

Joint Petitioners' Confidential Exhibit No. 6

Northern Indiana Public Service Company LLC

Dunn's Bridge I Solar Generation LLC

Dunn's Bridge II Solar and Storage Generation LLC

Cavalry Solar and Storage Generation LLC

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Joint TURC
PETITIONER'S
EXHIBIT NO. 6
DATE 3-1-21 REPORTER AT

VERIFIED DIRECT TESTIMONY OF SANDRA E. BRUMMITT

1 **Q1. Please state your name, business address and title.**

2 A1. My name is Sandra E. Brummitt. My business address is 290 W.
3 Nationwide Blvd., Columbus, Ohio 43215. I am currently the Vice
4 President and Chief Tax Officer for NiSource Corporate Services Company
5 ("NCSC"), a management and services subsidiary of NiSource Inc.

6 **Q2. On whose behalf are you submitting this direct testimony?**

7 A2. I am submitting this testimony on behalf of Joint Petitioners Northern
8 Indiana Public Service Company LLC ("NIPSCO"), Dunn's Bridge I Solar
9 Generation LLC, Dunn's Bridge II Solar and Storage Generation LLC, and
10 Cavalry Solar and Storage Generation LLC (collectively referred to as the
11 "Joint Ventures").

12 **Q3. Please describe your educational and employment background.**

13 A3. I received a Bachelor of Economics with an Accounting Emphasis from the
14 University of California, Santa Barbara in 1999. I received a Masters of

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1 Business Administration from the Smith School at the University of
2 Maryland, College Park in 2010. I held various tax and finance positions in
3 the power and utility industry from 2001 through 2012. In 2012, I became
4 Director, Tax for Exelon's Utilities and became Vice President, Tax for
5 Exelon's Utilities in 2016. I served as Senior Director, Global Tax Reporting
6 at Walmart prior to joining NiSource in 2019 as Vice President and Chief
7 Tax Officer.

8 **Q4. What are your responsibilities as Vice President and Chief Tax Officer?**

9 A4. As Vice President and Chief Tax Officer, I oversee all tax matters, other than
10 employment, benefits, and charitable tax matters and informational return
11 reporting, for NiSource and its subsidiaries, which includes NIPSCO.
12 Included in that scope is the tax work and rate case support around
13 NIPSCO's generation strategy.

14 **Q5. Have you previously testified before this or any other regulatory agency?**

15 A5. No.

16 **Q6. Are you sponsoring any attachments to your testimony in this Cause?**

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1 A6. Yes. I am sponsoring Attachment 6-A, a private letter ruling ("PLR")
 2 released by the U.S. Internal Revenue Service ("IRS") on November 15,
 3 2019, which was prepared by me or under my direction and supervision.

4 **Q7. What is the purpose of your direct testimony in this proceeding?**

5 A7. The purpose of my direct testimony is to describe the tax structure of the
 6 Joint Ventures that provide value to NIPSCO's customers. I also address
 7 certain tax considerations that impact the type of contract NIPSCO will
 8 utilize to pay for the energy generated by the projects at issue in this
 9 proceeding.

10 **Q8. Has NIPSCO received approval to use the joint venture structure**
 11 **described herein?**

12 A8. NIPSCO requested a certificate of public convenience and necessity
 13 ("CPCN") to purchase and acquire (indirectly through a joint venture
 14 structure similar to the structure presented in this proceeding) a (1) 102
 15 megawatt ("MW") wind farm (Rosewater Project) in Cause No. 45194, and
 16 (2) 302 MW wind farm (Crossroads Project) in Cause No. 45310. Both
 17 requests were approved by the Commission.

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1 **Q9. Please describe any differences between the joint venture structure**
 2 **approved for Rosewater and Crossroads and the joint venture structure**
 3 **in this filing.**

4 A9. The joint venture structure in this filing has been simplified. Unlike in
 5 Rosewater and Crossroads where the developer (EDPR) became a member
 6 of the joint venture, in the joint venture structure proposed in this filing, the
 7 developer (NextEra) will not be a member of the joint venture. Instead, the
 8 joint venture will simply purchase the project from the developer (NextEra)
 9 at completion.

10 **Q10. Please describe the projects subject to NIPSCO's request in this**
 11 **proceeding.**

12 A10. NIPSCO is seeking approval of three projects, which I refer to as the "Solar
 13 Projects."¹ The Bridge I Project is a solar farm and associated electric
 14 transmission line in Jasper County, Indiana that will have an aggregate
 15 nameplate capacity of approximately 265 MW. The Bridge II Project is a
 16 solar plus storage farm and associated electric transmission line in Jasper

¹ "Solar Projects" refers to the Bridge I Project, Bridge II Project, and Cavalry Project.

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County, Indiana that will have an aggregate nameplate solar capacity of approximately 435 MWs and energy storage capacity of approximately 75 MW. The Cavalry Project is a solar plus storage farm and associated electric transmission line in White County, Indiana that will have an aggregate nameplate solar capacity of approximately 200 MWs and energy storage capacity of approximately 60 MW.

Q11. Please describe the joint ventures.

A11. Each of the three joint ventures is a limited liability company that will own and operate the solar (or solar plus storage) generation assets. One-hundred percent (100%) of the energy and capacity of each project will be paid for by NIPSCO through a Contract for Differences ("CFD") or a power purchase agreement ("PPA"). There will be two (or more) members in each joint venture, NIPSCO and a tax equity partner(s).²

Contract for Differences

Q12. What is a contract for differences?

² It is possible that there will be more than one tax equity partner for any one of the Solar Projects. For simplicity, however, I will refer to a single "tax equity partner" in testimony.

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1 A12. As explained by Witness Campbell, a CFD is a financial instrument that is
2 often used in energy markets to establish a fixed price for energy when a
3 party is not physically transacting in the underlying commodity (in this
4 case, the energy from the Solar Projects). Ultimately, as explained by
5 Witness Campbell, utilizing the CFD instead of a PPA will have no
6 monetary impact on NIPSCO's customers, as the price that will be paid will
7 be the same under either scenario.

8 **Q13. Why is NIPSCO seeking approval of a CFD, as well as the Build Transfer**
9 **Agreement ("BTA") PPA?**

10 A13. As noted above, NIPSCO will be a party to each Joint Venture. If the Joint
11 Venture sells electricity to NIPSCO under the BTA PPA, the PPA can make
12 NIPSCO and the Joint Venture each a "related party" for IRS purposes. The
13 sale of electricity generates losses at the joint venture level as a result of
14 accelerated depreciation. Under the IRS rules, a related party relationship
15 disallows the losses created by depreciation – depreciation that is a tax
16 incentive to invest in renewables. NIPSCO has not yet received IRS
17 guidance on the related party matter, which means using the BTA PPA

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1 could disallow losses and change the economics of the Solar Projects and
2 negatively impact NIPSCO and its customers.

3 Therefore, until IRS guidance is issued, NIPSCO must appropriately
4 structure the proposed transactions to remove the risk of not getting the full
5 benefit of tax losses generated at the joint venture level. Because a CFD is
6 a "financial" instead of a "physical" contract, the related party issue does
7 not come into play. That is why NIPSCO is seeking approval of a CFD,
8 which would be utilized if related party guidance from the IRS is not
9 received. This is discussed more fully by Witness Campbell.

10 **Q14. Has NIPSCO received any guidance from the IRS relating to the joint**
11 **venture structures?**

12 A14. Yes. In Cause No. 45194, NIPSCO indicated it would be requesting a PLR
13 from the IRS on two issues: normalization and related party. NIPSCO
14 received PLR 201946007 which ruled on normalization but declined to rule
15 on related party. The IRS will not issue a letter ruling or a determination
16 letter if the request presents an issue that cannot be readily resolved before
17 a regulation or any other published guidance is issued. See Attachment 6-

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1 A. The IRS is in the process of determining if it can issue general guidance
2 to the utility industry relating to the related party and the use of tax equity
3 partnerships to structure renewable transactions.³

4 **Q15. Has NIPSCO requested any further guidance from the IRS?**

5 A15. Yes. NIPSCO submitted a PLR request on April 15, 2020 for its solar
6 renewables. The ruling has not yet been issued by the IRS, and, as noted,
7 NIPSCO is still awaiting related party guidance. In the event that related
8 party guidance is not received, NIPSCO is seeking approval of CFDs to
9 purchase the energy that will be produced by the Solar Projects and sold by
10 the Joint Venture to NIPSCO.

11 **Q16. What happens if NIPSCO receives IRS guidance that resolves the related**
12 **party issue?**

13 A16. If this guidance were provided, NIPSCO anticipates utilizing the BTA PPA,
14 rather than the CFD. NIPSCO plans to do so because utilizing the BTA PPA

³ In the transaction for the Rosewater Project, the tax equity partner was funding more than 50% of the project cost, which meant NIPSCO had less than a 50% stake in the joint venture for IRS purposes. Because of this, the Rosewater Joint Venture and NIPSCO were not considered "related parties" and could enter into a BTA PPA without running into the "related party" issue.

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1 will ensure NIPSCO can fully utilize tax losses related to the projects.⁴

2 **Joint Venture Controlling Documents**

3 **Q17. What agreements control each Joint Venture?**

4 A17. There will be two documents that control each Joint Venture – a Joint
5 Venture Operating Agreement (the “LLC Agreement”), and an Equity
6 Capital Contribution Agreement.

7 **Q18. Please describe the LLC Agreement.**

8 A18. Witness Campbell sponsors Confidential Attachment 2-D, which is an
9 Example Term Sheet for a joint venture agreement. This Term Sheet has
10 not been negotiated between parties and is intended only as an example of
11 the material terms that are typically addressed in joint venture agreements
12 for renewable energy projects such as those presented in this filing. The
13 example Term Sheet outlines all the material items that would be in an LLC
14 Agreement. When the LLC Agreement is finalized, a copy will be filed with

⁴ It is possible that the timing of when guidance is received from the IRS could impact NIPSCO's ultimate decision, as NIPSCO may be too far along with negotiations or signed documents to change from the CFD to the BTA PPA.

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1 the Commission and shared with all parties.

2 **Q19. What are the material terms of the LLC Agreement?**

3 A19. The LLC Agreement sets forth the terms applicable to:

- 4 (1) The operation and management of joint venture and the ProjectCo(s),⁵
- 5 (2) The allocation of tax items,
- 6 (3) The distribution of net cash flow by the joint venture after the Funding
- 7 Date,
- 8 (4) Managing members,
- 9 (5) Milestones for investor returns,
- 10 (6) Conditions precedent,
- 11 (7) Relationship to other related documents,
- 12 (8) Representations and warranties of parties,
- 13 (9) Purchase price option, and
- 14 (10) Governance.

15 **Q20. Please describe the Equity Capital Contribution Agreement.**

16 A20. The Equity Capital Contribution Agreement is the document that binds the
 17 tax equity partner to invest in the Joint Venture if all conditions precedent
 18 in the BTA are met. The Equity Capital Contribution Agreement is the
 19 document that causes the Joint Venture to issue Class A Interests to the
 20 Member and Class B Interests to the Investors, in each case, in accordance

⁵ "ProjectCos" refers to Dunns Bridge Solar Center, LLC; Dunns Bridge Energy Storage, LLC; and Cavalry Energy Center, LLC.

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1 with the terms of the LLC Agreement. On the financial closing date, which
2 will coincide with Project Mechanical Completion, the Joint Venture will
3 acquire all of the outstanding membership interests of the ProjectCo. The
4 purchase price will be paid in installments, with a portion being paid at
5 Project Mechanical Completion (which will coincide with the closing date
6 of acquisition of the ProjectCo) and the remainder being paid at Project
7 Substantial Completion. When the Equity Capital Contribution Agreement
8 is finalized, a copy will be filed with the Commission and shared with all
9 parties.

10 **Q21. Which member will be the managing member of each Joint Venture?**

11 A21. NIPSCO will be the managing member of each joint venture and, as noted
12 by Witness Campbell, will *remain* the managing member of each Joint
13 Venture.

14 **Q22. Have the limited liability companies been formed yet?**

15 A22. Yes. Dunn's Bridge I Solar Generation LLC, Dunn's Bridge II Solar and
16 Storage Generation LLC, and Cavalry Solar and Storage Generation LLC
17 were all formed on August 20, 2020, with NIPSCO as the sole member. The

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1 tax equity partner(s) of a particular Joint Venture will be added when that
2 Project is reaches Project Mechanical Completion and is sold to the Joint
3 Venture. Witness Campbell describes the transaction in further detail.

4 **Investment Tax Credits**

5 **Q23. When are the Solar Projects expected to be completed?**

6 A23. The Bridge I Project is expected to be completed and in-service no later than
7 December 31, 2022. The Bridge II Project and the Cavalry Project are both
8 expected to be completed and in-service no later than December 31, 2023.

9 **Q24. Please explain the significance to these dates of completion.**

10 A24. The Solar Projects are expected to qualify for Section 48 Investment Tax
11 Credits ("ITCs") as provided under the Internal Revenue Code. If the
12 project began construction in 2019—which each of these projects did—and
13 is completed and in-service by December 31, 2023, the project will qualify
14 for the 30% ITC. These credits are a significant source of value to the
15 project.

16 **Q25. Please briefly explain the ITC and its declining value.**

17 A25. Federal tax incentives are currently in place for solar and paired solar plus

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1 storage resources. Resources are eligible for an ITC, which provides a
2 dollar-for-dollar reduction in the federal income taxes that a company
3 claiming the credit would otherwise pay. The ITC is based on the amount
4 of investment in solar or paired storage property. To qualify for the ITC,
5 projects need to "commence construction" by a certain date and be put into
6 service by a certain date, as reflected in the chart below. The start of
7 construction deadline can be met as long as certain equipment purchases
8 and development costs have been "safe harbored" by federal tax
9 authorities. The safe harbor for beginning of construction is investment of
10 at least 5% of the total project cost on or before the specified date. Safe
11 harbored projects that commenced construction in 2019 are eligible for a
12 30% ITC, with a step-down over time according to the table below. All three
13 Solar Projects are expected to qualify for the 30% ITC.

14 The chart below reflects the reduction schedule:

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Year During Which Construction Begins	Last Year Project Can be Placed in Service	Credit Percentage
2019	2023	30
2020	2023	26
2021	2023	22
2022 +	2022 +	10

1

2 **Q26. What dollar amount of ITCs will each Solar Project qualify for?**

3 A26. Based upon the estimated project costs, construction start dates, and in-
4 service dates, the Bridge I Project is anticipated to qualify for approximately
5 [REDACTED] of ITCs; the Bridge II Project is anticipated to qualify for
6 approximately [REDACTED] of ITCs; and the Cavalry Project is anticipated
7 to qualify for approximately [REDACTED] of ITCs.

8 **Joint Venture Structure and Details**

9 **Q27. Please describe the financial aspects of the structure of the Joint**
10 **Ventures.**

11 A27. Witness Campbell describes the details of the transactions, including the
12 entities involved in developing and ultimately selling the Solar Projects into
13 each respective Joint Venture. He also explains the CFDs and PPAs
14 NIPSCO will enter into to become the exclusive off-taker from the Solar

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1 Projects.

2 Under the terms of an anticipated LLC Agreement (see Example Term

3 Sheet), [REDACTED]

4 [REDACTED]

5 [REDACTED] [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED] NIPSCO projects that 100% of

12 the ITCs will have been generated and distributed prior to reaching this

13 point.

14 **Q28. Please describe the nature and timing of the cash investments required**

15 **to be made by the members of the Joint Ventures.**

16 A28. As mentioned previously, the cash investments will be in installments. The

17 tax equity partner will provide 20% of its overall committed investment

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1 when the projects reach Project Mechanical Completion,⁶ with the balance
2 of its investment being paid at Project Substantial Completion. At this time,
3 the tax equity partner is anticipated to provide cash equal to approximately
4 [REDACTED] of the purchase price of each respective Project, and NIPSCO
5 will provide the remaining cash required to make up the purchase price.

6 **Q29. Will the Joint Ventures have any debt?**

7 A29. Other than accounts payable and operating lines of credit, the Joint
8 Ventures will not have any short- or long-term debt on their balance sheets.

9 **Q30. What is the purpose of the tax equity partner in these transactions?**

10 A30. The tax equity partner brings financial efficiency to the projects by virtue of
11 its ability to utilize the tax attributes on a more accelerated basis than
12 NIPSCO. In essence, the tax equity partner is monetizing the tax attributes
13 of the Solar Projects.

14 **Q31. Why is the tax equity partner able to utilize the tax attributes more**
15 **efficiently than NIPSCO?**

⁶ The projects are anticipated to reach Project Mechanical Completion as follows: Bridge I Project – September 2022, Bridge II Project – August 2023, and Cavalry Project – September 2023.

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1 A31. NIPSCO is constrained in the use of tax attributes due to previous and
2 anticipated accelerated tax deductions that will limit its utilization of losses
3 and credits over the next several years.

4 The tax equity partner, on the other hand, is not involved in a capital-
5 intensive industry and not subject to the tax incentives (*i.e.*, accelerated
6 depreciation) provided by Congress for electric utility infrastructure
7 investing and therefore has the capacity to immediately utilize tax credits
8 as they are accumulated by the project. This ability of the tax equity partner
9 to more efficiently utilize the tax attributes is reflected in the upfront cash
10 investment, which reduces the overall investment of NIPSCO in the project
11 (and ultimately the cost to customers) while still allowing NIPSCO to obtain
12 100% of the non-tax ownership attributes of the project.

13 **Q32. Will the tax equity partner remain a member of the Joint Ventures for the**
14 **life of the Solar Projects?**

15 A32. Under the terms of the LLC Agreement, NIPSCO will have the option to
16 acquire the tax equity partner's remaining ownership interest after the tax
17 equity partner has achieved its negotiated IRR. This buyout option

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1 provides for a fair market value purchase price of that remaining ownership
2 interest. The fair value of the ownership interest will be determined on the
3 discounted future cash flows of the projects for the remaining ownership
4 interest.

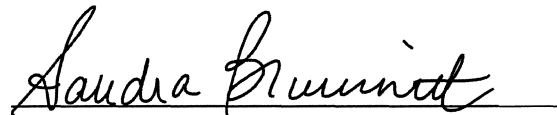
5 **Conclusion**

6 **Q33. Does this conclude your prefiled direct testimony?**

7 **A33. Yes.**

VERIFICATION

I, Sandra E. Brummitt, Vice President and Chief Tax Officer for NiSource Corporate Services Company, affirm under penalties of perjury that the foregoing representations are true and correct to the best of my knowledge, information and belief.


Sandra E. Brummitt

Date: November 30, 2020

Internal Revenue ServiceNumber: **201946007**

Release Date: 11/15/2019

Index Number: 45.00-00

Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B06

PLR-101794-19

Date:

August 08, 2019

LEGEND

Company =

Taxpayer =

State A =

State B =

a =b =

County =

Date 1 =

Date 2 =

Date 3 =

Year 1 =

Year 2 =

Year 3 =

Commission 1 =

Commission 2 =

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Dear

This is in response to your recent ruling request concerning the federal income tax consequences with regard to the transaction described below.

BACKGROUND

Taxpayer, a State A corporation, is the parent company of a group of corporations (the Group) that files a U.S. consolidated federal income tax return. The Group includes members that are regulated natural gas and electric utility companies operating in states. The Group files a consolidated federal income tax return on a calendar year basis using accrual methods of accounting.

Company is a State B limited liability company, wholly owned by Taxpayer, and treated as a disregarded entity for U.S. federal income tax purposes. Company is regulated by Commission 1 and participates in a wholesale energy market regulated by Commission 2. As part of its plan to replace a substantial portion of its coal-fueled electric generating fleet, Company intends to invest in and purchase electricity from wind projects. These wind projects are intended to qualify for the production tax credit (PTC) under § 45 of the Internal Revenue Code.

The Facility is located in County. It will have a nameplate capacity of approximately a MW. The Facility is currently being developed by an independent third party developer (Developer). The Facility is owned by Project LLC, a disregarded entity of Developer for U.S. federal income tax purposes. On Date 1, Company entered into a Build Transfer Agreement with Developer pursuant to which Developer will continue to develop the Facility and sell it to Wind JV upon completion. The Facility is expected to be completed before Date 2.

On or before Date 3, Company and an independent investor (Tax Equity Investor) will enter into a joint venture by forming Wind JV LLC (Wind JV). Wind JV will purchase from Developer all of the equity interests in Project LLC. Because Project LLC will be a disregarded entity for U.S. federal income tax purposes, this transaction will be treated as the sale and purchase of the Facility assets.

Wind JV will use the Facility to generate electricity to sell to Company under a wholesale power purchase agreement (PPA). Under the PPA between Company and Wind JV, Company will purchase a% of the electric output and capacity of the Facility. The PPA will have a term of at least b years and will constitute a wholesale PPA under the market-based rate authority of Commission 2. The structure of Wind JV and related transactions, as well as the PPA, are also subject to approval by Commission 1. Prices under the PPA will be determined on a market basis, using a competitive bidding process, and will not be determined on a rate of return basis or cost basis.

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Company will also include the electricity purchased from Wind JV under the PPA as part of its system power to provide electric service to Company's retail customers. Company's sale of electricity to its retail customers will be subject to regulation by Commission 1.

Based on the expected completion date, beginning in Year 1 and extending through Year 2, Company will purchase a% of the electrical power produced by the Facility. Accordingly, Company will make ongoing payments to Wind JV pursuant to the PPA. Profits, losses, cash, and PTCs will all be allocated to Company and Tax Equity Investor in accordance with the LLC Agreement.

In Year 3, Company will have an option to purchase all of Tax Equity Investor's interests in Wind JV for fair market value in accordance with the terms of the LLC Agreement. If the option is exercised Company will then own a% of Wind JV.

In the hands of Wind JV, the electricity generated by the Facility will not be subject to rate of return or cost basis regulation by Commission 1.

RULINGS REQUESTED

Rulings have been requested that:

- (1) The Facility is not public utility property (or PUP) under § 168(i)(10).
- (2) Any losses of Wind JV allocated to Tax Equity Investor will not be disallowed under §707(b).

LAW AND ANALYSIS

Section 168(f)(2) of the Internal Revenue Code (Code) provides that the depreciation deduction determined under § 168 shall not apply to any public utility property (within the meaning of § 168(i)(10)) if the taxpayer does not use a normalization method of accounting.

Section 168(i)(10) of the Code defines, in part, public utility property as property used predominantly in the trade or business of the furnishing or sale of electrical energy if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision thereof.

Prior to the Revenue Reconciliation Act of 1990, the definition of public utility property was contained in § 167(l)(3)(A) and § 168(i)(10), which defined public utility property by means of a cross reference to § 167(l)(3)(A). The definition of public utility property is unchanged. Section 1.167(l)-1(b) provides that under § 167(l)(3)(A), property is public utility property during any period in which it is used predominantly in a § 167(l) public utility activity. The term "section 167(l) public utility activity" means, in part, the trade or business of the furnishing or sale of electrical energy if the rates for such furnishing or

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sale, as the case may be, are regulated, i.e., have been established or approved by a regulatory body described in § 167(l)(3)(A). The term “regulatory body described in section 167(l)(3)(A)” means a State (including the District of Columbia) or political subdivision thereof, any agency or instrumentality of the United States, or a public service or public utility commission or other body of any State or political subdivision thereof similar to such a commission. The term “established or approved” includes the filing of a schedule of rates with a regulatory body which has the power to approve such rates, though such body has taken no action on the filed schedule or generally leaves undisturbed rates filed by the taxpayer.

The definitions of public utility property contained in § 168(i)(10) and former § 46(f)(5) are essentially identical. Section 1.167(l)-1(b) restates the statutory definition providing that property will be considered public utility property if it is used predominantly in a public utility activity and the rates are regulated. Section 1.167(l)-1(b)(1) provides that rates are regulated for such purposes if they are established or approved by a regulatory body. The terms established or approved are further defined to include the filing of a schedule of rates with the regulatory body which has the power to approve such rates even though the body has taken no action on the filed schedule or generally leaves undisturbed rates filed.

Pursuant to Code §50(d)(2), rules similar to the rules of former Code §46(f) as in effect on November 5, 1990, continue to determine whether or not an asset is PUP for purposes of the investment tax credit normalization rules. As in effect at that time, former Code §46(f)(5) defined PUP by reference to former Code § 46(c)(3)(B).

The regulations under former § 46, specifically § 1.46-3(g)(2), contain a definition of regulated rates that is expanded somewhat from that contained in § 1.167(l)-1(b)(1). This expanded definition embodies the notion of rates established or approved on a rate of return basis. In addition, there is an expressed reference to rate of return in § 1.167(l)-1(h)(6)(i). The operative rules for normalizing timing differences relating to use of different methods and periods of depreciation are only logical in the context of rate of return regulation. The normalization method, which must be used for public utility property to be eligible for the depreciation allowance available under § 168, is defined in terms of the method the taxpayer uses in computing its tax expense for purposes of establishing its cost of service for ratemaking purposes and reflecting operating results in its regulated books of account. Therefore, for purposes of application of the normalization rules, the definition of public utility property is the same for purposes of the investment tax credit and depreciation.

Under both the depreciation and investment tax credit normalization rule definitions, the property must be predominately used in one of a number of enumerated activities. Aside from the description of certain telecommunications services (which has no relevance to Taxpayer's situation), the list of activities in

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the two definitions are virtually identical. One of these activities is the furnishing or sale of electric energy.

There are, therefore, three characteristics all of which a facility must possess in order to be characterized as PUP:

1. It must be predominately used in the trade or business of the furnishing or sale of electric energy;
2. The rates for such sale must be established or approved by one of the enumerated agencies or instrumentalities; and
3. The rates set by that agency or instrumentality must be established or approved on a rate-of-return basis.

The Facility will be predominantly used in the trade or business of the furnishing or sale of electric energy, and therefore, it will possess the first of the three characteristics. Moreover, as a regulated company subject to the jurisdiction of Commission 2, Wind JV will possess the second of the three characteristics. However, Wind JV will use the Facility to generate electricity to sell to Company under a wholesale PPA. The wholesale PPA between Company and Wind JV will be regulated by Commission 2, but prices under the PPA will be set at arm's length pursuant to an RFP provided to Company by Developer and under Commission 2 regulation will be determined on a market basis and will not be determined on a rate of return basis or cost basis. Because rates on the sale of electricity from the Facility will not be regulated by Commission 2 on a rate of return basis, the Facility will not be PUP. Moreover, Commission 1 will not have any jurisdiction over Wind JV or the Facility, and as a result, could not influence the rates Company will pay for the electricity from the Facility.

Therefore, while the Facility will be used to produce electricity and will be subject to the jurisdiction of Commission 2, and thus possesses the first two characteristics of PUP, the Facility must possess all three characteristics to be considered PUP. For property to be PUP, the electricity generated must be sold at rates that are regulated by a government agency or public utility commission on a rate of return basis. Rates for the sale by Wind JV of electricity generated by the Facility are determined on a market basis and not on a rate of return or cost basis. Thus, the Facility is not PUP under § 168(i)(10).

With respect to the second issue, section 6.09 of Rev. Proc. 2019-1, 2019-1 I.R.B. 1, provides that generally, the Service will not issue a letter ruling or a determination letter if the request presents an issue that cannot be readily resolved before a regulation or any other published guidance is issued.

Accordingly, we conclude:

1. The Facility is not Public Utility Property under §168(i)(10).

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2. The Service will not rule on the second issue based on § 6.09 of Rev. Proc. 2019-1.

Except as specifically determined above, no opinion is expressed or implied concerning the Federal income tax consequences of the matters described above under any other provisions of the Code (including other subsections of § 168). Specifically, no opinion is expressed concerning whether the contract to sell electricity constitutes a service contract under § 7701(e). In addition, no opinion is expressed concerning whether the Taxpayer is the owner of the Facility generating electricity for federal income tax purposes. Further, no opinion is expressed or implied on the classification of the property under § 168(e). Except as provided in § 168(e)(3), section 5.03 of Rev. Proc. 87-56, 1987-2 C.B. 674, provides, however, that asset classes in Rev. Proc. 87-56 include property described in such asset classes without regard to whether a taxpayer is a regulated public utility or an unregulated company.

Sincerely,

Patrick S. Kirwan
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Office of Associate Chief Counsel (Passthroughs &
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