STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF WHITING CLEAN ENERGY, INC., AND BP PRODUCTS NORTH AMERICA, INC., SEEKING TERMINATION OF ALTERNATIVE REGULATORY TREATMENT PURSUANT TO IND. CODE 8-1-2.5 AND ESTABLISHMENT OF ASSOCIATED SERVICE TERMS, IN LIGHT OF MATERIAL CHANGES IN CIRCUMSTANCES.	)	**CAUSE NO. 45071**
RESPONDENT: NORTHERN INDIANA PUBLIC SERVICE COMPANY	)	**APPROVED:**

ORDER OF THE COMMISSION

Presiding Officers:
David E. Ziegner, Commissioner
Brad J. Pope, Administrative Law Judge

On March 29, 2018, Whiting Clean Energy, Inc. ("WCE") and BP Products North America, Inc. ("BP") (together "Petitioners") filed their petition seeking relief from the provisions of an Order issued by the Commission in Cause No. 41530 and for establishment of related service terms. The petition named Northern Indiana Public Service Company ("NIPSCO") as Respondent. The Indiana Office of Utility Consumer Counselor ("OUCC") was served with the petition and has participated as a party in its statutory capacity on behalf of the ratepaying public.

By petition filed on June 12, 2018, United States Steel Corporation ("U. S. Steel") sought leave to intervene. That petition to intervene was granted by Docket Entry dated June 25, 2018. No other entities petitioned to intervene in the proceeding.

By agreement of the parties, a procedural schedule was initially established by Docket Entry dated April 26, 2018, and subsequently was amended by the grant of unopposed motions through Docket Entries dated September 7, 2018, and October 16, 2018.

On May 18, 2018, Petitioners and NIPSCO jointly moved for interim approval of a capacity transaction that was scheduled to be effective on June 1, 2018. The request for approval was based on a provision in the Commission's December 29, 1999 Order in Cause No. 41530 (the "1999 Order") calling for approval of specified transactions between WCE and NIPSCO. Also on May 18, 2018, Petitioners and NIPSCO filed a joint motion seeking confidential treatment of the transaction document for which interim approval was being sought. Both motions were unopposed. By Docket Entry dated May 22, 2018, the joint motion for

confidential treatment was granted with a preliminary determination of confidentiality, pursuant to which the specified document was then filed on a confidential basis. By Docket Entry dated May 29, 2018, the joint motion for interim approval was granted, with an express preservation of the Commission's authority to make further determinations regarding the transaction in its Final Order.

On June 22, 2018, Petitioners timely filed their case-in-chief evidence, consisting of the written testimony and exhibits of three witnesses: Cameron H. Eveland, the Deputy Operations Manager for BP's Whiting Refinery and President of WCE; Gregory Martin, Commercial Process Engineer at WCE; and James R. Dauphinais, a Managing Principal with Brubaker & Associates, Inc. On the same date, Petitioners also moved for administrative notice of specified documents. That motion was granted by Docket Entry dated July 3, 2018.

By joint motion filed on October 12, 2018, Petitioners, NIPSCO and the OUCC (the "Settling Parties") stated that they had reached an agreement in principle to resolve the issues in this cause and sought to modify the procedural schedule to accommodate Commission review of a settlement. By Docket Entry dated October 16, 2018, that motion was granted and the scheduled evidentiary hearing was converted into a settlement hearing. On November 2, 2018, the Settling Parties jointly filed their Stipulation and Settlement Agreement ("Settlement"). On the same date, supporting evidence was filed consisting of the written settlement testimony of three witnesses: Mr. Martin on behalf of Petitioners; Paul S. Kelly on behalf of NIPSCO; and Lauren M. Aguilar on behalf of the OUCC. By Docket Entry dated November 29, 2018, the Commission requested that the Settling Parties provide additional information, and Petitioners on behalf of the Settling Parties filed a Response on November 30, 2018.

Pursuant to notice given and published as required by law, the Commission conducted a settlement hearing in this cause on December 5, 2018, at 9:30 a.m., in Hearing Room 222 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana. At the hearing, the parties appeared by counsel and the prefiled testimony and exhibits were admitted into the record. No additional evidence was presented, and no additional parties or members of the public appeared. The Settling Parties subsequently filed their post-hearing submission, which has been duly considered by the Commission.

The Commission, based on applicable law and the evidence of record, now finds:

1. <u>Notice and Jurisdiction</u>. Notice of this proceeding and of the public hearing in this cause were given and published as required by law. By virtue of the 1999 Order, WCE was determined to be a public utility as defined in the Public Service Commission Act, subject to a declination of Commission jurisdiction on stated terms. BP is a retail electric customer of NIPSCO at its Whiting Refinery in Whiting, Indiana. NIPSCO is a public utility providing retail electric and natural gas services to customers in northern Indiana, and was properly named as Respondent due to its interest in the subject matter of this cause. Pursuant to Ind. Code §8-1-2-61, the Commission has authority to determine the merits of petitions filed by public utilities. Pursuant to Ind. Code ch. 8-1-2.4, the Commission has authority in specified respects over service arrangements relating to alternate energy production facilities, cogeneration facilities, and private generation projects. Pursuant to Ind. Code §8-1-2-34.5, the Commission has

authority to investigate and enter orders on complaints by individual customers of public utilities. The Commission therefore has jurisdiction over the parties and over the subject matter of the Petition in this cause.

2. Characteristics of Petitioners and Respondent. WCE is a corporate affiliate of BP and operates a cogeneration facility (the "WCE Facility") adjacent to and contiguous with BP's Whiting Refinery. Since it became operational in 2001, the WCE Facility has produced thermal output in the form of steam that has been used to support BP's industrial operations at the Whiting Refinery, as well as electric output that has been sold into the wholesale market pursuant to WCE's status as an Exempt Wholesale Generator ("EWG"). On March 29, 2018, WCE filed a Form 556 with the Federal Energy Regulatory Commission ("FERC") self-certifying as a Qualifying Facility ("QF"), with a specified implementation date of May 1, 2019. With that status, both the electric and steam output of the WCE Facility will be used to support the Whiting Refinery operations and the WCE Facility will be fully integrated into the Whiting Refinery. BP is a retail electric customer of NIPSCO receiving service pursuant to the terms of NIPSCO's electric tariff. The provision of electric power as well as steam by WCE as a QF will significantly alter the electric services provided by NIPSCO to BP at the Whiting Refinery. NIPSCO is regulated by the Commission pursuant to the provisions of Indiana law relating to public utilities.

3. Relief Requested. Petitioners seek a determination that, due to material changes in circumstances, the terms of the 1999 Order are no longer applicable and should be suspended as moot. In particular, Petitioners seek to establish that WCE is no longer a "public utility" and that the terms on which the declination of jurisdiction in the 1999 Order was conditioned, including a requirement of Commission approval for transactions between WCE and NIPSCO, should be rescinded as moot. Petitioners further requested relief concerning the arrangement for transmitting electric power from the WCE Facility to the Whiting Refinery, proposing three alternatives involving aggregated metering, self-wheeling, and installation of a private line. In addition, Petitioners requested resolution of any disputed issues relating to the services provided by NIPSCO upon implementation of the QF arrangement, including the provision of back-up, maintenance and temporary services, the purchase and marketing of excess power produced by the WCE Facility, and the application of the demand ratchet applicable to the Whiting Refinery. In that respect, however, Petitioners have not sought any change or revision to the terms of NIPSCO's electric tariff in this proceeding.

4. Terms of the Settlement. The Settlement as filed on November 2, 2018, addresses the issues in this cause in relation to the electric rate case filed by NIPSCO on October 31, 2018, pending as Cause No. 45159 (the "Rate Case"). The material provisions to which the Settling Parties agreed are as follows:

a. The Settling Parties seek a final order containing three determinations relating to the 1999 Order: (1) that WCE is no longer a "public utility" subject to regulation under Indiana law and hence the conditional declination of jurisdiction in the 1999 Order is moot and no longer in effect; (2) that because WCE and NIPSCO are no longer affiliates the requirement in the 1999 Order for Commission approval of certain transactions between WCE and NIPSCO is moot and no

longer in effect, that WCE may market power as a QF subject to the provisions of Indiana and federal law relating to QFs, and that the capacity transaction addressed in the motion for interim approval in this cause does not require further regulatory approval; and (3) that all other reporting requirements and other conditions placed on WCE by the 1999 Order premised on the "public utility" finding are moot and no longer in effect.

b. No ruling by the Commission is required regarding the meter aggregation or transmission-only service options proposed by Petitioners. An available option to implement the QF arrangement is the installation of a private line. Any further alternative would be subject to terms and conditions to be addressed in the Rate Case.

c. Petitioners will amend the Form 556 filed with FERC on March 29, 2018, to postpone the implementation date of May 1, 2019, to a date after completion of the Rate Case.

d. The rendering of standby services by NIPSCO, the marketing of excess WCE energy and capacity, and the application of the demand charge in the rate schedule under which BP is served will be governed by applicable law, including tariff provisions to be approved in the Rate Case.

5. **Summary of the Evidence.** The case-in-chief evidence submitted by Petitioners described the WCE Facility and its uses, and the decision to electrically integrate the WCE Facility with the Whiting Refinery. The testimony also provided historical background on the relationship between and among WCE, BP and NIPSCO, and analysis regarding mechanisms to accomplish the integration as well as applicable terms for standby and transitional services. The settlement testimony supported the Settlement and the determinations sought under its terms.

a. **The WCE Facility and Whiting Refinery.** The WCE Facility is a 545 MW topping cycle, natural gas-fired, combined cycle cogeneration facility owned and operated by WCE. WCE is a wholly-owned subsidiary of BP Alternative Energy North America, Inc., and a commonly owned corporate affiliate of BP Products North America, Inc., the entity which owns and operates the Whiting Refinery. The WCE Facility is located on land owned by BP that is adjacent to and contiguous with the Whiting Refinery. The facility sits on the northeast side of the Whiting Refinery, directly across Standard Avenue which runs along the northeastern side of the Refinery.

In addition to the electric generation capacity, the facility is capable of producing steam at an average net rate of production of 493 BTUs per hour. Presently, steam from the WCE Facility is transported to the Whiting Refinery through BP-owned facilities that pass over Standard Avenue. Inside the Refinery, the steam is used as thermal energy to heat process streams and in the reboilers of the distillation columns for hydrocarbon separation. The steam also powers compressors and pumps and turbine generators which produce electricity for internal use within the Refinery.

The Whiting Refinery was constructed in 1889 and initially operated by Standard Oil of Indiana. In 1985, Standard Oil was renamed Amoco, which merged in 1998 with BP Products North America, Inc., to become the largest producer of oil and gas in the United States. In 2013, BP completed a major modernization project at the Whiting Refinery to expand production capabilities and provide the refinery the flexibility to process heavier grades of Canadian crude oil. The multi-billion dollar project took years to complete and was the largest private sector investment in Indiana history. BP has also completed or undertaken an additional $715 million in recent investments at the Refinery.

Because of the energy-intensive nature of refinery operations, the Whiting Refinery is one of the largest customers served by NIPSCO. The Whiting Refinery's production-related energy costs are a major expense and have material impact on the economic efficiency of the Refinery and its commercial vitality.

Although the WCE Facility and Whiting Refinery are not directly connected via a separate, dedicated, transmission line, both are separately interconnected to NIPSCO's 138 kV transmission system. This includes interconnection through a number of parallel 138 kV transmission lines and an interconnection through NIPSCO's Marktown substation via a transmission line less than two miles in length.

b. <u>Historical background and use</u>. The WCE Facility initially went into operation in 2001. At that time, WCE was a subsidiary of Primary Energy, which was in turn an indirect, wholly-owned subsidiary of NiSource, Inc., and therefore an affiliate of NIPSCO. In 1999, prior to the facility's construction, WCE entered into an Energy Sales Agreement and Ground Lease with Amoco. That agreement included provisions for Amoco to purchase both the steam and electricity produced by WCE in order to support the energy requirements at the Whiting Refinery. By the time construction of the WCE Facility was complete, however, BP Amoco had entered into a Commission-approved special contract with NIPSCO for the provision of electric service to the Whiting Refinery. After the operational date of the WCE Facility, then, the WCE Facility provided only steam to support Refinery operations.

In 1999, WCE filed a petition requesting that the Commission decline to exercise jurisdiction over the construction, ownership, and operation of the WCE Facility. By an order dated December 29, 1999, the Commission granted the requested relief with certain terms. In particular, the Commission found that by virtue of the sale of steam to BP Amoco and ownership and operation of an electric generation facility, WCE would be a "public utility." Given the corporate affiliation between NIPSCO and WCE that existed at that time, the Commission also ordered regulatory review and approval of any sales of electric power by WCE to NIPSCO. The Commission also prohibited any retail sales of electricity from the WCE Facility and called for certain reports and the provision of certain information upon Commission request.

In 2001, WCE submitted an application with FERC to establish the facility as an EWG. As an EWG, WCE has made sales of electric power into the wholesale market pursuant to federal law and the provisions of the 1999 Order. A level of electric generation occurs on a constant basis in connection with the operation of the Facility to produce steam, and at times additional electric power has been generated in light of market conditions. In connection with

sales into the wholesale market, WCE is also subject to NERC standards and is a registered market participant in MISO.

In 2007, NIPSCO filed a petition in Cause No. 43396 that included a request to approve the purchase of the WCE Facility and related assets. BP, however, exercised a contractual right of first refusal, and in 2008 BP Alternative Energy North America, Inc. purchased all the capital stock of WCE. This transaction turned WCE into a corporate affiliate of BP and terminated the indirect affiliation with NIPSCO. At that time, the arrangement between WCE and BP was not altered and the WCE Facility continued to provide steam to the Whiting Refinery while WCE continued to sell electric power into the wholesale market as an EWG.

c. <u>Status and operation as a Qualified Facility</u>. On March 29, 2018, WCE filed a Form 556 with FERC, self-certifying the WCE Facility as a QF under federal law. As a QF, the facility will provide both steam and electricity to support operations at the Whiting Refinery. The FERC Form 556 indicates that implementation of the QF arrangement will be May 1, 2019, in order to provide BP and WCE the opportunity to secure any necessary approvals and, if needed, install additional infrastructure, including the potential construction of a private transmission line, to complete the integration.

Mr. Eveland explained that a number of developments dramatically increased the cost of energy for the Whiting Refinery and led to the decision to complete the electric integration of the WCE Facility into the Refinery's operations. He noted that the special contract, approved in 1999, expired on 2011, which led to the Whiting Refinery transitioning to tariff rates. In addition, the modernization project completed in 2013 not only expanded the Refinery's production capacity and flexibility, but also involved a major increase in the load served by NIPSCO. Mr. Eveland also noted that the costs of the higher electric requirements at the Whiting Refinery have been compounded by a series of NIPSCO rate increases since the expiration of the special contract. Mr. Eveland explained that in light of these factors, and BP's investment in the WCE Facility, BP determined that the productive use of the WCE Facility's generation capacity to support the Whiting Refinery would improve operations, create synergies, help control a major cost of production, mitigate the challenges of rising energy costs, and better position BP to continue investment in the Whiting Refinery.

Currently, the Whiting Refinery is served under NIPSCO Rate 733 and receives standby service under Rider 776 to support approximately 83 MWs of existing self-generation within the Refinery. BP has given NIPSCO notice of the reduction to its contract demand under Rate 733 to 20 MWs. Upon the electrical integration of the WCE Facility, BP will meet the electricity needs of the Whiting Refinery through the 20MW of contract demand with NIPSCO, the 83 MWs of existing private generation within the refinery, and the supply from the WCE Facility. BP will continue to receive service under Rate 733, and will add WCE to the list of eligible QFs for purposes of standby service under Rider 776. Because the generation capacity of the WCE Facility exceeds the current electric needs of the Whiting Refinery, the Facility will have excess energy and capacity which it is prepared to sell to NIPSCO under Rider 778 or into the MISO market. Mr. Dauphinais testified that the sales of excess capacity and energy into the MISO market or to NIPSCO would be consistent with federal law under PURPA and related FERC

rules as well as the Commission's rules under 170 IAC 4-4.1-8 & -9. He also testified that Rider 778 complies with applicable law and will not need revision to accommodate such sales.

BP states that the WCE Facility is in excellent working condition and has an established history of reliable operation. As with any cogeneration facility, WCE has planned outages and faces the risk of unexpected disruption, however because the WCE Facility's two gas turbines can operate independently, they provide redundancy during outages. BP also anticipates coordinating with NIPSCO with respect to any maintenance or planned outages that would affect power production at the WCE Facility.

d. Electric integration alternatives. Mr. Dauphinais provided additional testimony regarding the means of integration to allow WCE to deliver electric energy to the Whiting Refinery. He identified three means by which the electrical integration could be achieved: 1) the aggregation of delivery points; 2) self-wheeling across the NIPSCO system; or 3) the construction of a private transmission line.

Mr. Dauphinais described the aggregation of delivery points as an approach by which the meters for the WCE Facility and Whiting Refinery would, for billing purposes, be summed to a single value so that for a given period of time there would be either a net input of power from the NIPSCO transmission system, or a net output of power into the NIPSCO transmission system. He testified that the marginal transmission congestion and losses cost from the WCE Facility to Whiting Refinery have been small and negative indicating that self-supply of power through aggregation would generally decrease congestion and losses. He offered the opinion that aggregation would eliminate the need for the redundant investment in a private line that would duplicate the functions of existing transmission facilities without providing benefits that would reduce the cost to serve NIPSCO's other customers.

Mr. Dauphinais also testified regarding a self-wheeling alternative, by which BP would pay NIPSCO a transmission wheeling charge for the portion of the Refinery load served by the WCE Facility. He offered opinions regarding the potential pricing and terms for such service.

The third alternative, the construction of a private line, would involve BP building a private 138 kV transmission line to directly connect the WCE Facility to the Whiting Refinery. Mr. Dauphinais testified this approach would not require alteration of existing interconnections between the WCE Facility, the Whiting Refinery and NIPSCO, but would require a decision about how the interconnections should operate. He also testified that the private line option would require the meters at the WCE Facility and Whiting Refinery to be summed for billing purposes to properly capture the net input or output to or from the NIPSCO transmission system.

e. Tariff services. Mr. Dauphinais testified about the importance of standby service to customers like BP with self-service power. He described standby service as consisting of backup power, which is needed by a host to replace energy ordinarily generated by a customer's own equipment during a force deration or outage of the equipment, and maintenance power, which is needed to replace the host's energy needs provided by self-service power during planned or scheduled outages. Mr. Dauphinais also testified regarding supplemental power which he described as power purchased in addition to standby service.

Mr. Dauphinais testified that NIPSCO provides standby services to QFs through Rider 776. He noted that the Whiting Refinery already takes standby service under that rider for the 83 MW of existing generation within the Whiting Refinery. Mr. Dauphinais testified that no changes were needed to Rider 776 to accommodate the addition of the WCE Facility as a QF, and that the existing transmission system is sufficient to provide standby service to the Whiting Refinery.

Mr. Dauphinais also testified that BP had provided NIPSCO with appropriate notice of its reduction in demand and taken steps to revise its contract demand to reflect the upcoming electric integration, giving NIPSCO reasonable opportunity to prepare for the change in BP's service requirements. On that basis, he proposed that BP not be subject to the 11-month demand ratchet under Rate 733.

f. <u>Settlement testimony</u>. Each of the Settling Parties offered testimony supporting the Settlement.

Mr. Martin described the issues raised by the Petitioners in this case, noting the material changes in circumstances related to the ownership and status of WCE and the WCE Facility that rendered the 1999 Order no longer applicable. He also noted that Petitioners sought relief relating to alternative transmission arrangements to move power from the WCE Facility to the Whiting Refinery and concerning the altered service arrangement with NIPSCO.

Mr. Martin described the events that led to the negotiation of the Settlement. He stated that after filing their case-in-chief, Petitioners provided additional information to the other parties through both formal and informal exchanges. Petitioners worked with NIPSCO on technical issues, including the potential design of the private line option in order to ensure functionality without adverse consequences for NIPSCO's system. Petitioners also hosted representatives from the OUCC at a site visit to the WCE Facility. Petitioners joined the other parties in requesting a one-month extension to the procedural schedule to explore the potential for an agreed resolution, and that during that period, Petitioners, the OUCC and NIPSCO reached the Settlement.

Mr. Martin testified that NIPSCO announced its plan to file a general rate case on October 31, 2018, which will include a reformation of NIPSCO's industrial rates. Mr. Martin explained that this impacted the settlement discussions because the Rate Case proposals would impact key elements of the service arrangement between Petitioners and NIPSCO. He stated that in light of the relief being sought in the Rate Case, the Settlement carefully delineates between issues being resolved in this case, and those reserved for the Rate Case.

Mr. Martin summarized the terms of the Settlement. With respect to the 1999 Order, the Settling Parties are jointly seeking an order finding it is moot and no longer effective in three respects. Specifically, the parties are seeking an order that finds: (1) as a QF, WCE is no longer a "public utility" subject to a declination of jurisdiction; (2) insofar as WCE is no longer an affiliate of NIPSCO, regulatory approval of transactions with NIPSCO is no longer necessary; and (3) all reporting requirements and other conditions predicated on the "public utility" finding

are moot and no longer effective. Regarding the transmission options, the Settlement provides that the private line is an option, and any other alternative will be subject to terms and conditions to be decided in the Rate Case. The Settlement also provides that the planned implementation date will be postponed to coincide with the completion of the Rate Case. This, in turn, means that tariff issues including the provision of standby service, the disposition of excess energy and capacity, and charges during the transition period, will be governed by applicable law, including tariff provisions to be approved in the Rate Case.

Mr. Martin testified that the Settlement provisions regarding the 1999 Order were reasonable given the significant changes in circumstances. In particular, with the change of WCE from an EWG to a QF, and the change in ownership of WCE, the provision of steam and electric power to Whiting Refinery is a self-supply arrangement that justifies operation under regulatory provisions for QFs instead of those applicable to public utilities. In addition, with the termination of the affiliate relationship between NIPSCO and WCE, the conditions imposed by the 1999 Order, including those related to the capacity transaction which was the subject of the motion for interim relief, are no longer necessary or appropriate.

Mr. Martin testified that the Settlement resolves the transmission arrangements through agreement that a private line is an option, providing sufficient resolution so that Petitioners are no longer seeking findings in this case on the other two options, aggregation and self-wheeling. Those other options, however, remain open to consideration in the Rate Case, and the Settlement does not preclude approval of those, or other, arrangements.

Mr. Martin explained that the change in the implementation date was agreed to because of the relatively short time any arrangement under the existing tariffs would be in place before new tariffs are approved in the Rate Case. With the delay in implementation and new tariffs expected in the Rate Case, the Settling Parties agreed that the requests for findings on the tariff provisions were no longer necessary or appropriate in this proceeding.

Finally, Mr. Martin testified that the Settlement is reasonable and in the public interest, noting that the requested findings are supported by the evidentiary record and applicable law and that the Settlement recognizes the limitations on the range of issues that need resolution in light of the filing of the Rate Case. He also testified that the Settling Parties represent the utility, the customer and cogeneration facility, and the ratepaying public, and all signatories were informed of relevant circumstances, represented by counsel, and supported by experts.

Ms. Aguilar, a Utility Analyst in the Electric Division of the OUCC, testified that the Settlement was negotiated in good faith and at arms-length, and that all involved parties received compromised benefits while avoiding litigation risk, delay and expense.

Ms. Aguilar testified the OUCC had two primary concerns with the relief requested in this cause: (1) the reasonableness and appropriateness of terminating Commission jurisdiction given consideration of the public interest; and (2) the impact of implementing QF status and related service terms on NIPSCO's other customers. She noted the requested relief implicated ratemaking and tariff design issues without the opportunity to evaluate all issues as would occur in a base rate case.

Ms. Aguilar testified Indiana law supports the utilization of QFs, and testified that while termination of the conditional declination of jurisdiction would remove Commission jurisdiction over WCE, it would not leave the entity unregulated as it would still be subject to regulation by FERC. She stated terminating the 1999 Order would serve the public interest in support of QFs. She also testified that allowing the service terms to be resolved in the context of the Rate Case would balance the needs of all interested and affected parties and provide for all interested parties to participate, which would be in the public interest. Ms. Aguilar testified the OUCC recommends approval of the Settlement as being in the public interest.

Mr. Paul Kelly, Vice President of Major Accounts for NIPSCO, testified that the Settlement should be approved by the Commission and that the Cause should be concluded with a final order consistent with the agreed upon terms.

Mr. Kelly summarized the issues raised in this cause by Petitioners, and noted the changes in circumstances, including the sale of WCE to BP and the change from an EWG to a QF, that justify the conclusion that certain determinations in the 1999 Order were no longer applicable. Mr. Kelly testified that WCE meets the definitions of a "qualifying facility" and "private generation project" under Indiana Code §8-1-2.4-2 and that WCE is no longer an affiliate of NIPSCO. He testified that these changes render the Settlement's terms addressing the 1999 Order to be reasonable, as the provisions of the 1999 Order are no longer necessary.

Mr. Kelly also testified about the steps NIPSCO undertook to understand Petitioners' proposals, which included meeting with Petitioners to understand technical issues and meeting with representatives from MISO to understand the treatment of a QF, such as the WCE Facility, that provides energy to its host, but also sells energy into the marketplace.

Mr. Kelly testified that the filing of the Rate Case, and proposed new industrial service structure, influenced the range of issues subject to resolution in this cause. He testified these include resolution of the transmission options, other than the private line option; the tariff provisions relating to the provision of standby service and the application of the demand charge; and the disposition of excess energy and capacity.

Mr. Kelly testified that he believes the Settlement is in the public interest as it limits the scope of issues resolved in this case in light of the Rate Case, and allows for the installation of a private line for WCE as a QF/private generation project to provide power to the Whiting Refinery in a manner consistent with Indiana law.

6. Commission Discussion and Findings. The relief requested under the terms of the Settlement will be analyzed by reference to the standards applicable to a negotiated agreement submitted for Commission approval, the particular findings relating to the 1999 Order, the proposed resolution of the alternative transmission options, the postponement of the implementation date to coincide with the completion of the Rate Case, and the service terms reserved for determination in the Rate Case.

a. Standard for consideration of settlements. Settlements presented to the Commission are not ordinary contracts between private parties. *United States Gypsum, Inc. v. Indiana Gas Co.*, 735 N.E.2d 790, 803 (Ind. 2000). Any settlement agreement that is approved by the Commission "loses its status as a strictly private contract and takes on a public interest gloss." *Id.* (*quoting Citizens Action Coalition v. PSI Energy, Inc.*, 664 N.E.2d 401, 406 (Ind. Ct. App. 1996)). Thus, the Commission "may not accept a settlement merely because the private parties are satisfied; rather [the Commission] must consider whether the public interest will be served by accepting the settlement." *Citizens Action Coalition*, 664 N.E.2d at 406. Furthermore, any Commission decision, ruling, or order – including the approval of a settlement – must be supported by specific findings of fact and sufficient evidence. *United States Gypsum*, 735 N.E.2d at 795 (*quoting Citizens Action Coalition v. Public Service Co*., 582 N.E.2d 330, 331 (Ind. 1991)). Therefore, before the Commission can approve the Settlement, we must determine whether the evidence in this cause sufficiently supports the conclusion that the Settlement is reasonable, just, and consistent with applicable law, and that the Settlement serves the public interest.

At the same time, Indiana law strongly favors settlement as a means of resolving contested proceedings. *See, e.g., Manns v. State Dept. of Highways*, 541 N.E.2d 929, 932 (Ind. 1989); *Klebes v. Forest Lake Corp*., 607 N.E.2d 978, 982 (Ind. Ct. App. 1993); *Harding v. State*, 603 N.E.2d 176, 179 (Ind. Ct. App. 1992). This policy is an established feature of Indiana law. *See, e.g., Mendenhall v. Skinner & Broadbent Co.*, 728 N.E.2d 140, 145 (Ind. 2000) ("The policy of the law generally is to discourage litigation and encourage negotiation and settlement of disputes.") (citation omitted); *In re Assignment of Courtrooms, Judge's Offices and Other Facilities of St. Joseph Superior Court*, 715 N.E.2d 372, 376 (Ind. 1999) ("Without question, state judicial policy strongly favors settlement of disputes over litigation.") (citations omitted).

The Commission has carefully analyzed the evidence and the terms of the Settlement to evaluate whether the proposed outcome is reasonable and in the public interest. Based on that review, and as further discussed below, we conclude that the Settlement is reasonable and in the public interest and should be approved. The Settlement is attached hereto and incorporated herein by reference.

b. Findings relating to the 1999 Order. The Settling Parties seek findings that, due to materially changed circumstances, the 1999 Order is moot and should be suspended in three respects: (1) WCE is no longer a "public utility"; (2) transactions between WCE and NIPSCO should no longer require Commission approval; and (3) the terms and conditions relating to "public utility" status should no longer be applicable.

i. Public utility status. The Settlement seeks determinations that, due to material changes in circumstances, WCE is no longer a "public utility" and therefore the conditional declination of jurisdiction in the 1999 Order is moot. The Settlement further states that the agreed resolution is solely for purposes of the unique circumstances presented here, and in particular the Settling Parties do not seek to establish any principles or policies of general applicability concerning "public utility" status or appropriate regulatory treatment associated with QFs in any future cases. In that context, accordingly, the Commission will determine whether the agreed resolution concerning "public utility" status is reasonable, supported by the record, and consistent with applicable law.

In the 1999 Order, the Commission declined to exercise jurisdiction over WCE pursuant to Ind. Code §8-1-2.5-5, subject to stated conditions. Under the circumstances presented at that time, the Commission found WCE was a "public utility" within the meaning of Ind. Code §8-1-2-1 and hence an "energy utility" for purposes of Ind. Code §8-1-2.5-2. The 1999 Order based the "public utility" finding on two grounds. First, WCE at the time was planning to sell all of its electric power output into the wholesale market as an EWG. Second, WCE also planned to sell steam service at retail to Amoco (now BP). *See* 1999 Order at 5. The relevant changes since that time, however, are that WCE has self-certified as a QF to supply both power and steam to support the Whiting Refinery, and in addition WCE has been acquired by a BP affiliate.

Regarding the provision of steam to the Whiting Refinery, the fact that WCE and BP are now commonly owned and jointly operated by corporate affiliates makes the service a self-supply arrangement rather than a retail sale to a third party consumer. *See also BP Products v. Office of Utility Consumer Counselor*, 947 N.E.2d 471, 476-80 (Ind. Ct. App.), *mod'd on reh. on different grounds*, 964 N.E.2d 234 (2011), *transfer dismissed*, 963 N.E.2d 1120 (Ind. 2012) (holding private steam arrangement not subject to "public utility" regulation). At the time of the 1999 Order, WCE was an indirect subsidiary of NiSource and not an affiliate of BP Amoco. The change of circumstance, therefore, materially alters the basis for the "public utility" finding in the 1999 Order with respect to the provision of steam.

Concerning the marketing of power at wholesale as an EWG, the change of circumstance is that WCE has self-certified as a QF and in that capacity will be supplying both power and steam to support BP's operations at the Whiting Refinery. As noted in the 1999 Order, "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* 1999 Order at 2 (emphasis added). *See also id.* at 5 ("the power will be generated *solely* for the sales for resale") (emphasis added). As an EWG, then, WCE was treated as a merchant plant for purposes of Indiana law.

By contrast, as a QF, WCE will provide both power and steam to support operations at the Whiting Refinery, and consequently the electric output will be substantially dedicated to support the host industrial operation. *See* 16 U.S.C. §824a-3(n)(1)(A)(ii) (requiring a QF to be "used fundamentally for industrial . . . purposes" and not "fundamentally for sale to an electric utility"). As with the provision of steam, the provision of power by WCE to support operations at the Whiting Refinery is in the nature of self-supply and hence is not a "public utility" function.

In addition to the self-supply of power, a QF is also entitled under Indiana and federal law to sell excess power not consumed by the host industrial operation to the electric utility serving the location or into the wholesale market. *See* Ind. Code §§8-1-2.4-4(a)(1) & 6(b); 16 U.S.C. §§824a-3(b), 824a-3(m). The question here, accordingly, is whether the sale of excess power as a QF necessitates classification of WCE as a "public utility" under Indiana law. For purposes of approving the Settlement in this case, and without addressing the possible range of situations that might support a different conclusion in a future case, the Commission concludes that the finding requested by the Settling Parties here is consistent with applicable law.

A chapter of the Indiana Code is devoted to addressing alternate energy production, cogeneration, small hydro facilities, and private generation projects. *See* Ind. Code ch. 8-1-2.4. The statutory provisions expressly contemplate sales to electric utilities (*see id.* §§4(a)(1), 6(b)), but that chapter does not include any provision calling for regulation of the QF or other private facility as a "public utility."

The corresponding statutory provisions under federal law, moreover, address the sale of power from a QF to an electric utility, but again do not call for regulation of a QF as a "public utility." *See* 16 U.S.C. §§824a-3(b), 824a-3(m). The legislative history for PURPA indicates that structure was deliberate:

> The conferees recognize that cogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis a vis the sale of power to the utility and whose risk in proceeding forward in the cogeneration or small power production enterprise is not guaranteed to be recoverable. . . . The establishment of utility type regulation over them would act as a significant disincentive to firms interested in cogeneration and small power production. . . . The conferees do not intend cogenerators or small power producers to be subject, under the commission's rules, to utility-type regulation.

H.R. Conf. Rep. No. 95-1750 at 97-98.

The Commission regulations implementing Ind. Code ch. 8-1-2.4, similarly, address sales of energy and capacity from a QF to a public utility, but do not contemplate treating the QF as a "public utility." *See* 170 Ind. Admin. Code §§4-4.1-5(a), -8, -9, -10. To the contrary, those regulations expressly provide:

> *Qualifying facilities shall be exempt from revenue requirement and associated regulation under IC 8-1-2* as administered by the Indiana utility regulatory commission, but the commission shall be final authority over rates for purchase and sale of electric energy and capacity in transactions between qualifying facilities and electric utilities.

Id. §3 (emphasis added). Again, the corresponding provisions of federal law are also explicit in exempting QFs from regulation under state public utility laws. *See* 16 U.S.C. §824a-3(e)(1); 18 C.F.R. §292.602(c). The regulations, notably, preserve the Commission's authority with respect to sales of excess power by a QF to an electric utility, but the exercise of that authority does not entail treatment of the QF as a "public utility." The Settling Parties, accordingly, are not asserting any challenge to, or seeking any deviation from, the provisions of NIPSCO's Rider 778 or any successor provisions.

The proposition that a QF is distinct from a "public utility" is further consistent with past regulatory treatment under Indiana law. In Cause No. 43674, the Commission addressed service issues involving NIPSCO and a cogeneration facility supporting an industrial customer, including terms for sale of power to NIPSCO, without any suggestion that the operator of the

cogeneration facility should be treated as a "public utility." *See* April 7, 2010 Order in Cause No. 43674. The net metering rules, which also involve self-supply facilities and potential wholesale transactions, have a structure corresponding to the treatment of QFs in which the net metering facilities are exempt from revenue requirement and associated regulation under Ind. Code 8-1-2. *See* 170 Ind. Admin. Code §4-4.2-3. Net metering customers, accordingly, have not been regarded as having "public utility" status and have not been required to seek a declination of jurisdiction.

For purposes of the agreed resolution presented here under the unique circumstances in this case, and in light of materially changed circumstances subsequent to the 1999 Order, the Commission concludes that WCE will be subject to regulatory treatment as a QF but is no longer a "public utility" for purposes of Indiana law, and hence the conditional declination of jurisdiction in the 1999 Order is moot and no longer in effect.

ii. <u>Approval of transactions between WCE and NIPSCO</u>. At the time of the 1999 Order, WCE was a corporate affiliate of NIPSCO, but was unaffiliated with BP Amoco. In light of the affiliate relationship, the OUCC raised a concern regarding potential sales of power from WCE to NIPSCO. *See* 1999 Order at 4. In response, WCE did not oppose a requirement for Commission approval of such transactions. *Id.* at 5. The Commission, then, included a provision in the order requiring specific Commission approval for any sale of electric power by WCE to NIPSCO. *Id.* at 9 ¶3(b).

The subsequent acquisition of WCE by a BP affiliate in 2008 materially altered the grounds on which that approval requirement was premised. Since that time, WCE has no longer been an affiliate of NIPSCO, and instead has become an affiliate of BP. The concern regarding potential affiliate transactions between WCE and NIPSCO is no longer present. *See* Ind. Code §8-1-2-49(2) (authorizing Commission oversight of transactions between public utilities and their affiliates). Both Indiana and federal law expressly contemplate the sale of excess power produced by a QF to the public utility serving the location. *See* Ind. Code §§8-1-2.4-4, -6; 170 Ind. Admin. Code §§4-4.1-5, -8, -9; 16 U.S.C. §824a-3(a), (b), (m); 18 C.F.R. §§292.303, 292-304, 292.309 to 292.311. *See also* Pet. Adm. Not. 1, Att. 6 (NIPSCO Rider 778).

Insofar as WCE and NIPSCO are no longer affiliates and hence the basis for the approval requirement in the 1999 Order is no longer applicable, and in light of the regulatory framework in which sales of excess power produced by QFs to public utilities such as NIPSCO are expressly contemplated subject to established standards and principles, the Commission concludes that the requirement in the 1999 Order calling for Commission approval of certain transactions between WCE and NIPSCO is moot and no longer in effect. WCE may market power as a QF subject to the provisions of Indiana and federal law relating to QFs.

By motion dated May 18, 2018, Petitioners and NIPSCO jointly moved for interim approval of a transaction involving the sale of WCE capacity to NIPSCO effective on June 1, 2018. The motion referenced the approval requirement in the 1999 Order, while noting that part of the relief sought in this proceeding included termination of that requirement as moot in light of the changed circumstances. By Docket Entry dated May 29, 2018, the Commission granted the interim approval as requested, while preserving authority to make further determinations

regarding the transaction in the final order in this proceeding. In light of the conclusion that the provision in the 1999 Order requiring approval of sales from WCE to NIPSCO is moot and no longer in effect, the Commission finds that the transaction addressed in the May 18, 2018 motion does not require further regulatory approval.

iii. Reporting requirements and other conditions. As a condition of the declination of jurisdiction, the 1999 Order called for WCE to provide certain reports and to submit additional information upon request. *See* 1999 Order at 9 ¶4. Like the declination of jurisdiction, the additional requirements were predicated on the finding that WCE would have the status of a "public utility" under the circumstances presented at that time. Consistent with the determination above that WCE is no longer a public utility under the changed circumstance arising from the QF filing, the Commission concludes that all other reporting requirements and other conditions placed on WCE by the 1999 Order premised on the "public utility" finding are moot and no longer in effect.

c. Alternative transmission options. Currently, there are connecting facilities between the WCE Facility and the Whiting Refinery for the transmission of steam but not for the transmission of electricity. In the Petition and case-in-chief evidence, Petitioners described three potential alternatives to perform the transmission function: (1) aggregation of meters at WCE and the Whiting Refinery; (2) self-wheeling of power; and (3) installation of a private line. *See* Petition ¶¶16-18; Pet. Ex. 3 at 5-10.

Pursuant to the Settlement, no Commission ruling is required with respect to the meter aggregation or the self-wheeling alternatives. Insofar as the merits of those two alternatives are not at issue and no question is presented for determination, the Commission does not make any finding regarding either of those two options.

The Settlement further provides that the installation of a private line is an available option. The Commission agrees that the installation of private transmission facilities would be a lawful means to perform the transmission function and that the Settling Parties' agreement in this regard is therefore reasonable.

In addition, the Settlement states that any further alternative would be subject to terms and conditions to be addressed in the Rate Case. The supporting testimony notes that the Settlement does not foreclose other possibilities that may be feasible at the conclusion of the Rate Case. *See* Pet. Ex. 4 at 7. The Commission finds, accordingly, that the determination that a private line is an available option does not preclude any other potential arrangement that may be consistent with the outcome of the Rate Case. Nothing in this Order, however, should be construed as predetermining or addressing in any way the merits of any issue that may be presented in the Rate Case.

d. Issues reserved for rate case determination. NIPSCO filed its electric rate case on October 31, 2018. Pursuant to Ind. Code §8-1-2-42.7(e), a final order is expected in that proceeding by August 2019. The FERC filing by WCE self-certifying as a QF specified an implementation date of May 1, 2019, in order to allow sufficient time to determine and establish the transmission connection. In several respects, the service arrangements between Petitioners

and NIPSCO will be governed or affected by the terms of NIPSCO's electric tariff, which is subject to review and revision in the Rate Case. Rather than proceeding for only a few months under NIPSCO's current tariff provisions before new provisions go into effect at the conclusion of the Rate Case, Petitioners agreed in the Settlement to amend the FERC filing to revise the implementation date from May 1, 2019 to a date after completion of the Rate Case. The Commission finds that postponing the implementation of the QF arrangement until the end of the Rate Case will promote a more orderly transition and is therefore reasonable.

In the Petition and case-in-chief evidence, Petitioners referenced certain aspects of the service arrangement with NIPSCO that are addressed in tariff provisions, including the provision of standby services by NIPSCO, the disposition of excess energy and capacity produced by the WCE Facility, and application of the demand ratchet in the rate schedule applicable to the Whiting Refinery. *See* Petition ¶19; Pet. Ex. 3 at 11-18. Consistent with the agreed postponement of the QF implementation until the Rate Case is concluded, the applicable tariff provisions will be those approved in the Rate Case.

In light of the pending Rate Case, in which the terms and provisions of NIPSCO's electric tariff will be determined and may be revised from the currently applicable terms and provisions, the Settlement provides that the specified features of the service relationship will be governed by applicable law, including tariff provisions approved in the Rate Case. No change or exception, consequently, is being sought in this proceeding with regard to the tariff provisions currently in effect and other relevant law concerning standby services, disposition of excess energy and capacity, or application of the demand charge.

The Settling Parties stated that the Rate Case was a significant development that led to a careful delineation in the Settlement between issues resolved in this proceeding and those subject to determination in the Rate Case. *See* Pet. Ex. 4 at 4-5; Resp. Ex. 1 at 4-5; Public Ex. 1S at 3-4. The Commission concludes that the Settlement appropriately balances the scope of the issues being resolved in the context of this proceeding and issues remaining open for determination in the Rate Case. The Settlement terms regarding standby services, disposition of excess energy and capacity, and the demand ratchet, accordingly, are reasonable. Again, the references to issues that may be raised and decided in the Rate Case should not be construed as prejudicial to or a predisposition with respect to the merits of any potential Rate Case issue.

e. <u>Conclusion regarding approval of Settlement</u>. The evidence submitted by the Settling Parties affirms that the Settlement was negotiated at arm's length and in good faith, following full disclosure of all relevant information. *See* Pet. Ex. 4 at 4, 9; Public Ex. 1S at 1. The Settling Parties include the industrial customer, the cogeneration facility operator, the public utility, and the representative of the consuming public. *See* Pet. Ex. 4 at 9. The endorsement of the OUCC, as statutory advocate for NIPSCO's ratepayers, supports the conclusion that the Settlement is in the public interest. *See* Public Ex. 1S at 3-4. *See also Nextel West Corp. v. Indiana Utility Regulatory Commission*, 831 N.E.2d 134, 156 (Ind. Ct. App. 2005), *transfer denied*, 860 N.E.2d 588 (Ind. 2006).

The Settlement, furthermore, appropriately provides for a resolution specific to this proceeding consistent with applicable law, without establishing any principle or precedent for

purposes of future cases. The Settling Parties specified that they sought to conclude this case on mutually acceptable terms in light of the unique circumstances presented here, but did not seek to predetermine or foreclose any other issues that may arise in the future. In particular, the Settlement properly limits the scope of the determinations being made in this proceeding, in recognition of issues that may be raised and addressed in the Rate Case.

The Commission concludes the Settlement is reasonable, consistent with applicable law, supported by the record, appropriate in the specific circumstances presented here, and in the public interest. The Commission therefore approves the Settlement in its entirety, without change or modification. A copy of the Settlement is attached hereto and incorporated herein by reference. With regard to future citation of this Order, we find that our approval of the Settlement should be construed in a manner consistent with our finding in *Richmond Power & Light*, Cause No. 40434, 1997 WL 34880849 at *7-8 (IURC 3/19/1997).

f. Confidential information. Petitioners and NIPSCO filed a joint motion on May 18, 2018, seeking confidential treatment of a transaction document relating to the contemporaneous request for interim approval. The motion was supported by affidavit attesting to the status of the document as trade secret information subject to reasonable measures to safeguard confidentiality, having independent economic value arising from not being publicly available, and consequently subject to protection pursuant to Ind. Code §§24-2-3-2 and 5-14-3-4(a). By Docket Entry dated May 23, 2018, the Commission made a preliminary finding of confidentiality, and the document at issue was then filed under seal. Having reviewed the document and the affidavits supporting the joint motion for confidential treatment, the Commission affirms the preliminary ruling and finds this information should be exempted from the public access requirements contained in Indiana Code ch. 5-14-3 and Indiana Code § 8-1-2-29, and held confidential and protected from public disclosure by this Commission.

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

1. The Stipulation and Settlement Agreement is approved in its entirety, without change or modification, consistent with Finding 6(e).

2. The determinations and conditions set forth in the December 29, 1999 Order in Cause No. 41530 are moot and no longer in effect, in the specified respects and to the extent addressed in Finding 6(b). Specifically: (1) WCE will be subject to regulatory treatment as a QF but is no longer a "public utility" under Indiana law, and therefore the conditional declination of jurisdiction is moot and no longer in effect: (2) the requirement for specific Commission approval of sales from WCE to NIPSCO is moot and no longer in effect, and the transaction addressed in the May 29, 2018 Docket Entry in this Cause does not require further regulatory approval; and (3) all further reporting requirements and other conditions placed on WCE that were premised on the finding of "public utility" status are moot and no longer in effect.

3. The installation of a private line is an available option to effectuate the transmission of power generated at the WCE Facility to the Whiting Refinery. Any further alternative shall be subject to terms and conditions to be addressed in Cause No. 45159.

4. Petitioners shall amend the Form 556 as filed with FERC on March 29, 2018, in order to postpone the implementation date from May 1, 2019 to a date after the issuance of a final order in Cause No. 45159.

5. All further issues raised in this proceeding relating to terms and provisions in NIPSCO's current electric tariff shall be subject to resolution based on applicable law, including tariff provisions approved in Cause No. 45159, in accordance with Finding 6(d).

6. The information submitted under seal in this Cause pursuant to the joint motion for confidential treatment is determined to be confidential and exempt from public access and disclosure pursuant to Ind. Code §§24-2-3-2 and 5-14-3-4.

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

HUSTON, FREEMAN, KREVDA, OBER AND ZIEGNER CONCUR

APPROVED:

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

_____

Mary M. Becerra,
Secretary to the Commission