

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE JOINT PETITION)
OF INDY SOLAR I, LLC, INDY SOLAR II,)
LLC AND INDY SOLAR III, LLC FOR THE)
COMMISSION TO DECLINE ITS)
JURISDICTION OVER JOINT PETITIONERS')
ACTIVITIES AS GENERATORS OF POWER)

CAUSE NO. 44304

APPROVED:

MAY 29 2013

ORDER OF THE COMMISSION

Presiding Officers:

James D. Atterholt, Chairman

Loraine L. Seyfried, Chief Administrative Law Judge

On February 15, 2013, Indy Solar I, LLC, Indy Solar II, LLC and Indy Solar III, LLC (“Joint Petitioners”) filed their Verified Joint Petition with the Indiana Utility Regulatory Commission (“Commission”) in this proceeding for certain determinations, declinations of jurisdiction and approvals relating to the proposed construction, operation and maintenance of three proposed electric generating facilities to be located in south Marion County (collectively the “Indy Solar Facilities” or “Facilities”).

Pursuant to notice as provided by law, proof of which was incorporated into the record, an evidentiary hearing in this Cause was held in Room 222 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana at 1:30 p.m., on April 9, 2013. At the hearing, Joint Petitioners and the Indiana Office of Utility Consumer Counselor (“OUCC”) participated and offered without objection their respective prefiled testimony. No other person appeared or otherwise sought to participate.

Based on the evidence and applicable law, the Commission now finds:

1. Notice and Jurisdiction. Proper legal notice of the hearing in this Cause was given and published by the Commission as required by law. As discussed further below, each of the Joint Petitioners intend to engage in an activity that would qualify it as a “public utility” under Ind. Code ch. 8-1-2 and an “energy utility” under Ind. Code ch. 8-1-2.5. Joint Petitioners seek certain determinations concerning the applicability of Ind. Code ch. 8-1-8.5 and request the Commission decline to exercise its jurisdiction under Ind. Code § 8-1-2.5-5. Accordingly, the Commission has jurisdiction over Joint Petitioners and the subject matter of this Cause.

2. Joint Petitioners’ Characteristics. Joint Petitioners are limited liability companies organized and existing under the laws of the State of Delaware and are registered as foreign limited liability companies under the laws of the State of Indiana. Joint Petitioners’ principal place of business is 1200 Old Crystal Bay Road, Wayzata, Minnesota. Joint

Petitioners' are involved in the development, construction, operation and maintenance of solar generating facilities.

3. **Relief Requested.** Joint Petitioners request the Commission determine that the public interest allows it to decline jurisdiction, pursuant to Ind. Code § 8-1-2.5-5, over Joint Petitioners with respect to the construction, operation, maintenance and any other activity in connection with the Facilities. Joint Petitioners will be wholesale providers of electricity generated from solar resources for sale in the wholesale power market. The power output from the Facilities will be sold exclusively to Indianapolis Power & Light Company ("IPL"). The wholesale rates for power are ultimately subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC").

4. **Joint Petitioners' Direct Testimony.** Dean C. Leischow, Managing Director of Sunrise Energy Ventures, LLC ("Sunrise Energy"), testified that Sunrise Energy participated in IPL's reverse auction in accordance with the Commission's March 7, 2012 Order ("March 7 Order") in Cause No. 44018. Sunrise Energy submitted three bids for three separate solar power generating units, each with a nameplate capacity of approximately 10 MW. After submitting its bids, Sunrise Energy formed the Indy Solar LLCs to be the project entities for each of the submitted bids.

Mr. Leischow stated that Joint Petitioners request the Commission decline, pursuant to Ind. Code § 8-1-2.5-5, to exercise jurisdiction over the construction, ownership, operation, maintenance and any other activity in connection with the Indy Solar Facilities. He said if Joint Petitioners meet the definition of a "public utility," they request the Commission decline to exercise its jurisdiction over their activities consistent with other declination orders the Commission has issued. He also noted that Joint Petitioners do not believe the certification requirements of Ind. Code ch. 8-1-8.5 apply to the Indy Solar Facilities due to the exemption contained in Ind. Code § 8-1-8.5-7(2). However, Mr. Leischow stated that if the Commission disagrees with Joint Petitioners' interpretation, they request the Commission also decline jurisdiction under that provision.

Mr. Leischow testified that there are other regulatory requirements with which Joint Petitioners must comply. First, they must operate within the parameters of IPL's Rate REP as approved by the March 7 Order. The March 7 Order approved a maximum price of 20 cents/kwh and requires Commission approval of all REP purchased power contracts ("PPA") under the Commission's Thirty-Day Administrative Filing Procedures and Guidelines ("Thirty-Day Rule").¹ Second, since Joint Petitioners elected to participate in the reverse auction ordered by the March 7 Order, they must also comply with the requirements of the Request for Offers ("RFO") published by IPL.

Mr. Leischow described the Indy Solar Facilities as consisting of three separate solar generators, two with a nameplate capacity of 10 MW Alternating Current ("AC") and one with a capacity of 8.6 MW AC. The Indy Solar I and II facilities will be located on a 155 acre site abutting East Southport Road in southern Marion County. These facilities will tap into a separate 13.2 kV transmission line, which will be directly connected to IPL's Indian Creek

¹ 170 IAC 1-6.

Substation. The Indy Solar III facility will be located on a 132 acre site abutting West Southport Road in southern Marion County. This facility will directly connect to an existing IPL 13.2 kV transmission line. Mr. Leischow stated that Joint Petitioners have acquired options on their project sites that will be exercised when all regulatory approvals are obtained. He also stated that the most important criterion for selecting these particular sites was close proximity to the 13.2 kV transmission system of IPL. The second criterion in site selection was to minimize the impact on the surrounding communities that would be near the Indy Solar Facilities.

Mr. Leischow then explained how the Indy Solar Facilities would generate electricity. He said each facility will consist of solar modules totaling approximately 350,000 photo voltaic ("PV") solar panels for all three projects which will be constructed on east to west roads with the modules facing south. The PV modules will be electrically connected via wire to combiner boxes that collect power from several rows of modules that feed into a power conversion station. The inverters that are located in each power conversion station convert the electrical input to grid quality AC electrical output. A transformer then steps up the voltage of the output to the medium voltage 13.2 kV for collection by the PV switchgear. The PV switchgear is connected to the outlying tap to the existing 13.2 kV IPL transmission lines.

Mr. Leischow stated Joint Petitioners have three separate interconnection agreements that were finalized during the first part of the 2013 and executed on January 29, 2013. Joint Petitioners also executed three separate purchased power agreements with IPL on February 4, 2013. Pursuant to the terms of IPL's Rate REP, these PPAs were submitted on February 8, 2013 for Commission approval under the Commission's Thirty-Day Rule.²

Mr. Leischow stated that pursuant to the terms of the reverse auction, each of the Indy Solar Facilities must be completed and the generating units operational within 12 months of executing the Rate REP agreement. Joint Petitioners expect construction, which will commence as soon as all regulatory approvals are obtained, to take approximately eight months and be concluded by the early second quarter 2013. Mr. Leischow stated the first phase of the construction project will be site preparation. Once that is completed, the solar power plant construction activities can be divided into two phases: solar array assembly and construction of the solar power plant and related project components. As the solar arrays are installed, the balance of the plant will be constructed and the electrical connections and communication systems will be installed. After the equipment is connected, commissioning, including electric service, will be verified, motors checked and control logic verified. Once the individual systems have been tested, the projects will be ready to be tested under fully integrated conditions. Mr. Leischow testified that any construction waste will be disposed of in accordance with local, state and federal regulations and recycling will be used to the greatest extent possible.

Mr. Leischow testified that any impact on water usage during construction will be minimal. He said it is anticipated the overall construction water usage will be approximately 380 acre feet during the construction period. The main use of water would be for compaction and dust control during initial earth work with smaller quantities required for the preparation of concrete and other minor uses. He also stated that the operation activities of the Indy Solar Facilities will have no impact on water usage. Panel washing is not expected to occur more than

² We note that the PPAs were actually filed with the Commission on February 18, 2013.

twice a year and the overall operation of the site, including the operation and maintenance building, dust suppressant and module cleaning, is expected to use only 15 acre feet per year of water. Mr. Leischow said the contractors will adhere to any occupational noise exposure covered by federal and state regulations.

Next, Mr. Leischow summarized the permitting status of the Indy Solar Facilities, stating he expected all permitting processes to successfully conclude in the near future. He stated Joint Petitioners have already obtained city drainage approval. They also need an Indiana Department of Environmental Management Rule 5 National Pollutant Discharge Elimination System permit and appropriate notifications have been filed. In addition, a location permit will be necessary and Joint Petitioners have received comments on their structural permit application. Mr. Leischow said Joint Petitioners are also in the process of obtaining local zoning approval, have participated in two public meetings and expect to obtain local zoning variances in the near future. He also said Joint Petitioners probably need a state building permit and that there may be other permits necessary for construction to proceed. As to the decommissioning plan, he stated that the likely engineering, procurement and construction (“EPC”) manager has a well deserved reputation of environmental responsibility over the entire life cycles of a project. As part of the contract with the project owners, the EPC manager will require recycling of its modules in environmentally responsible disposal methods.

Mr. Leischow testified the reverse auction process was rigorous and very competitive. He noted there were numerous requirements that had to be adhered to by all bidders that insured reliability, a level playing field, and best price. He noted the reservation for capacity under the RFO would be awarded based on lowest price first. Mr. Leischow sponsored Exhibit 5, which is an email from IPL to Sunrise Energy informing it that IPL has selected the Indy Solar Facilities as proposed. The exhibit indicates nine bidders offered 19 projects, totaling 123 megawatts at less than 13¢ per kilowatt hour. Twenty-one companies offered 70 bids. Mr. Leischow stated that the three projects proposed by Joint Petitioners had the lowest pricing of the 70 bids that were submitted to IPL and that this pricing is fixed throughout the 15 year term of each PPA.

Mr. Leischow also testified concerning Joint Petitioners managerial and operational expertise to construct and operate the Indy Solar Facilities. He said Joint Petitioners are currently in confidential and sensitive negotiations for an EPC contract. He said the potential EPC manager is a company with approximately \$2.7 billion in annual revenues, \$5.7 billion in assets and employs over 7,000 people. This EPC has been responsible for the installation of five GW of solar capacity. As to the operation of the Indy Solar Facilities, Mr. Leischow expected, at some point during construction, an investment group to become owner and that the EPC contractor would provide the ongoing operation and maintenance of the facilities.

Mr. Leischow stated that Joint Petitioners have the ability to finance the Indy Solar Facilities. He stated, based on preliminary estimates, each facility is expected to cost approximately \$20 million. With respect to financing, he noted considerable time has been spent in discussions with potential lenders, including well known banks. He explained there was one difficulty in procuring the financing, which was a statement in the three PPAs that if the Commission denied recovery of the costs under any of the PPAs, IPL would be free to cancel the contract without any liability. He noted that while Joint Petitioners have been advised of the

possibility that such an occurrence is minimal, almost every lending institution had difficulty getting over this hurdle. In his opinion, it is very important the Commission recognize the importance of rate recovery for each of the Indy Solar Facilities to obtain project financing under reasonable terms and conditions.

Mr. Leischow stated Joint Petitioners were not seeking the power of eminent domain or other rights and powers of an Indiana public utility. Options for the acreage in southern Marion County for construction of the Indy Solar Facilities have been purchased. He also noted Joint Petitioners were not asking the Commission to establish electric rates because Joint Petitioners' costs and any return will be recovered under the terms of the PPA with IPL. He noted that Joint Petitioners will also receive local, real and personal property tax exemptions.

Mr. Leischow testified there is a need for the energy to be generated by the Indy Solar Facilities. According to the most recent forecast (September, 2011) by the State Utility Forecasting Group ("SUFG"), over 1500 MW of resource additions will be required during the first half of the forecast period (2013-2028) and an additional 3000 MW will be needed during the second half. Mr. Leischow expressed his opinion that, not only is the energy needed, but the type of energy (e.g., solar) is also needed. In short, he stated, the Indy Solar Facilities are consistent with the policies and objectives of the State of Indiana as these types of renewable, green energy projects should be encouraged in order to provide alternative sources of electricity for the state's electric consumers.

Finally, Mr. Leischow expressed his belief that the construction and operation of the Indy Solar Facilities will be in the public interest. He reiterated that there is a clear need for the electric output of the Indy Solar Facilities. He noted that purchase by IPL of the Indy Solar Facilities' electric output would be pursuant to Rate REP, which has been approved by the Commission on two separate occasions. Furthermore, the rates that are reflected in the three PPAs pending Commission review were the result of a rigorous reverse auction bidding process with the primary criteria being price.³ Given this process and the arms length negotiations that took place, Mr. Leischow opined there is no reason for the Commission to exercise jurisdiction over Joint Petitioners. He also noted that Joint Petitioners will provide a substantial capital investment (over \$60 million) for the State of Indiana and Marion County. He testified that exercising jurisdiction over Joint Petitioners while the Commission has declined jurisdiction over other alternate energy providers would put Joint Petitioners at a competitive advantage. Noting the Indy Solar Facilities represent a non-coal energy production utilizing solar resources, he stated he could not think of any better use than to produce such electricity for the benefit of Indiana electric consumers.

5. OUCC's Testimony. Ronald L. Keen, Senior Analyst with the OUCC's Resource Planning and Communication Division, testified that Joint Petitioners' request for declination of Commission jurisdiction is similar to past requests by other Indiana wind farm developers. After describing the Indy Solar Facilities, Mr. Keen noted that land development will begin sometime in May, with construction starting approximately July, 2013. He stated that Joint Petitioners expect the Indy Solar Facilities to be fully operational no later than December 31, 2013.

³ We note Joint Petitioners' PPAs were approved on March 21, 2013.

Mr. Keen stated Joint Petitioners have not requested use of public right-of-ways, eminent domain or other rights and powers of an Indiana utility. He said the PPA agreements that Joint Petitioners have signed with IPL are for terms of 15 years, but noted the typical life span of solar panels for these types of facilities have a warranty period of 25 years. Mr. Keen testified that Joint Petitioners informed him that their inverter systems may require some overhaul prior to 25 years, but the infrastructure panels and overall facility can remain operational well beyond 25 years with proper maintenance. He said that at the end of the 15-year term of the PPAs, if the projects are unable to secure a new PPA, an economic feasibility analysis will be performed at the then current avoided cost rates to determine the future of the Indy Solar Facilities.

Mr. Keen testified Joint Petitioners satisfy the definition of "public utility" found in Ind. Code § 8-1-2-1 because Joint Petitioners' ownership, development, financing, maintenance, and operation of the Indy Solar Facilities will be specifically for the sale of generated power in the wholesale market to one or more public utilities. He noted that in previous cases, the Commission has determined a business engaged in wind farm development that generates electricity and sells electricity directly to public utilities is a public utility.

Mr. Keen expressed his belief that the Indy Solar Facilities are in the public interest. He said the project will offer consumers a renewable, emission free resource that will have a positive impact on the state economy. He also noted that Joint Petitioners are fostering economic growth within the local community through the potential creation of 120 temporary construction jobs involved with the various phases of the project over a four month period and the equivalent of three full time permanent positions associated with the completed project. He stated the Indy Solar Facilities project demonstrates Indiana can be a viable location to develop solar energy generation facilities.

Mr. Keen agreed with Joint Petitioners that there is a need for additional resources of electric generation. According to the SUFG report, over 730 MW of additional capacity will be required by 2015 and over 2600 MW of additional capacity will be needed by 2020. Recognizing the 2011 SUFG forecast was significantly lower than the 2009 forecast for need by 2015, Mr. Keen explained that the forecast energy needs for the State of Indiana will exceed forecasted generation taking into account upcoming retirements and replacement generations and the proposed Indy Solar Facilities will provide needed capacity for Indiana residents.

With respect to the environment, Mr. Keen noted that although solar energy generation poses little danger to the environment once operational, attention should be paid to the potential impact of construction on endangered plant and animal wildlife. He said that based upon discussions with Joint Petitioners, the OUCC is convinced that environmental considerations have been taken into account. He indicated Joint Petitioners have been proactive and demonstrated a willingness to act as good stewards in preserving and protecting the environment while constructing and operating these facilities. He also noted that as part of the Marion County Commissioner's approval process, Joint Petitioners will develop a decommissioning plan no later than April, 2013 to insure that should Joint Petitioners be unable to continue operations and remain in business, the Indy Solar Facilities will not be abandoned in place and left to deteriorate.

Finally, Mr. Keen recommended a number of reporting requirements tailored to the specific characteristics of the solar energy generation facilities, which differ from those previously instituted for wind generation. Basically, Mr. Keen recommended that within 30 days of a final, unappealable Commission order, Joint Petitioners file an initial report containing the information set forth in his testimony. He also proposed that Joint Petitioners file subsequent quarterly reports within 30 days following the end of each calendar quarter until the quarter after which commercial operation has been achieved. Thereafter, subsequent reports would be filed as an addendum to Joint Petitioners' annual report. In each case, Mr. Keen set forth a list of recommended items to be included in each report. Mr. Keen concluded by recommending the Commission approve Joint Petitioners' request to decline jurisdiction over the construction, ownership and operation of, and other activities in connection with, the Indy Solar facilities.

6. Commission Discussion and Findings. Consistent with prior determinations, if the Commission finds from the record evidence that Joint Petitioners are public utilities for purposes of Ind. Code § 8-1-8.5-1 (the "Power Plant Act"), then each of the Joint Petitioners would be an "energy utility" as defined by Ind. Code § 8-1-2.5-2. The Commission may decline to exercise its jurisdiction pursuant to Ind. Code ch 8-1-2.5, including the Commission's jurisdiction under Ind. Code ch. 8-1-8.5 to issue certificates of public convenience and necessity. However, in order for the Commission to decline to exercise jurisdiction over Joint Petitioners pursuant to Ind. Code ch. 8-1-2.5, the Commission must first determine whether Joint Petitioners are public utilities pursuant to Ind. Code §§ 8-1-2-1 and 8-1-8.5-1.

The Power Plant Act defines "public utility" to mean a: "(1) Public, municipally owned or cooperatively owned utility; or (2) Joint agency created under IC 8-1-2.2." Ind. Code § 8-1-8.5-1(a). A "public utility" is defined in Ind. Code § 8-1-2-1 as "every corporation...that may own, operate, manage, or control any plant or equipment within the state for the... production, transmission, delivery, or furnishing of heat, light, water or power..." The evidence establishes that Joint Petitioners' ownership, development, financing, construction and operation of the Indy Solar Facilities is for the purpose of sale of the power generated by those facilities in the wholesale market to a public utility. 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, e.g., Benton County Wind Farm, LLC*, Cause No. 43068 (IURC Dec. 6, 2006). In *Benton County*, the Commission specifically found that it had jurisdiction over a wind energy generator with wholesale operations such as Joint Petitioners. Consequently, for purposes of the ownership, development, financing, construction and operation of the Indy Solar Facilities, we find that each of the Joint Petitioners is a public utility within the meaning of Ind. Code §§ 8-1-2-1 and 8-1-8.5-1, and therefore an "energy utility" within the meaning of Ind. Code § 8-1-2.5-2.

While we find Joint Petitioners are "public utilities," the Powerplant Construction Act, at Ind. Code § 8-1-8.5-7(2), specifically provides that the requirements of Ind. Code ch. 8-1-8.5 do not apply to persons who "[c]onstruct an alternate energy production facility... that complies with the limitations set forth in I.C. 8-1-2.4-5." An "alternate energy production facility" includes solar facilities, such as Joint Petitioners. Ind. Code § 8-1-2.4-2(b). The limitations set forth in Ind. Code § 8-1-2.4-5 include the following: (1) the facility does not have a generating capacity of greater than 80 megawatts; (2) the facility produces electricity for industrial, commercial or residential purposes; and (3) the facility is owned by an entity that is not primarily engaged in the

business of selling electricity other than selling electricity solely from the alternate energy production facility and does not sell electricity to residential users other than themselves or their tenants. Based on the evidence presented, Joint Petitioners satisfy these limitations. The expected output of each of the Indy Solar Facilities is approximately 10 MW, and together are less than 80 MW. Joint Petitioners will sell the entire output to IPL, which will be utilized for industrial, commercial or residential purposes. Finally, the electricity produced by the Indy Solar Facilities will be the only source of electricity to be sold by Joint Petitioners, and the electricity will not be sold directly to residential customers. Accordingly, we find that Joint Petitioners are alternate energy production facilities that satisfy the limitations of Ind. Code § 8-1-2.4-5 and are therefore exempt from the requirements Ind. Code ch. 8-1-8.5.

As alternate energy production facilities, Joint Petitioners are also subject to the Commission's regulations at 170 IAC 4-4.1, which defines a "qualifying facility" as an "alternate energy production facility of eighty (80) megawatts capacity or less which is owned not more than fifty percent (50%) in equity interest by a person primarily engaged in the generation or retail sale of electricity, gas or thermal energy, other than as described in this rule." 170 IAC 4-4.1-1(q). A "qualifying facility" is "exempt from revenue requirement and associated regulation under IC 8-1-2 as administered by the [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." 170 IAC 4-4.1-3. Consequently, Joint Petitioners are also exempt from the traditional utility rate regulation and associated authority of the Commission under Ind. Code ch. 8-1-2, except with respect to its sale of electricity to IPL. And, as indicated above, Joint Petitioners' PPAs with IPL for the sale of electricity under Rate REP were submitted for Commission approval through its Thirty-Day Rule and approved on March 21, 2013.

While Joint Petitioners satisfy the criteria to be considered public utilities, the Legislature exempted facilities such as the Indy Solar Facilities from the requirement to obtain a certificate of public convenience and necessity in an effort "to encourage the development of alternate energy production facilities." Ind. Code §§ 8-1-2.4-1, 8-1-8.5-2 and -7. Pursuant to Ind. Code § 8-1-2.4-3, the Commission adopted its Cogeneration and Alternate Energy Production Facilities Rule at 170 IAC 4-4.1, which also generally exempts qualifying facilities from rate regulation and associated requirements under Ind. Code ch. 8-1-2. Given Indiana's policy to encourage the development of qualifying facilities, the Commission has since limited the exercise of its jurisdiction over such qualifying facilities to that contemplated by its rules. The exemption from regulation contained in 170 IAC 4-4.1 effectively assigns the oversight of qualifying facilities to the contract managing them. As noted previously, the Commission has approved the contracts in question. Therefore, no further declination of Commission jurisdiction is required for the Indy Solar Facilities. This conclusion is wholly consistent with the historical treatment previously afforded qualifying facilities under 170 IAC 4-4.1. Further, we note that this treatment has historically been accomplished without a docketed proceeding seeking facility specific declination. However, to the extent that Joint Petitioners modify their operations such that they are no longer subject to Ind. Code §§ 8-1-2.4-5, 8-1-8.5-7 and 170 IAC 4-4.1, then they shall be required to seek the appropriate Commission approval of operating authority.


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

1. Joint Petitioners are “public utilities” within the meaning of Ind. Code ch. 8-1-2 and 8-1-8.5.
2. Joint Petitioners are “alternate energy production facilities” that comply with the limitations contained in Ind. Code § 8-1-2.4-5, and therefore are exempt under Ind. Code § 8-1-8.5-7 from the requirement to obtain a certificate of public convenience and necessity.
3. Joint Petitioners are subject to the jurisdiction of the Commission in accordance with 170 IAC 4-4.1 and shall comply with those requirements.
4. This Order shall be effective on and after the date of its approval.

BENNETT, MAYS, ZIEGNER, AND LANDIS CONCUR; ATTERHOLT ABSENT:

APPROVED: MAY 29 2013

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


Brenda A. Howe
Secretary to the Commission