two members of Petitioner: (a) PSEG Global USA Inc. which has a 99% ownership interest, and (b) PSEG Midwest Operating Company which has a 1% ownership interest. Both members are wholly-owned subsidiaries of PSEG Global Inc. ("PSEG Global") which is in the business of developing, owning and operating electric generation facilities and distribution systems and engages in power production and distribution in the United States, South America and Asia. PSEG Global is a direct subsidiary of PSEG Energy Holdings and an ultimate subsidiary of Public Service Enterprise Group, a diversified energy company with annual revenues of approximately \$6 billion and more than 100 years of experience in the gas and electric power business. Other subsidiaries of Public Service Enterprise Group include Public Service Electric & Gas Company ("PSE&G"), a public utility engaged in electric and gas distribution in New Jersey and PSEG Power. PSEG Power was formed to own and operate the electric generation assets of PSE&G.

Upon completion, the Facility will generate electricity solely for sales for resale in the wholesale market. Petitioner will be an Exempt Wholesale Generator ("EWG") pursuant to Section 32(a)(1) of the Public Utility Holding Company Act of 1935 ("PUHCA"), 15 U.S.C. §79z-5a(a)(1) and power from the Facility will be sold pursuant to Federal Energy Regulatory Commission ("FERC") authorized wholesale market-based rates.

3. **Relief Requested.** Petitioner has requested that the Commission determine that the construction, ownership and operation of the Facility will not make Petitioner an Indiana "public utility" as defined by Indiana law. In the alternative, if the Commission finds that Petitioner is a public utility under Indiana law, Petitioner requested that the Commission decline to exercise its jurisdiction over Petitioner as a public utility, including, but not limited to, its jurisdiction under Ind. Code § 8-1-8.5. In the further alternative, Petitioner requested that to the extent the Commission does not decline its jurisdiction, the Commission grant to Petitioner all necessary certificates and authority required for the construction, ownership and operation of the Facility.

Petitioner asserts that the exercise of the Commission's jurisdiction over Petitioner and its ownership, development, financing, construction and operation of the Facility is unnecessary and would be a waste of the Commission's resources. Petitioner represents that, on the other hand, declination of jurisdiction over Petitioner by the Commission would be beneficial to the Commission, Petitioner, and the electricity consumers of Indiana. Petitioner alleges that such a

declination would permit immediate and necessary construction of the Facility to meet electric energy use requirements in Indiana. Petitioner further alleges that such a declination will allow Petitioner to promote energy utility efficiency, reliability, and competitive rates for power.

Petitioner represents that it does not intend to sell the electricity generated by the Facility to the general public or to any retail customer. Petitioner did not request authority to exercise any of the rights or privileges of a public utility in the construction and operation of the Facility, e.g., eminent domain, use of public rights-of-way, *etc.* Petitioner has represented that it does not intend to recover its costs through a rate base/rate of return or other process typically associated with "public utility" rates. Petitioner will construct the Facility and the output of the Facility will be sold to one or more power marketers, energy service providers or public utilities purchasing in a competitive wholesale market. Petitioner argues that its development, financing, construction and operation of the Facility, and the ultimate purchase by any public utility, either directly or indirectly, of the electricity it generates, should not cause Petitioner to become a "public utility." In the alternative, Petitioner requests that the Commission substantially decline to exercise its jurisdiction over Petitioner or, to the extent it does not decline its jurisdiction, grant such certificates and authority as are necessary for the Facility.

4. Evidence Presented.

Petitioner Petitioner's witness Benjamin H. Sisson, Director of Business Development for PSEG Global and Vice President of PSEG Lawrenceburg, testified about Petitioner's project. Mr. Sisson stated that the Facility will be located on 70 acres of industrial zoned land in Lawrenceburg. Mr. Sisson said the Facility would use natural gas as its fuel. The Facility will have four GE Frame 7FA combustion turbines operated in combined cycle mode. In this mode, heat will be recovered from the combustion turbine exhaust gas to generate steam and drive two associated steam turbine generators. The plant design will incorporate supplemental gas burners in the heat recovery boilers to increase the amount of steam generated and yield additional electric power output during times of need. Mr. Sisson said the Facility would be an intermediate load or load following plant which Petitioner anticipated would operate between 25% and 65% of the time which is less than a base load plant but more than a peaking unit.

Mr. Sisson discussed the reasons why the site in Lawrenceburg was selected for the project. Mr. Sisson described the compatibility of the project with the area in which it is located, the time schedule for the project, and Petitioner's evaluation of the need for the project, including the market studies upon which Petitioner relies. Mr. Sisson also testified regarding local zoning requirements; other local permits and approvals; Petitioner's noise evaluation; the status of necessary environmental permits; air quality issues; water and wastewater issues; the gas supply for the project; AEP's system impact studies; the community support for the project; and the benefits to the State of Indiana which would be created by the Facility. Mr. Sisson testified that Petitioner had filed on July 20, 2000 and July 26, 2000 applications with the Indiana Department of Environmental Management for the required Air Permits (the Prevention of Significant Deterioration ("PSD") Construction Permit and Acid Rain Permit) and National Pollutant Discharge Elimination System

("NPDES") permit for Process Water Discharged from the facility. Mr. Sisson also stated that modeling completed as part of the Air Permit preparation activities using a USEPA-approved model showed that the Facility would have no significant impact on local or regional air quality.

Mr. Sisson said that Petitioner considered surface water from Tanners Creek to be the primary source of water supply for the Facility. Other potential sources were the cooling water discharge stream of the Seagram distillery and groundwater. Groundwater is available from an aquifer which is robust and one of the largest resources of water in the region. Evidence presented by the Petitioner in the form of a *Ground Water Supply Pump Test Plan*, confirms the existence of a sufficient water supply in the area. Mr. Sisson committed that Petitioner's use of groundwater would not adversely affect the ability of the local and neighboring water utilities to serve their customers.

OUCG: OUCG's witness Dr. Peter M. Boerger testified that the Commission should put certain limitations, restrictions and conditions on any declination of jurisdiction which it might grant in this proceeding. Dr. Boerger stated that Petitioner should not be permitted to exercise special rights, powers and privileges granted to utilities selling at retail in Indiana. Dr. Boerger said that Petitioner should be required to comply with all local construction-related requirements. Dr. Boerger also testified about the transmission study; the need for submission of a gas supply study; and, requirements that should apply if Petitioner later becomes an affiliate of an Indiana retail electric utility.

Citizens Action Coalition: CAC witness Reed Cearley, a utility consultant and former Associate Director of the State Utility Forecasting Group, testified regarding the project; the regulatory framework for merchant plants; the current market status of merchant plants; merchant plant developments and trends; the relationship between merchant plants and the energy needs of the State of Indiana; the standards he believes should be met before the Commission declines jurisdiction over a merchant plant; his analyses of the market studies relied on by Petitioner; local siting issues; Petitioner's site selection process; affiliate relationship issues; financing issues; and other considerations related to merchant plants generally and Petitioner's project specifically.

Petitioner's Rebuttal Testimony: On rebuttal, Mr. Sisson responded to the issues raised by Dr. Boerger and Mr. Cearley. Mr. Sisson's rebuttal testimony included a discussion of Petitioner's site selection process. Petitioner also presented as witnesses on rebuttal Judah Rose, Senior Vice President of ICF Consulting ("ICF"), who testified regarding ICF's electric market study performed for PSEG Global, and Gregg Shively, head of the Fuel Strategy and Business Planning practice at Pace Global Energy Services ("Pace"), who testified about gas issues relating to the Facility, including the fuel strategy and detailed gas study which Pace developed for PSEG Global.

5. **Conclusions and Order Upon Review of Facts and Issues.** Petitioner has asserted that, if the Commission finds from the record evidence that Petitioner is a public utility for purposes of Indiana's utility power plant construction law (Ind. Code § 8-1-8.5-1 *et seq.*), then Petitioner would be an "energy utility" as defined by Ind. Code § 8-1-2.5-2. The Commission may decline to

exercise its jurisdiction pursuant to Ind. Code § 8-1-2.5-1 *et seq.*, including the Commission's jurisdiction under Ind. Code § 8-1-8.5-1 *et seq.*, to issue certificates of public convenience and necessity for the construction of the Facility. In order for the Commission to decline to exercise jurisdiction over Petitioner pursuant to Ind. Code § 8-1-2.5, or to issue Petitioner a certificate of public convenience and necessity under Ind. Code § 8-1-8.5 if it retains such jurisdiction, the Commission must assert jurisdiction over Petitioner as a public utility.

Petitioner intends to own, operate, and control an electric generation facility. The evidence establishes that Petitioner's ownership, development, financing, construction and operation of the Facility is for the purpose of sale of the power generated by that plant in the wholesale market to public utilities, energy service providers and power marketers within and without Indiana. The Commission has found in prior cases that a business that only generates electricity and then sells that electricity directly to public utilities is itself a public utility. *See, In re Petition of Commonwealth Edison of Indiana, Inc.*, Cause No. 36093 (Ind. Util. Reg. Comm'n, June 12, 1980); *In re Petition of AES Greenfield, LLC*, Cause No. 41361 (Ind. Util. Reg. Comm'n, March 11, 1999), wherein the Commission specifically found that it had jurisdiction over utilities with operations such as the Petitioner's. Consequently, for purposes of the ownership, development, financing, construction and operation of the Facility, we find that Petitioner is a public utility within the meaning of Ind. Code § 8-1-2-1.

While we conclude that the Petitioner's proposed Facility is a "public utility" as defined in the Public Service Commission Act, the Indiana Code authorizes the Commission to decline to exercise, in whole or in part, jurisdiction over an "energy utility" if certain conditions are satisfied. In particular, the Indiana Code provides that "the Commission may enter an order, after notice and hearing, that the public interest requires the Commission to commence an orderly process to decline to exercise, in whole or in part, its jurisdiction over . . . the energy utility . . ." Ind. Code § 8-1-2.5-5.

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

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

- (5) competing with other providers of functionally similar energy services or equipment.

Ind. Code § 8-1-2.5-5.

In determining whether the public interest would be served by such a declination, the Commission concludes that it should consider, among other things, whether the proposed location of the electric generation facility will significantly and negatively impact an Indiana electricity supplier or its customers. In addition, the Commission notes that evidence has been presented in this Cause that demonstrates that market conditions exist that will support the construction of a plant selling at competitive rates into the wholesale market. Finally, the Commission has examined evidence in this Cause regarding the Petitioner's financial viability and proposed financing structure for the project.

Petitioner does not intend, nor does it request authority, to sell the electricity generated by the Facility to the general public or to any retail customer. Petitioner acknowledges that, consistent with FERC precedent, it is required to pay for the costs of interconnection with AEP, consistent with the terms and conditions of the Interconnection Agreement between AEP and Petitioner, and that it will be responsible for costs that may be incurred under FERC tariffs and regulations. Petitioner agrees to operate its Facility in a manner consistent with good utility practice. Petitioner does not seek or request authority to exercise any of the rights, powers, or privileges of a Indiana public utility in the construction and operation of the Facility, *e.g.*, the power of eminent domain, the use of public rights of way, *etc.* Further, the evidence demonstrates that Petitioner's costs will not be recovered through a rate base/rate of return or other process typically associated with public utility rates. Petitioner has presented evidence that the officials of Lawrenceburg have reviewed and support the development, construction and operation of the Facility, and we note that no evidence was presented to indicate any local opposition to the Facility.

To operate as an EWG Petitioner must apply to FERC for such status. 15 U.S.C. § 79z-5(a)(1). In addition, Petitioner's wholesale rates and charges for the sale of energy will be subject to the jurisdiction of FERC and are required to be just and reasonable, in conformity with standards set by FERC. 16 U.S.C. § 824d. Nothing herein should be construed to replace or affect any approvals needed on environmental issues under Indiana and federal law from the Indiana Department of Environmental Management or the U.S. Environmental Protection Agency. Petitioner shall, prior to beginning operation of the facility, have obtained all appropriate air, water and other permits in accordance with the law.

As noted above, and in support of its proposal that the Commission decline to exercise its jurisdiction the Petitioner presented evidence in this Cause that addressed a number of factors deemed to be in the public interest. including the following:

Location: Petitioner has submitted evidence that it has complied with local zoning and land use requirements, has obtained or will obtain all local construction-related permits and will not rely on the public utility exemption from local zoning regulation. Therefore, regardless of whether these

local approvals are legally necessary, they have been or will be obtained in this case. As part of its public interest determination, the Commission may consider whether or not the location of a proposed facility is compatible with the surrounding land uses. In determining compatibility, the Commission may evaluate and consider any evidence of compliance with local zoning and land use requirements.

In deciding whether to decline jurisdiction over Petitioner and the Facility, the Commission has authority to consider whether the public interest will be served by the Facility being in its planned location. In such a review, the Commission considered the potential for adverse effects on Indiana "electricity suppliers" (as that term is used in Ind. Code § 8-1-2.3), their customers, or a local community in deciding whether to decline, or subsequently reassert, jurisdiction over Petitioner or the construction of its Facility. Indiana statutes regarding surface and groundwater rights and obligations, including those establishing the authority of the Indiana Natural Resources Commission (Ind. Code § 14-25-7-15) do not limit our jurisdiction to make such determinations under the public interest standards of Ind. Code § 8-1-2.5 or the public convenience and necessity standards of Ind. Code § 8-1-8.5-5(b)(3). If a proposed new power plant will significantly and negatively impact an electricity supplier, its consumers, or a local community, the Commission may, refuse to decline jurisdiction under Ind. Code § 8-1-2.5 and Ind. Code § 8-1-8.5. Similarly, while FERC has jurisdiction over interstate transmission service, this Commission can consider the effects that a new power plant could have on other Indiana electricity suppliers and their consumers when determining whether to decline jurisdiction over, or to certify construction of, a new power plant. In this regard, this Commission does not decline any jurisdiction it has to adjudicate disputes regarding alleged adverse impacts on the transmission and distribution facilities of an Indiana electricity supplier and its consumers.

With specific regard to Petitioner's Facility, Petitioner has filed with the Commission Phase I and Phase II System Impact Studies ("SIS"): At Petitioner's request, AEP served its Phase I SIS on the neighboring retail Indiana electric utilities interconnected to AEP on July 14, 2000 and its Phase II SIS on the same utilities on August 17, 2000. We note that no objections thereto have been submitted to the Commission. Petitioner has also submitted on a confidential basis the analysis regarding gas supplies for the Facility performed by Pace and the electric market study performed by ICF. Petitioner has also submitted evidence for the record regarding the Facility's lack of impact on the water rights and water uses of the Lawrenceburg community. In addition, although the Petitioner has no plans to do so, evidence presented by the Petitioner indicates that due to its technology the plant could be converted to utilize gasified coal if an alternative fuel source becomes attractive at some point in the future. Thus, in this case, Petitioner has demonstrated, through record evidence, that the impact of the Facility on transmission systems of Indiana utilities, and the impact of the Facility on regional gas supplies and water use rights, will not adversely impact Indiana utilities, consumers or communities. Petitioner also has demonstrated that the local community in Lawrenceburg supports the proposed Facility. Accordingly, on the basis of this information, we have determined that the public interest will be served if the Facility is located as planned.

Need: In determining the public interest, the Commission will review the need (*i.e.*, will the development of additional generating capacity serve the public interest). To demonstrate need, entities must provide evidence that a proposed facility will meet the demands of the market; a mere assertion that the wholesale market is competitive is insufficient to meet this standard. As the Commission has noted in previous orders, it is aware of the changing business environment for the production and marketing of electricity at wholesale, in which “merchant” plants are increasingly common. These merchant plants are projected to be mostly gas-fired combustion turbines and combined cycle units. Moreover, the Petitioner presented evidence that the need for more power was demonstrated by the extreme heat events experienced in Indiana in June 1998 and July 1999.

For purposes of demonstrating need, Petitioner has submitted to the Commission and the parties on a confidential basis its analysis of the Midwest power market. This study shows a need by 2005 for additional power in the Southern segment of the East Central Area Reliability Council (“ECAR”) Region of approximately 11,308 MW – generally proportionate to the increased need in Indiana over the same period. It further shows a need for additional capacity, including intermediate and baseload capacity, in Southern ECAR after 2005. According to Petitioner’s evidence, neither of these needs have yet been met. Petitioner’s evidence also shows that the Facility will be dispatched with sufficient frequency in the competitive wholesale market over the period of its expected operating life to recover its revenue requirement. Petitioner will submit to the Commission prior to construction a certificate that it has obtained financing for the Facility as represented in its testimony.

Petitioner’s market study provides the evidence necessary for the Commission to be satisfied that there is not only a generic need for power in the region, but also a particular need for the power to be generated by the Facility. Evidence presented by the Petitioner indicates that the proposed Facility should reduce the cost of power and provide additional power that, in turn, will benefit ratepayers in Indiana. The evidence further demonstrates that the Petitioner has agreed to provide notice of any change in the in-service date, which the Commission may use to refine its integrated resource planning for Indiana retail utilities.

In evaluating need, the Commission notes that the CAC has proposed that “tolling agreements” between certain merchant power plant developers and parties who both provide the fuel for and take the power from a plant should be filed with the Commission on a confidential basis. Petitioner does not intend to use long-term tolling agreements for purposes of increasing the leverage in the project financing. Therefore, this issue is not relevant in this case. If Petitioner later chooses to enter into any tolling agreements in excess of five years in duration, it agrees to file such agreements with the Commission on a confidential basis.

Financing: To ensure that ratepayers and consumers are not adversely affected by the proposed development of generation plants in Indiana, developers must demonstrate to the Commission that the financial structure of a proposed project will not jeopardize retail electric supply. Specifically, the Commission is seriously concerned that highly leveraged projects may adversely impact the public interest, and present undue risk to Indiana’s jurisdictional retail utilities

which must maintain the reliability of retail electric supply at its current level. In assessing a developer's financing to ensure the viability of a proposed project, the Commission may consider the developer's ability to finance, construct, own, and operate other generating facilities in a commercially responsible manner. As necessary, the Commission also may consider the specific method proposed to finance a particular project, including the debt/equity ratio proposed by a developer.

The evidence in this case demonstrates that the proposed Facility will not be financed under a highly leveraged "project financing" arrangement whereby the Facility will be financed almost entirely with borrowed funds to be repaid from the project's revenue stream. Instead, Petitioner's parent expects to invest sufficient funds in the Facility to support a debt/equity ratio of 60/40 or even 50/50. At the very least, Petitioner has committed that it will have a maximum debt ratio of 70%.

To ensure that Indiana consumers are not adversely affected by a merchant plant's financing arrangements, developers must demonstrate the long-term economic viability of their proposed projects. In this proceeding, Petitioner has filed on a confidential basis its market analysis for the Midwest power market to demonstrate that there is a need for the power generated by the Facility. Petitioner also agreed to file with the Commission, prior to construction, a certification of its actual financing for the Facility.

The evidence presented in this Cause demonstrates that PSEG Global has assets of \$1.7 billion and ownership interests in 19 currently operating generation facilities totaling 2,002 MW of capacity located in the United States, Argentina, China and Venezuela. In addition, PSEG Global has ownership interests in 18 operating projects either under construction or in advanced stages of development totaling 4,832 MW of capacity in the United States, Argentina, Tunisia, China, Italy and Poland. Moreover, PSEG Global's affiliate, PSEG Power, currently owns 10,200 MW of existing generation capacity and expects to add 3,000 to 5,000 MWs within a three to five year time frame. Most of these existing plants were acquired from PSE&G, the retail electric utility affiliate of PSEG Global and PSEG Power. The ultimate parent company, Public Service Enterprise Group, is a Fortune 500 company with annual revenues of approximately \$6 billion and 11,000 employees.

Thus, Petitioner, a wholly-owned subsidiary of PSEG Global and ultimately of Public Service Enterprise Group, has adequately demonstrated that it has the technical, financial, and managerial capability to construct and operate the Facility, and that Petitioner's development of the Facility will not adversely affect ratepayers or consumers, or otherwise jeopardize retail electric supply. Accordingly, based on the evidence presented in this Cause, we decline to exercise jurisdiction with respect to any financing of the Facility.

In addition to determining whether the public interest would be served if the Commission declines jurisdiction over Petitioner, the Commission also has reviewed what actions it must take to ensure that the public interest is served throughout the commercial life of the Facility. Specifically, the Commission has determined the extent to which it must reserve its authority over Petitioner's activities involving affiliate transactions and transfers of ownership.

Affiliate Transactions: To ensure that the Commission's declination of jurisdiction over an "energy utility" is in the public interest, the Commission must be assured that adequate consumer protections are in place should an "energy utility" subsequently become an affiliate, as defined in Ind. Code § 8-1-2-49, of any regulated Indiana retail utility. While the Commission is declining jurisdiction over Petitioner's affiliate transactions initially, the Commission reserves its authority to regulate Petitioner should it become an affiliate of any regulated Indiana retail utility. Petitioner agrees to inform the Commission and the OUCC of any affiliation with any regulated retail utility operating in Indiana at the time of its occurrence. Further, Petitioner agrees to obtain prior Commission approval with respect to the sale of any electricity to any such affiliated regulated Indiana retail utility. Accordingly, if Petitioner becomes affiliated with any regulated Indiana retail utility and Petitioner (either directly or through an affiliate) engages in retail electric sales, Petitioner will, without further action of this Commission, automatically become subject to: (1) all applicable regulations governing affiliate relationships as those regulations exist at the time Petitioner becomes an "affiliate" of a regulated Indiana retail utility; or (2) regulations governing retail electric sales in Indiana under such subsequently enacted Indiana statutes. The Commission notes that it retains certain authority under Section 201 of the Federal Power Act, as amended, to examine the books, accounts, memoranda, contracts, and records of EWGs selling to regulated Indiana retail utilities, consistent with the limitations contained therein, and under Section 32(k) of PUHCA to review transactions between EWGs and regulated Indiana retail utility affiliates.

Transfers of Ownership: In determining the public interest the Commission may place limitations on any transfers of ownership of the assets of an energy utility over which we have otherwise disclaimed jurisdiction. Therefore, we are reserving our jurisdiction and will require Petitioner to seek Commission approval of any transfer of the assets owned by Petitioner. Petitioner, however, shall not be required to seek prior approval of any transfers of ownership of the Facility assets or ownership interests in the Petitioner involving: (1) the grant of a security interest to a bank or other lender or collateral agent, administrative agent or other security representative, or a trustee on behalf of bondholders in connection with any financing or refinancing (including any lease financing); (2) a debtor in possession; or (3) a foreclosure (or deed in lieu of foreclosure) on the property owned by Petitioner or ownership interests in Petitioner. Additionally, a third-party owner and operator may succeed to Petitioner's declination of jurisdiction, provided: (1) the Commission determines that the successor has the necessary technical, financial, and managerial capability to own and operate the Facility; and (2) the successor agrees to the same terms and conditions imposed on Petitioner as set forth in this Order.

Given the above findings, and the additional requirements contained in this Order, the Commission believes that a declination of jurisdiction over Petitioner as an energy utility, except over the areas discussed above as to which we are reserving our jurisdiction, is in the public interest. While the Commission is not declining jurisdiction over Petitioner for a particular term of years, the Commission does not intend to reassert jurisdiction over Petitioner absent circumstances affecting the public interest. *See, In the Matter of An Investigation into Centrex Charters Offered by Indiana Bell Telephone Company, Inc., d/b/a Ameritech Indiana*, Cause No. 40612, September 13, 1996.

Petitioner is not granted authority to offer its power for sale to the general public. Therefore, any revenue that it derives from the sale of electricity for resale by the purchaser is not subject to the public utility fee.

6. **Financial Assurance:** The Commission has determined that it is in the public interest that the Petitioner establish and maintain an independent financial instrument to ensure that funds will be available in the event of abandonment, financial failure, and/or bankruptcy to return the site to its current condition. The financial instrument utilized may, at the Petitioner's option, be established by one of the following options:

- (1) Surety bond;
- (2) Letter of credit;
- (3) A certificate of insurance;
- (4) Financial test;
- (5) Corporate guarantee, or
- (6) Other financial guarantee approved by the Commission

In order to ensure that adequate funds will be available for this purpose, the Petitioner should prepare a cost estimate that contains a detailed estimate of the costs associated with fully decommissioning the Facility and returning the site to its current condition. The financial instrument selected and utilized by the Petitioner must be sufficient to cover the costs contained in the cost estimate. A copy of the current cost estimate and the financial instrument selected by the Petitioner must be submitted to the Secretary of the Commission for approval within sixty (60) days of the date of approval of this Order. The cost estimate and corresponding financial instrument, must be revised by the Petitioner every five (5) years to account for inflation.

7. **Reporting Requirements:** If after notice and hearing the Commission determines that Petitioner either (1) has failed to commence construction of the Facility within two years of the date of this Order and is no longer diligently pursuing the commencement of construction of the Facility, or (2) has not completed construction of the Facility within five years of the date of this Order, then this declination of jurisdiction will automatically terminate. In addition to the foregoing reporting requirements, it shall be a condition of this Order and our continued partial declination of jurisdiction over Petitioner's operations, that it file with the Commission Annual Reports as provided in I.C. 8-1-2-49 and provide such other information as the Commission may from time to time request. These reporting requirements are intended to ensure that the Commission obtains reliable up-to-date information in a timely manner necessary to carry out its statutory obligations regarding the construction and operation of generating facilities, as well as the statutory obligations of the Commission's State Utility Forecasting Group, and the Office of the Utility Consumer Counselor. The Commission will require the following reports ("Reporting Requirements") be prepared and filed by the Petitioner. A responsible officer of Petitioner shall verify all reports. The Petitioner shall provide one (1) paper copy and one (1) electronic copy to the Secretary of the Commission, and to the OUCC, within the timeframes prescribed below:

(a) . **Planning Report:** A Planning Report that includes the following information shall be submitted to the Commission within six (6) weeks of approval of this Order. To avoid unnecessary duplication, it is not necessary for the Petitioner to refile information that remains unchanged and has been previously submitted.

- (1) Project ownership and name(s) of the facility;
- (2) Name, title, address, and phone number(s) for primary contact person(s) at the facility;
- (3) Specific location (county and nearest city or town);
- (4) Ownership of land on which the facility is located;
- (5) Anticipated "boilerplate capacity" of the unit. If multiple units will be located at the proposed site list the anticipated boilerplate capacity of each unit.
- (6) Unit type [manufacturer, model number, operational characteristics];
- (7) Primary fuel to be used by the facility;
- (8) Secondary fuel (if applicable)
- (9) Connecting utility(s)
- (10) Copy of "System Impact Studies" prepared by connecting utility(s)
- (11) Primary and, if applicable, secondary water source
- (12) Expected in-service (commercial operation) date;
- (13) An estimate of the engineering/construction timeline and critical milestones for the facility.

(b) **First Year Report:** A First Year Report, that includes the following information, shall be submitted within thirteen (13) months of the in-service date.

- (1) Summer and winter dependable capacity ratings;
- (2) Annual capacity factor, summer seasonal (June through August) capacity factor, and winter seasonal (December through March) capacity factor. Please include hours of operation annually and for each season;
- (3) Annual average gas usage, average daily gas usage, peak output gas usage;
- (4) Total annual, peak day, and summer seasonal water usage and discharge; itemization of any operational and or environmental restrictions placed upon the Facility during the year as a result of environmental conditions or impacts;
- (5) Itemization of transmission Loading Restrictions (TLRs) or other operational restrictions incurred during the year;
- (6) Number of employees employed by the Facility.

8. **Construction Notices:** Brief notifications shall also be filed with the Commission during the construction period as follows:

(a) **Start-Up Report:** A Construction Start-up Report, that includes the following information, shall be submitted one (1) week prior to commencement of construction activities.

- (1) Status of permits from the Indiana Department of Environmental Management (IDEM), Indiana Department of Natural Resources (DNR), and, if applicable, United States Army Corps of Engineers, and other necessary permits;
- (2) Expected in-service date;

(b) **Mid-Point Notice:** A Mid-Point Report, that includes the following information, shall be submitted at the mid-point described on the timeframes and contained in the "Planning Report." In the event the actual construction schedule is at variance with the construction timeframes, the Petitioner will provide an explanation for the variation in the schedule and shall include a revised estimate of the completion schedule.

- (1) Status of construction;
- (2) Expected in-service date;

(c) **Testing Notification Notice:** A Testing Notice shall be submitted to the Commission two (2) weeks prior any testing of the facility, and should advise the Commission that testing of the facility is about to begin.

(d) **In-Service Notice:** An In-Service Notice that includes the following information shall be submitted to the Commission at the time of the initial commercial operation of the generating facility.

- (1) Contracts for firm utility sales and contracts for firm sales to Indiana utilities. Please itemize the contract amount and the entity;
- (2) A summary of fuel contracts (e.g., "tolling arrangement," firm, spot] and itemize the pipeline(s) involved in the transactions;
- (3) Contingency plans, if any, detailing response plans to emergency conditions as required by state or local units of government, transmission owner and /or relevant regional transmission grid operator;
- (4) Certified (or accredited) dependable capacity rating

Notification of Changes in Capacity or Operation: In the event that the Petitioner intends to increase, decrease or otherwise materially change the facility's capacity or operation, the owner must obtain the Commission's prior approval.

9. **Confidential Exhibits.** On October 10, 2000, Petitioner filed a Motion For Protection of Confidential Information requesting that the Commission find that certain of its rebuttal exhibits be determined to be confidential and protected from public disclosure under Ind. Code § 8-1-2-29 and § 5-14-3-4 and that the Commission adopt procedures to protect the confidentiality of such information. The motion related to (a) the Midwest Natural Gas Market Assessment prepared for PSEG Global by Pace (*Petitioner's Exhibit BHS-22*); (b) Pace's Midwest Projects Fuel Screening and Regional Fuel Procurement Strategy presentation (*Petitioner's Exhibit BHS-23*), (c) internal documentation regarding PSEG Global's site selection process (*Petitioner's Exhibit BHS-24*); (d) a schedule of cash requirements and exposure relating to Petitioner's project (*Petitioner's Exhibit BHS-25*); (e) ICF's Southern ECAR market study (*Petitioner's Exhibit BHS-26*); (f) a memorandum from Pace describing Petitioner's gas strategy (*Petitioner's Exhibit GS-4*); and (g) Pace's gas study (*Petitioner's Exhibit GS-5*). The motion was supported by an affidavit of Mr. Sisson regarding the high degree of confidentiality associated with this information.

On October 12, 2000, the presiding officers in this Cause issued a docket entry making a preliminary finding that the information shall be treated as confidential in accordance with Ind. Code § 5-14-3-4 and that confidential procedures should be followed with respect to the information. Pursuant to the docket entry, Petitioner delivered one copy of the confidential rebuttal exhibits to the presiding Administrative Law Judge under seal and conspicuously identified as confidential. At the time of the hearing, the presiding officers made an *in camera* inspection of the information. Based thereon, the Commission confirms that a permanent finding of confidentiality should be made.

The Commission, therefore, finds that *Petitioner's Exhibits BHS-22 through BHS-26 and Petitioner's Exhibits GS-4 and GS-5* (collectively the "Confidential Exhibits") contain confidential, proprietary, competitively sensitive and trade secret information that has economic value to Petitioner and its affiliates from being neither known to nor ascertainable by its competitors and other persons who could obtain economic value from the knowledge and use of such information; that the public disclosure of such information would have a substantial detrimental effect on Petitioner and its affiliates; and that the information is subject to efforts of Petitioner and its affiliates that are reasonable under the circumstances to maintain its secrecy.

Accordingly, the Confidential Exhibits should be exempt from the public access requirements of Ind. Code § 5-14-3-4 and § 8-1-2-29, and held as confidential by the Commission.

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

1. Petitioner is and is hereby adjudged to be a "public utility" within the meaning of the Indiana Code § 8-1-2-1.
2. The Facility of approximately 1150 MWs is and is hereby adjudged to be a "utility" within the meaning of Indiana Code § 8-1-2-1.

3. Petitioner shall not exercise any of the rights, powers, and privileges of an Indiana public utility in the construction and operation of the Facility, *e.g.*, the power of eminent domain, use of public rights-of-way, exemption from zoning and land use regulation, *etc.*

4. Petitioner shall not sell at retail in the State of Indiana any of the electricity generated by the Facility without further order of the Commission so long as retail power service remains subject to Commission regulation.

5. Petitioner shall advise the Secretary of the Commission and the OUCC of the final plant site, in-service date, rated capacity, interconnection point with AEP's transmission system, any change of ownership of the Facility, and all other reporting requirements referenced in this Order. Should the information submitted to the Commission by Petitioner subsequently change, Petitioner is obligated to provide the Commission with updated information.

6. Petitioner shall submit to the Commission the information identified in, and in accordance with, Finding Nos. 5, 6, 7 and 8.

7. Based on the findings and conclusions stated above and subject to the limitations and requirements contained in Ordering Paragraphs 3, 4, 5, 6, 7, and 8 the Commission declines its jurisdiction over Petitioner except to the extent otherwise provided herein. If after notice and hearing the Commission determines that Petitioner either (1) has failed to commence construction of the Facility within two (2) years of the date of this Order and is no longer diligently pursuing the commencement of construction of the Facility, or (2) has not completed construction of the Facility within five (5) years of the date of this Order, then this declination of jurisdiction will automatically terminate.

8. The gross revenues generated by sales for resale of the electricity generated by the Facility are hereby adjudged to be exempt from the public utility fee prescribed by Indiana Code § 8-1-6-1 *et. seq.*

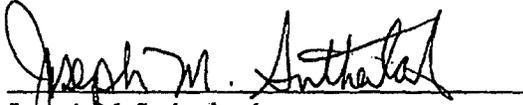
9. *Petitioner's Exhibits BHS-22 through BHS-26 and Petitioner's Exhibits GS-4 and GS-5* are hereby declared to contain "trade secrets" as defined in Ind. Code §24-2-3-2 and, therefore, are exempt from the public access requirements of Ind. Code §5-14-3-4 and § 8-1-2-29 and shall be held as confidential by the Commission.

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

**McCARTY, HADLEY, RIPLEY, SWANSON-HULL, AND ZIEGNER CONCUR:
APPROVED:**

DEC 20 2000

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

A handwritten signature in black ink, appearing to read "Joseph M. Sutherland", written over a horizontal line.

Joseph M. Sutherland
Secretary to the Commission