

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

VERIFIED PETITION OF NIPSCO GENERATION LLC)
FOR CERTAIN DETERMINATIONS BY THE)
COMMISSION WITH RESPECT TO ITS JURISDICTION) CAUSE NO. 46183
OVER PETITIONER’S ACTIVITIES AS A NON-RETAIL)
GENERATOR OF ELECTRIC POWER.)
)

**CITIZENS ACTION COALITION OF INDIANA, CLEAN GRID ALLIANCE, AND
LAPORTE COUNTY’S REPLY IN SUPPORT OF MOTION TO DISMISS**

Citizens Action Coalition of Indiana (“CAC”), Clean Grid Alliance, and Board of County Commissioners of La Porte County, Indiana (collectively, “Movants”), by counsel, respectfully submit this reply in support of their March 24, 2025 Motion to Dismiss (the “Motion”) NIPSCO Generation LLC’s (“GenCo”) Petition. GenCo filed its Response in opposition to the motion on April 4, 2025.

The Movants now reply to GenCo’s Response as follows:

I. ARGUMENT

The Petition requests that the Commission decline jurisdiction over GenCo’s electric generation facilities for megaload customers. If the Petition were granted, the Commission would decline jurisdiction over GenCo under 51 statutory provisions. GenCo would be able to construct and operate an undefined number of generation facilities at different locations with only limited Commission oversight. Within this structure, GenCo intends to have one customer: Northern Indiana Public Service Company (“NIPSCO”). NIPSCO would purchase GenCo’s power on a wholesale basis through power purchase agreements with as yet undisclosed terms, and NIPSCO

would sell this power to “megaload” customers through special contracts with as yet undisclosed terms.

GenCo’s Response to the Motion does not adequately address the deficiencies of its application. GenCo’s case-in-chief does not provide sufficient facts to support a finding that the requested relief is in the public interest. The Response further misstates the relevant evidentiary requirements for supporting the Motion: the Commission may consider discovery responses provided to date in the proceeding regardless of whether they have been formally admitted into evidence. While doing so converts the Motion to one seeking summary judgment, there is no procedural requirement for such motion to be supported by sworn affidavits in this instance. Finally, while GenCo contends that the Petition is sufficient as a matter of law, and this Cause can proceed without NIPSCO as a co-petitioner, Movants maintain that NIPSCO must be added as a co-petitioner in order to preserve the Commission’s ability to provide adequate relief in this proceeding.

A. The Commission owes no deference to GenCo’s legal conclusions.

The Movants agree with GenCo that its verified statements as to facts are entitled to a favorable inference in determining whether GenCo has alleged sufficient facts to support its request for relief and survive the Movants’ Motion. Whether the unprecedented declination of jurisdiction that GenCo is seeking is in the public interest, however, is a question of law, not of fact. And even accepting as true all facts as alleged by GenCo in its case-in-chief and drawing reasonable inferences therefrom, it has not made a *prima facie* case that it is entitled to be relieved from the full panoply of statutes and administrative rules that would otherwise govern its activities.

In its response, GenCo cites this Commission’s August 18, 2004 order denying a NIPSCO motion to dismiss a complaint for lack of subject matter jurisdiction in Cause No. 42526 as supporting GenCo’s assertions that the Commission should consider its “pleadings” in the light most favorable to GenCo.¹ That order does indeed refer to giving deference to the non-movant’s pleadings, explaining that “[i]t remains for trial whether the [petitioner] can establish the facts it alleges.”² But the underlying legal question in that case—whether the Commission possessed subject matter jurisdiction—“is purely one of law.”³ The Commission, not the parties, determines such questions. Subsequently, the cited order performs a careful analysis of whether the complaint should be dismissed as a matter of law before going to a hearing.⁴ The Commission agreed that it lacked authority over condemnation decisions made by public utilities and would dismiss the case if the complaint was limited to matters of condemnation.⁵ But because the Commission determined that it had “an independent statutory basis” for jurisdiction over other aspects of the complaint, it denied the motion to dismiss that was based on an alleged lack of subject matter jurisdiction.⁶

In the instant case, Movants are not questioning the Commission’s jurisdiction over GenCo’s declination petition. Rather, Movants challenge the sufficiency of GenCo’s case-in-chief to carry its burden that, as a matter of Indiana law, the public interest requires the requested declinations. Assuming, for purposes of considering the motion to dismiss, that all of GenCo’s factual allegations are proven at the hearing, none of the four statutorily prescribed public

¹ Resp. 5, n. 7 (Apr. 3, 2025).

² Cause No. 42526, *In re Compl. Porter Cnty. All. v. NIPSCO* 3 (Aug. 18, 2004).

³ *Id.*

⁴ *Id.* at 3–4.

⁵ *Id.* at 4.

⁶ *Id.*

interest considerations has been satisfied. Furthermore, GenCo's assertion that the statute "does not require all of the factors to be specifically satisfied for relief to be granted"⁷ offers no argument nor guidance as to what alternative standard GenCo proposes the Commission apply in making its public interest determination.

B. GenCo's petition is not in the public interest and is insufficient as a matter of law.

Pursuant to 170 IAC 1-1-12 (a)(3)(B) and Trial Rule 12(B)(6), the Commission should dismiss the Petition because GenCo's case-in-chief has not adequately pleaded facts demonstrating that declination of the Commission's jurisdiction will serve the public interest. To survive a motion to dismiss, GenCo must "plead the operative facts necessary to set forth an actionable claim."⁸ GenCo attempts to obfuscate the issue at hand, framing its unprecedented and unusual relief as "limited, well defined, and within the Commission's authority."⁹ GenCo does not disclose in its Response that it seeks declination under 51 statutory provisions and that, unlike in other declination proceedings, such declination would apply to an undefined number of projects to build or acquire as yet unidentified generation resources. Such relief would eliminate the vast majority of the Commission's jurisdiction over GenCo, decrease transparency, and leave the Commission and the public in the dark about GenCo's operations. GenCo further argues that it has presented a *prima facie* case that sufficiently states a claim under the Declination Statute.¹⁰ GenCo's arguments fail for two main reasons.

First, GenCo's case-in-chief is inadequate because GenCo does not plead the operative facts necessary to survive a motion to dismiss. GenCo argues that Attachment A to the Petition

⁷ Resp. 5; *see also id.* at 13.

⁸ *Miller v. Mem. Hosp. of South Bend, Inc.*, 679 N.E.2d 1329 (Ind.1997).

⁹ Resp. 9.

¹⁰ *Id.* at 3–6, 8–11.

includes plain and concise statements of facts relevant to each of the public interest factors.¹¹

GenCo highlights that Attachment A is a “15-page document delineating each provision (chapter or section) of the Indiana Code for which declination is sought,”¹² resisting characterization of this document as a “list.” But a “list” is an appropriate characterization. While Attachment A is 15 pages in length, it is not filled with the operative facts essential to each statutory provision. Instead, Attachment A consists almost entirely of a rote listing of statutory factors followed by the same one to three sentences of boilerplate, conclusory language repeated for each of the 51 provisions.¹³ Other public interest explanations in Attachment A omit almost all of the statutory factors. For example, in requesting the declination of the Commission’s authority under Ind. Code. §§ 8-1-8.7-1 *et seq.*, 8-1-40-16, 8-1-40-17, and 8-1-40-19, GenCo’s only public interest explanation is that it is “unnecessary and wasteful as contemplated by Ind. Code § 8-1-2.5-5(b)(1).”¹⁴ Yet, GenCo’s explanation does not expound upon why the Commission’s authority is unnecessary or wasteful and does not include any facts to support this claim.

Second, GenCo’s arguments against dismissal misconstrue the declination statute and the Commission’s previous declination decisions. GenCo argues that Ind. Code § 8-1-2.5-5(b) does not require all of the factors to be specifically satisfied for relief to be granted.¹⁵ At a minimum, GenCo must state how its request will satisfy each declination factor to facilitate the

¹¹ *Id.* at 4, 5, 9–11.

¹² *Id.* at 4.

¹³ For example, next to nearly all the statutory items listed in Attachment A, NIPSCO’s “Public Interest Explanation” begins with these conclusory statements: “This is unnecessary and wasteful as contemplated by Ind. Code § 8-1-2.5-5(b)(1). Declination will be beneficial for the energy utility and the energy utility’s customer (NIPSCO) as contemplated by Ind. Code § 8-1-2.5-5(b)(2). NIPSCO GenCo will be a non-retail provider, and its only customer will be NIPSCO.” Pet., Attach. A (Jan. 10, 2025).

¹⁴ *Id.* at 15.

¹⁵ Resp. 5, 12–13.

Commission’s required evaluations.¹⁶ As explained above and in the Motion, GenCo’s case-in-chief fails to do so with regard to any of the factors, and GenCo does not plead the operative facts necessary to set forth an actionable claim.¹⁷ Additionally, the Commission regularly considers and makes a finding as to each declination factor in these causes.¹⁸ But GenCo has not made this showing for each declination factor here.

Similarly, GenCo’s comparisons to previous wholesale power suppliers’ declination requests are unavailing. According to GenCo, the “requested relief is more specific and defined than any wholesale power supplier’s declination of jurisdiction request that counsel is aware of, which are routinely approved by this Commission with limited or no opposition.”¹⁹ This is not accurate. As evidenced by the opposition from the Office of Utility Consumer Counselor and a host of different types of intervenors, this declination request bears no relation to previous requests approved “with limited or no opposition.” Indeed, wholesale power suppliers—who are not affiliated with a regulated monopoly utility—regularly submit declination requests for specific facilities. GenCo’s close affiliation with the NIPSCO utility monopoly, as well as the blanket declination sought for some unknown number of unidentified generation facilities, set this petition apart. And these differences are directly relevant to why it could be in the public interest to decline jurisdiction over aspects of an independent power producer’s construction and operation of a single identified facility. In contrast with GenCo’s request, wholesale power

¹⁶ *Indiana Civil Rights Comm’n v. Indianapolis Newspapers, Inc.*, 716 N.E.2d 943, 947 (Ind. 1999) (“The word ‘shall’ is presumptively treated as mandatory ‘unless it appears clear from the context or the purpose of the statute that the legislature intended a different meaning.’”).

¹⁷ Mot. to Dismiss 5–15 (Mar. 24, 2025); *Miller*, 679 N.E.2d 1329.

¹⁸ See, e.g., Cause No. 46004, *In re Fletcher Power Pet. Comm’n Jurisdiction* 4 (June 19, 2024); Cause No. 46029, *In re Headwaters Wind Farm III Pet. Comm’n Jurisdiction* 4 (June 19, 2024); Cause No. 45891, *In re Galea Springs Pet. Comm’n Jurisdiction* 4 (Oct. 18, 2023); Cause No. 45604, *In re Petersburg Energy Ctr. Pet. Comm’n Jurisdiction* 4 (Dec. 22, 2021).

¹⁹ Resp. 10.

suppliers do not request declination over all future facilities with uncertain locations, undefined technologies, and opaque operating conditions.²⁰ Indeed, such details are regularly provided in wholesale power suppliers' declination petitions, but GenCo omitted them from its case-in-chief.

C. GenCo has not satisfied its burden under Trial Rule 56.

Further, GenCo has not satisfied its burden to create a genuine issue of material fact under Trial Rule 56. GenCo does not dispute that a motion under Trial Rule 12(B)(6) may rely on matters outside the petition, and, in that instance, the petition becomes a motion for summary judgment.²¹ GenCo argues that a motion for summary judgment must be supported by affidavits, declarations, and sworn statements and that the Motion is somehow deficient because Movants did not submit an affidavit to accompany the citation to GenCo's own data responses.²² The Commission should reject GenCo's argument for three reasons.

First, GenCo misstates the relevant legal rule. Trial Rule 56 permits the submission of a summary judgment motion "with or without supporting affidavits."²³ Trial Rule 56 only requires parties to designate the parts of "pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion."²⁴ Like a trial court, the Commission may consider material relied upon in a motion for summary

²⁰ See *supra* note 18.

²¹ Resp. 6.

²² *Id.* at 6–8.

²³ Ind. Tr. R. 56(A) (allowing claimants to submit a motion for summary judgment "with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof"); *Id.* 56(B) (allowing defending parties to "move with or without supporting affidavits for a summary judgment"). *Shepherd v. Truex*, 819 N.E.2d 457, 461 (Ind. Ct. App. 2004) ("T.R. 56(B) states that a defending party may move for summary judgment *with or without supporting affidavits.*") (emphasis in original).

²⁴ Ind. Tr. R. 56(C).

judgment as long as it is apprised of it.²⁵ To be clear, Movants should prevail at minimum because the Petitioner's case-in-chief, even if factual assertions are construed as charitably as possible for GenCo, fails to satisfy GenCo's statutory burden. The Motion additionally offered discovery responses for the Commission's consideration to show the ultimate insufficiency of GenCo's case even when GenCo is given an opportunity to fully recite its story, and the Commission may rely upon these extraneous materials to decide this motion.

Second, GenCo's reliance on *S. Indiana Gas & Elec. Co. v. Indiana Farm Gas Prod. Co.*, 549 N.E.2d 1063 (Ind. Ct. App. 1990) is unfounded. GenCo claims that *SIGECO* requires the submission of affidavits with a motion for summary judgment.²⁶ More recent cases—especially compared to the 35-year-old case cited by GenCo—codify the practice of submitting a summary judgment motion without submitting affidavits.²⁷ The *SIGECO* case also differs procedurally. In *SIGECO*, the Court of Appeals treated a motion to dismiss as a motion for judgment on the pleadings under Rule 12(C) because the motion was made after the moving party's filing of an answer.²⁸ This does not reflect the current procedural posture of this case. Additionally, at issue in *SIGECO* was the Commission's jurisdiction over the case, and the moving party in *SIGECO* did not allege that the petition had failed to state a claim under Rule 12(B)(6).²⁹

²⁵ *Nat'l Bd. of Examiners for Osteopathic Physicians & Surgeons, Inc. v. Am. Osteopathic Ass'n*, 645 N.E.2d 608, 615 (Ind. Ct. App. 1994) ("As long as the trial court is apprised of the *specific material* upon which the parties rely in support of or in opposition to a motion for summary judgment, then the material may be considered.").

²⁶ Resp. 6–7.

²⁷ See, e.g., *Shepherd*, 819 N.E.2d at 461; *Nat'l Bd. of Examiners for Osteopathic Physicians & Surgeons*, 645 N.E.2d at 615; *Marshall v. Blue Springs Corp.*, 641 N.E.2d 92, 95 (Ind. Ct. App. 1994); *Babinchak v. Town of Chesterton*, 598 N.E.2d 1099, 1101 (Ind. Ct. App. 1992).

²⁸ *S. Indiana Gas & Elec. Co. v. Indiana Farm Gas Prod. Co.*, 540 N.E.2d 621, 624 (Ind. Ct. App. 1989), order vacated on reh'g, 549 N.E.2d 1063 (Ind. Ct. App. 1990).

²⁹ *S. Indiana Gas & Elec. Co. v. Indiana Farm Gas Prod. Co.*, 549 N.E.2d 1063, 1064 (Ind. Ct. App. 1990).

Third, GenCo's failure to supply relevant details in discovery supports the motion to dismiss. However, GenCo attempts to obfuscate this fact, asserting that its responses to discovery and data requests are "informal" and thus not relevant for the purposes of the motion.³⁰ GenCo dismisses the citation of its own words as "disagreement with the requested relief and apparent frustration with responses to informal data requests."³¹ However, GenCo's argument is incompatible with the purpose of discovery. As declared by the Indiana Supreme Court, "the purpose of pretrial discovery is to make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."³² GenCo's responses to discovery demonstrate how it refuses to disclose crucial details regarding its insufficient Petition, even though such details would be necessary for the Commission to make any determination that GenCo's Petition is in the public interest.³³ Nor would affidavits sponsoring the data requests cited provide any evidentiary value. GenCo does not dispute that the responses cited in the Motion are from GenCo and NIPSCO, and Movants are unable to attest to the truth of their words. Movants do not offer the data requests for truths of any factual matters asserted therein but instead provide them to show that GenCo has failed to provide any factual support for its conclusory assertions in its case-in-chief. Thus, in addition to the sworn petition and testimony, GenCo's statements further demonstrate that it has failed to fulfill the requirements for the relief it seeks.

³⁰ Resp.7–8.

³¹ *Id.* at 8.

³² *Whitaker v. Becker*, 960 N.E.2d 111, 115 (Ind. 2012) (quoting *Outback Steakhouse of Florida, Inc. v. Markley*, 856 N.E.2d 65, 77 (Ind.2006)) (internal quotations omitted).

³³ *See* Mot. 6–15.

D. GenCo’s petition cannot proceed without NIPSCO as a co-petitioner.

The Petition is also insufficient because GenCo’s requested relief will require binding directives on NIPSCO. GenCo’s Petition cannot proceed without NIPSCO as a co-petitioner, and NIPSCO’s participation as an intervenor falls short of this need.³⁴ As a result, dismissal under Rule 12(B)(6) for failure to state a claim is appropriate. GenCo argues that NIPSCO is not seeking any relief in this case, and its requested relief will not impair or affect NIPSCO’s rights or the Commission’s jurisdiction over NIPSCO.³⁵

The Commission should reject GenCo’s arguments regarding its corporate affiliate NIPSCO’s party status. The Petition states that GenCo “intends to enter into certain contracts with NIPSCO to enable NIPSCO to supply retail service to ‘megaload customers’ in Indiana.”³⁶ Further, the Petition and the supporting testimony describe the interconnected relationships between NIPSCO, GenCo, and their parent company.³⁷ The interconnected relationships within this corporate structure create economic risks that must be addressed in this proceeding. GenCo’s requested relief—where it lacks the Commission’s accountability and requirements under 51 statutory provisions—will inevitably affect its only customer, NIPSCO, and, therefore, NIPSCO’s existing retail customers. As GenCo admits, “the Commission is free to order whatever relief it deems necessary and fit.”³⁸ But without NIPSCO as a co-petitioner, the Commission faces hampered and limited powers in ensuring that the public interest would be advanced by the broad declinations that GenCo seeks. Thus, it is unimaginable to envision a

³⁴ Mot. 15–16.

³⁵ Resp. 13–14.

³⁶ Pet. 2 (corrected March 24, 2025).

³⁷ *Id.* at 1 n. 1.

³⁸ Resp. 13.

scenario where NIPSCO, NIPSCO's customers, and the Commission's jurisdiction over NIPSCO are unaffected by GenCo's request.

II. CONCLUSION

For the foregoing reasons, Movants' Motion to Dismiss is well-founded, and GenCo's response in opposition should be given no credence. Accordingly, the Commission should grant the Movants' Motion to Dismiss, and the Commission should retain its full jurisdiction over GenCo.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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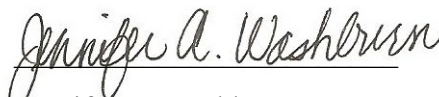
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