

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE COMPLAINT OF)
JOHNSON COUNTY CONCERNED CITIZENS FOR)
THE WRONGFUL PLACEMENT, PROPOSED)
CONSTRUCTION, AND OPERATION OF) **CAUSE NO. 45943**
ELECTRIC FACILITIES IN WHITE RIVER)
TOWNSHIP, JOHNSON COUNTY, INDIANA.)
RESPONDENT: DUKE ENERGY INDIANA, LLC)

DUKE ENERGY INDIANA, LLC’s VERIFIED MOTION TO DISMISS

Respondent, Duke Energy Indiana, LLC (“Duke Energy Indiana”), by counsel, respectfully requests that the Indiana Utility Regulatory Commission (“Commission”) dismiss the Complaint filed by the Johnson County Concerned Citizens (“Complainants”) and deny their request to suspend Duke Energy Indiana’s planning, site work, and construction of the switching station at an 8.824-acre site near the northeast corner of State Road 135 and Whiteland Road in Greenwood, Indiana (the “Property”). Under controlling Indiana law, this Commission does not have jurisdiction over what amounts to challenges to a pending condemnation action. Thus, the matter should be dismissed for “want of jurisdiction” pursuant to 170 IAC 1-1.1-12 (a)(3), Indiana Trial Rule 12(B)(1), and Indiana Trial Rule 12(B)(6).

In support of its Motion to Dismiss, Duke Energy Indiana states as follows:

I. Background

1. Duke Energy Indiana has initiated a condemnation proceeding to acquire the Property for the purpose of subsequently constructing a switching station. A complaint, entitled Duke Energy Indiana, LLC v. Whetstone Branch LLC et.al., was filed in the Johnson Superior Court Number 4, Cause Number 41D04-2309-PL-000129, on September 19, 2023. (the “Condemnation”). A copy is attached as Exhibit 1.

2. Before filing the Condemnation, Duke Energy Indiana undertook the necessary internal processes and statutory prerequisites.¹ Under the condemnation statute, Ind. Code § 32-24-1-1 *et seq.*, Duke Energy Indiana was required to and did make a Uniform Offer to the property owner, Whetstone Branch LLC (owned solely by Complainant Michael Stout), on August 2, 2023, which offer was based on an independent appraisal attached to the offer. (*See* Ind. Code § 32-24-1-5). Mr. Stout had thirty days to accept the offer and, barring his acceptance, Indiana’s condemnation statute allows for the initiation of a condemnation proceeding. (Ind. Code §§ 32-24-1-3 and 32-24-1-5).

3. The thirty days in which to accept the offer lapsed on September 2, 2023, and Mr. Stout did not accept.

4. Between the time of the Uniform Offer and the filing of the Condemnation, Mr. Stout and others filed this matter under the Commission’s general complaint statute, Ind. Code § 8-1-2-54, claiming that there is no need for the switching station and that any future construction of that station will be unsafe.

5. While Duke Energy Indiana has determined a need to construct a switching facility, it does not currently own the land and has not begun any actual project work.

¹ Prior to making the Uniform Offer, Duke Energy Indiana engaged in engineering studies and assessed the need for a switching station in the Greenwood/Bargersville area to enhance the provision of transmission along the U.S. 135 corridor and to provide a radial feed into an REMC substation. That substation provides service not only to existing customers but those who are anticipated to require service because of development in the area. Once having determined a need for the switching station, Duke Energy Indiana engaged in its siting study, in which it evaluated multiple sites for interconnection to the existing grid, the need for additional easements, effect on existing customers and areas then under development, archeological and environmental impacts and prudence in terms of costs. Based on this study, Duke Energy Indiana ranked the properties, and the Bargersville Site was selected as the preferred site. Then, following statutory procedures, Duke Energy Indiana attempted to find a voluntary/willing seller. It negotiated with Mr. Stout at length about the size, location, and price of a portion of his property and alternatively spent an additional eight months negotiating with another party. When negotiations were unsuccessful, Duke Energy Indiana undertook the first step of the statutory condemnation proceeding by making a Uniform Offer. Although Mr. Stout and the others claim there is no “need and necessity for the switching station” condemnation is a matter for the state courts. Any subsequent issue regarding safe construction, depends entirely on the start of the project, which has not occurred.

II. Legal Argument

6. The Commission has plenary jurisdiction over public utilities operating in Indiana, including Duke Energy Indiana, unless, by legislative design, a matter is carved away from that jurisdiction, as is the case with condemnation proceedings involving the acquisition of property.

7. Courts are clear since the *Lowe v. Indiana Hydroelectric Power Co.*, 151 N.E. 2d 220 (Ind. 1926) decision that public utilities need not obtain prior Commission approval or a certificate of public convenience and necessity before exercising their power of condemnation. *Alabach v. N. Ind. Pub. Serv. Co.*, 329 N.E.2d 645, 646-647 (Ind. Ct. App. 1975), *trans. Denied* (citing *Lowe v. Ind. Hydroelectric Power Co.*, 151 N.E. 220 (Ind. 1926)). The *Alabach* court makes clear that the Commission's general complaint statute must be read in conjunction with the condemnation statutes and concludes that "the unrelated terms of the general complaint statute... too weak a base for a successful assault on the distinct and powerful wording of the condemnation statute and the cases construing it." *Id.* at 650. Thus, the argument made by Complainants that the Commission must review or investigate the safety of the location of the proposed switching station should be seen for what it is: an attempt to circumvent the statutory condemnation process based on an argument already considered and roundly rejected by our courts in *Alabach*. Therefore, there can be no doubt that *Lowe* and its progeny squarely call for the dismissal of this cause.

8. In *Alabach*, "Petitioners-appellants (Landowners) [sought] review of an Order of the Public Service Commission (Commission) dismissing their petition objecting to a proposed right of way for Appellee Northern Indiana Public Service Company (NIPSCO), claiming that the Commission has subject matter jurisdiction to determine the reasonableness of a proposed electric transmission right of way." The Claimants there, much like those here, "alleged that better routes were available nearby, that the proposed location is unreasonable and unnecessary and should be

relocated by the Commission, or at least the Commission should investigate the necessity and reasonableness of the proposed easement.” When the Commission dismissed for lack of subject matter jurisdiction over what was really a complaint regarding an eminent domain proceeding, the *Alabach* Complainants filed an appeal, arguing that Ind. Code § 8-1-2-54 (the general complaint statute) was the source of the Commission’s authority over location of transmission lines. The Commission disagreed, “observing that if the Commission could alter the location of condemnations its action would be in conflict with the legislative intent of IC 1971, 32-11-3-1, -2 (Burns Code Ed.)” [the condemnation statute citation at that time -- now Ind. Code § 32-2-4-1 *et seq.*]²

9. The Indiana Court of Appeals in *Alabach* upheld the Commission’s decision, finding that:

The thrust of the general complaint statute is to afford certain persons a remedy against public utilities arising out of their operations *after* they are providing service. It is silent as to any remedy arising out of the acquisition of property and location of rights of way. The references to “service” and “property” by context are limited to operating public utilities. Landowners can take no solace from these references.

Id. at 648. (Emphasis added).

10. Subsequently, in another unanimous decision, *Schererville v. Northern Indiana Public Service Co.*, 463 N.E.2d 1134, 1136 (Ind. Ct. App. 1984), the Indiana Court of Appeals allowed a complaint at the Commission to proceed because that complaint related to the “manner” in which NIPSCO was going to provide “service” after property had already been acquired. The Court explained the distinction:

² Indiana Code § 32-24-1-4(a) states “If the person seeking to acquire the property does not agree with the owner of an interest in the property or with the guardian of an owner concerning the damages sustained by the owner, the person seeking to acquire the property may file a complaint for that purpose with *the clerk of the circuit court of the county where the property is located.*” (Emphasis added).

Alabach may be distinguished from the case here: We are not concerned with a utility obtaining property from a private party who seeks a remedy from the PSC not contemplated by the legislature. Here the town seeks to object to NIPSCO's *manner and method* of providing service on property **previously acquired by the utility without resort to eminent domain**. The dispute concerns the *furnishing* of a product and the manner of installing the *equipment* necessary to do so. This issue, therefore, is included in the definition of "service" in IC 8-1-2-1. Consequently, the PSC had subject matter jurisdiction of this dispute under IC 8-1-2-54.

Id. at 1136. (emphasis added).

11. The *Alabach* holding is analogous to the Complaint filed in this proceeding and distinct from the holding in *Schererville*. As in *Alabach* and unlike *Schererville*, Duke Energy Indiana has yet to acquire the property for the potential switching station – condemnation proceedings have not even yet begun. While the Commission possesses broad jurisdiction over Duke Energy Indiana, the Indiana General Assembly has specifically reserved condemnation proceedings to State Court, as acknowledged in *Alabach* and *Schererville*. Therefore, until property has been obtained by Duke Energy Indiana, it is premature for the Commission to award the relief requested by Complainants.

III. Conclusion

Duke Energy Indiana respectfully requests that the Commission dismiss the Complainants' Complaint for "want of jurisdiction" pursuant to 170 IAC 1-1.1-12 (a)(3), Indiana Trial Rule 12(B)(1), and Indiana Trial Rule 12(B)(6).

VERIFICATION

I, Andrew J. Wells, Associate General Counsel for Duke Energy Business Services LLC, a service company affiliate of Duke Energy Indiana, LLC, do hereby swear and affirm under penalties of perjury, that I have read the foregoing Verified Answer and that the representations set forth herein are true and correct to the best of my knowledge, information, and belief.



Andrew J. Wells

Respectfully submitted,

DUKE ENERGY INDIANA, LLC

By:



Counsel for Duke Energy Indiana, LLC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was electronically delivered
this 20th day of September 2023 to:

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41D04-2309-PL-000129

Johnson Superior Court 4

Filed: 9/19/2023 5:16 PM
Clerk
Johnson County, Indiana

STATE OF INDIANA
JOHNSON SUPERIOR COURT NO. 4

DUKE ENERGY INDIANA, LLC,)	
)	
Plaintiff,)	
vs.)	Cause No. _____
)	
WHETSTONE BRANCH, LLC and)	
AUDITOR and TREASURER OF)	
JOHNSON COUNTY, INDIANA,)	
)	
Defendants.)	

COMPLAINT IN CONDEMNATION

Plaintiff, Duke Energy Indiana, LLC (“DEI”), by counsel, for its Complaint in Condemnation (“Complaint”), alleges and states as follows:

1. DEI is an Indiana public utility, and, pursuant to IC 32-24-4-1, it has the authority to bring this eminent domain action under IC 32-24-1 *et seq.*
2. According to the records in Johnson County, Indiana, Defendant, Whetstone Branch, LLC (“Defendant owner”), is the owner of certain real estate located in Johnson County, Indiana, by virtue of a Quitclaim Deed, which real estate is hereafter referred to as the “subject real estate.” A copy of the Quitclaim Deed is attached to and made a part of this Complaint as Exhibit “1.”
3. In connection with DEI’s public utility business, it is necessary that DEI now appropriate fee simple title to a portion of the subject real estate for the construction of its Bargersville North Substation Project (“DEI’s Project”).
4. DEI’s Project is necessary to improve the capacity and reliability of the delivery of electricity to DEI’s customers in the Johnson County, Indiana area.

5. DEI's Project involves fee simple acquisition of a portion of the subject real estate, also called the "Fee Simple Area," which is specifically described in Exhibit "2" attached to and made a part of this Complaint. The fee simple title that DEI seeks to acquire in this case shall be subject to all rights-of-way and easements currently of record, including, but not limited to, the Town of Bargersville, an Indiana Municipal Corporation, and to its Successors and Assigns' Public Utilities Easement, dated December 14, 2022, and recorded in the Office of the Johnson County Recorder as Instrument No. 2022-027292; and Johnson County, Indiana, acting through its Board of Commissioners, and its Successors and Assigns' Right-of-Way and Easement Grant, dated February 9, 2004, and recorded in the Office of the Johnson County Recorder as Instrument No. 2005-009130.

6. Defendants, Auditor and Treasurer of Johnson County, Indiana, may claim an interest in the subject real estate based on a first, prior and existing tax lien.

7. Pursuant to IC 32-24-1-3 and IC 32-24-1-5, DEI offered to purchase the real estate that DEI seeks to acquire in this case from Defendant owner for the amount of Six Hundred Thousand Dollars (\$600,000.00). DEI and the owner have been unable to agree on a purchase price.

8. Any conditions precedent to the prosecution of this action have been performed, have occurred or have been excused or waived.

WHEREFORE, DEI requests the following:

- a. The Court order the appropriation of the real estate that DEI seeks to acquire in this case;

- b. Pursuant to IC 32-24-1-7, the Court appoint three (3) disinterested appraisers to appraise the value of the real estate being appropriated;
- c. The Court order the three (3) disinterested appraisers to make their one (1) report in writing to the Court on or before a date certain;
- d. Upon filing of the appraisers' report, pursuant to IC 32-24-1-11, the Court order the Clerk of the Court to send the appraisers' report and notice of its filing, by certified mail, to all parties in this case and their attorneys of record;
- e. The Court order all other just and proper relief in the premises.
- f. DEI reserves the right to demand a trial by jury in this case.

Respectfully submitted,



Yasmin L. Stump
*Attorney for Plaintiff, Duke Energy Indiana,
LLC*
Atty. No. 14876-49

CERTIFICATION OF COMPLIANCE WITH TRIAL RULE 5(G)

I do hereby certify that the foregoing or attached court record or document complies with the requirements of Trial Rule 5(G) with regard to information excluded from the public record under Administrative Rule 9(G).



Yasmin L. Stump
Attorney for Plaintiff, Duke Energy Indiana, LLC

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(2)

QUITCLAIM DEED

Inst 2007-000160

THIS INDENTURE WITNESSETH that William B. Scott and Wanda S. Scott, husband and wife (collectively "Grantor"), quitclaim to Whetstone Branch, LLC, an Indiana limited liability company ("Grantee"), for the sum of Ten and no/100 Dollars (\$10.00) and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, in the following described real estate and improvements in Johnson County, Indiana:

see Exhibit "A" attached hereto and by reference made a part hereof.

Subject to all easements, restrictions of record, outstanding mortgages and other encumbrances, unpaid real property taxes and solid waste assessments.

WITNESS WHEREOF, Grantor has caused this Quitclaim Deed to be executed effective as of the 30th day of August, 2006.

William B. Scott
William B. Scott

Wanda S. Scott
Wanda S. Scott

STATE OF INDIANA)
COUNTY OF MARION) SS:

Before me, a Notary Public in and for said County and State, personally appeared William B. Scott and Wanda S. Scott, and being first duly sworn, acknowledged her execution of the foregoing Quitclaim Deed.

Witness my hand and Notarial Seal this 30th day of August, 2006.

Patricia Seazor Bailey
Patricia Seazor Bailey, Notary Public

My Commission Expires: 6/20/2007

My County of Residence is: Marion

Return Deed to: Patricia Seazor Bailey, 50 S. Meridian Street, Suite 700, Indianapolis, Indiana 46204.

Send tax bills to: 1499 W. 350 N., Franklin, IN 46131

This Instrument was prepared by Patricia Seazor Bailey, Attorney, Stark Doninger & Smith, 50 South Meridian Street, Suite 700, Indianapolis, Indiana 46204.

I affirm, under the penalties of perjury, that I have taken reasonable care to redact each Social Security number in this document, unless required by law. Patricia Seazor Bailey

DULY ENTERED FOR TAXATION
SUBJECT TO FINAL ACCEPTANCE
FOR TRANSFER

JAN - 2 2007

Sue Anne Misiniec
AUDITOR, JOHNSON COUNTY

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IMAGE/COPY PROPERTY OF JOHNSON COUNTY, IN. OR LICENSEE OR NOT FOR RESALE PURSUANT TO I.C.

Exhibit "1"

Exhibit A

TRACT #15

The West half of the Southwest Quarter of Section 24, Township 13 North, Range 3 East of the Second Principal Meridian, containing eighty (80) acres, more or less.

Also, the West half of the Southeast Quarter and the East half of the Southwest Quarter; all in Section 24 of Township 13 North of Range 3 East of the Second Principal Meridian, containing one hundred sixty (160) acres, more or less.

EXCEPTING THEREFROM THE FOLLOWING DESCRIBED REAL ESTATE:

The West half of the Southeast Quarter and a part of the East half of the Southwest Quarter of Section 24, Township 13 North, Range 3 East of the Second Principal Meridian in White River Township, Johnson County, Indiana, described as follows:

Beginning at the Southwest corner of said West half Quarter Section; thence North 89 degrees 41 minutes 00 seconds East (assumed bearing) on and along the South line of said half Quarter Section 1354.00 feet to the Southeast corner thereof; thence North 00 degrees 04 minutes 30 seconds West on and along the East line of said West half Quarter Section 2672.55 feet to the Northeast corner thereof; thence South 89 degrees 48 minutes 00 seconds West on and along the North line of said West half Quarter Section and the North line of the East half of the Southwest Quarter of said Section 24, a distance of 1437.00 feet; thence South 00 degrees 00 minutes 00 seconds West 660.60 feet; thence South 89 degrees 48 minutes 00 seconds West 813.72 feet; thence South 00 degrees 00 minutes 00 seconds West 2018.80 feet to a point on the South line of said East half Quarter Section, thence North 89 degrees 32 minutes 30 seconds East on and along last said South line 900.31 feet to the Place of Beginning, containing one hundred twenty-six (126) acres, more or less. Subject to all legal rights-of-way and easements.

IMAGE/COPY PROPERTY OF JOHNSON COUNTY, IN. FOR LICENSEE ONLY. NOT FOR REPRODUCTION

LAND DESCRIPTION

Part of the Southwest Quarter of Section 24, Township 13 North, Range 3 East of the Second Principal Meridian in Johnson County, Indiana, being that 8.824 acre tract of land shown on the plat of an original Survey of said tract certified by Jonathan D. Polson, PS #LS21500011, as Banning Engineering's project Number 23203, dated July 26, 2023 (all references to monuments and courses herein are as shown on said plat of survey) described as follows:

Commencing at a mag nail with Northpointe washer marking the southwest corner of said southwest quarter; thence North 89 degrees 30 minutes 31 seconds East along the south line of said southwest quarter 500.00 feet; thence North 00 degrees 07 minutes 36 seconds East parallel with the west line of said southwest quarter 45.00 feet to the north line of a right of way easement recorded as Instrument Number 2005-009130 in the Office of the Recorder of Johnson County, marked by a 5/8 inch rebar with a Banning-Eng Firm #0060 cap (here after referred to Banning Rebar) being the POINT OF BEGINNING; thence North 00 degrees 07 minutes 36 seconds East parallel with said west line 620.00 feet to a Banning Rebar; thence North 89 degrees 30 minutes 31 seconds East parallel with the north line of said right of way easement 620.00 feet to a Banning Rebar; thence South 00 degrees 07 minutes 36 seconds West parallel with said west line 620.00 feet to the north line of said right of way easement, marked by a Banning Rebar; thence South 89 degrees 30 minutes 31 seconds West along said north line 620.00 feet to the POINT OF BEGINNING, containing 8.824 acres, more or less.

Exhibit "2"