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STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF) LAKE COUNTY SOLAR LLC FOR THE) COMMISSION TO DECLINE ITS) JURISDICTION OVER PETITIONER'S) ACTIVITIES AS A GENERATOR OF) POWER)	CAUSE NO. 44336 APPROVED: <div style="text-align: right; font-weight: bold; font-size: 1.2em;">JUN 26 2013</div>
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Presiding Officers:
Kari A.E. Bennett, Commissioner
Jeffery A. Earl, Administrative Law Judge

On April 26, 2013, Lake County Solar LLC (“Petitioner” or “LCS”) filed its Verified 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 two proposed electric generating facilities to be located in Griffith and East Chicago, Indiana (“Facilities”). On April 30, 2013, Petitioner prefiled the direct testimony and exhibits of William Lee, President of Bright Plain Renewable Energy LLC (“BPRE”). On May 22, 2013, the Indiana Office of Utility Consumer Counselor (“OUCC”) prefiled the direct testimony of Ronald L. Keen, Senior Analyst in the OUCC’s Resource Planning and Communication Division.

Pursuant to notice as provided by law, proof of which was incorporated into the record, the Commission held an evidentiary hearing in this Cause at 11:00 a.m. on June 13, 2013, in Hearing Room 222, 101 West Washington Street, Indianapolis, Indiana. Petitioner and the OUCC appeared and participated at the hearing. No other person appeared or otherwise sought to participate.

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

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

2. Petitioner’s Characteristics. Petitioner is a limited liability company organized and existing under the laws of the State of Delaware and is registered as a foreign limited liability company under the laws of the State of Indiana. Petitioner’s principal place of business is 1166 Avenue of the Americas, 9th Floor, New York, New York. Petitioner is involved in the development, construction, operation, and maintenance of solar generating facilities.

3. **Relief Requested.** Petitioner requests the Commission determine that the public interest allows it to decline jurisdiction, pursuant to Ind. Code § 8-1-2.5-5, over Petitioner with respect to the construction, operation, maintenance and any other activity in connection with the Facilities. Petitioner will be a wholesale provider of electricity generated from solar resources for sale in the wholesale power market. The power output from the Facilities will be sold exclusively to Northern Indiana Public Service Company (“NIPSCO”) under NIPSCO’s feed in tariff and a purchase power agreement (“PPA”).

4. **Petitioner’s Testimony.** Mr. Lee testified that BPRE acts as the Manager of LCS pursuant to a Management Services Agreement. Mr. Lee explained that pursuant to a 20-year management services agreement, BPRE provides the following services to LCS: supervision and monitoring of project service providers, contractors, and operators; collection of payments due to LCS; payment of invoices relating to expenses incurred by LCS; preparation and maintenance of financial books and records of operations; administration of project documents and financing documents; preparation of operating reports and delivery of material communications; preparation and filing, along with an authorized accounting firm, of tax returns; and other routine administrative matters. He noted that BPRE is also responsible for LCS’s regulatory and permitting compliance. Mr. Lee provided a chart to describe LCS’s ownership structure.

Mr. Lee stated that LCS requests that 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 LCS’s project. LCS requests that the Commission find that it meets the definition of a “public utility” under Ind. Code § 8-1-2-1, and decline to exercise jurisdiction consistent with other declination orders. LCS submitted that the certification requirements of Ind. Code ch. 8-1-8.5 do not apply to LCS’s Facilities due to the exemption found in Ind. Code § 8-1-8.5-7(2). Mr. Lee stated that LCS’s Facilities meet the definition of “alternate energy production facilities” as that term is defined in Ind. Code § 8-1-2.4-2(b)(1), so there is no need for the Commission to exercise jurisdiction under Ind. Code ch. 8-1-8.5. Nonetheless, he noted that if the Commission disagrees, LCS requests that the Commission decline jurisdiction.

Mr. Lee explained that Lake County Solar must operate within the parameters of NIPSCO’s Electric Renewable Feed In Rate approved as Experimental Rate 850 in the Commission’s July 13, 2011 Order in Cause No. 43922. He noted that this rate established an experimental program under which NIPSCO can purchase energy from renewable resources. The July 13, 2011 Order approved a price of 30 cents/kWh for solar energy generated through facilities with capacities less than or equal to 10 kW and 26 cents/kWh for solar energy generated through facilities with capacities between 10 kW and 2 MW, which is subject to a 2% escalator per year. Mr. Lee stated that LCS is also required to enter into an interconnection agreement and a PPA with NIPSCO.

Mr. Lee testified that the project will consist of solar photovoltaic facilities at two locations: 123 Pipeline Drive, Griffith, Indiana (the “Griffith Facility”) and 4100-4500 Kennedy Avenue, East Chicago, Indiana (the “East Chicago Facility”). He stated that the Facilities will each occupy an 11 acre site. Each facility will consist of 8,976 separate solar panels, with a

nameplate capacity of 2,692.8 kWp¹ per facility. Mr. Lee noted that in total, the project will consist of 17,952 separate solar panels with a total nameplate capacity of 5,385.6 kWp. He stated that the combined projected first year output is 6,921 mWh and the anticipated output per panel is 385 kWh per year. Mr. Lee testified that both solar arrays are located in Lake County, Indiana and are situated approximately 10 miles apart. According to Mr. Lee, the Griffith Facility's utility interconnection point of common coupling will be at the NIPSCO owned utility pole located adjacent to the Facility, and will tie into NIPSCO's 34.5 kV Hartsdale Transmission Substation Circuit 3451. The three phase line of this circuit will be upgraded and the cost of the upgrade will be paid by LCS. The East Chicago Facility's utility interconnection point of common coupling will be at the NIPSCO owned utility pole adjacent to the Facility, and will tie into NIPSCO's 34 kV Tod Ave Transmission Substation Circuit 34-126. Mr. Lee testified that the three phase line of this circuit 34-126 is being upgraded and the cost of the upgrade will be paid by LCS.

Mr. Lee testified that LCS selected the sites because of their close proximity to NIPSCO's 34.5 kV transmission system. LCS also selected sites with minimal impacts on surrounding communities that were available immediately without significant site preparation. Mr. Lee explained how the Facilities would generate electricity. Mr. Lee stated that the structures, totaling 8,976 photovoltaic solar panels for each facility, will be constructed on industrial lands leased by LCS from subsidiaries of Buckeye Partners, L.P. ("Buckeye"). Mr. Lee testified that the solar panels for this project have a warranty period of 25 years. He noted that the inverter systems may require some overhaul or other major maintenance prior to 25 years, but the infrastructure, panels, and overall facility can remain operational beyond 25 years with proper maintenance.

Mr. Lee testified that LCS has two separate Interconnection Agreements (one for each Facility) with NIPSCO that were executed on December 20, 2011. He testified that LCS has received all required interconnection impact studies. He noted that pursuant to the terms in the PPA and Interconnection Agreements with NIPSCO, and as required by NIPSCO's Renewable Feed-In Tariff, LCS was required to place the facility in service no later than December 20, 2012. However, on October 19, 2012, the parties mutually agreed to extend the in-service date to June 30, 2013. NIPSCO further agreed that the in-service date would be extended to July 31, 2013 if certain construction milestones were achieved. Mr. Lee testified that site and ballast preparation has begun, and LCS expects construction to take approximately 3 months. Mr. Lee also provided an estimate of the engineering/construction timeline and critical milestones for the project.

Mr. Lee explained that once the site preparation is completed, the solar power plant construction activities can be divided into two phases: solar array assembly and the construction of the electrical solar power plant equipment. The erection of the solar arrays will include support structures and associated DC electrical equipment. The concrete ballasts are shop manufactured nearby to the specifications of the design engineer. The concrete ballasts will rest on the soil, with no material ground penetrations. The fixed-tilt support structures will then be attached to metal posts bolted to the concrete ballasts and the modules will be placed on the support structures. Mr. Lee testified that the power conversion stations that contain the inverters

¹ The abbreviation kWp stands for kilowatt-peak, a measure of the peak output of a photovoltaic system.

and the medium voltage transformers will be mounted on a concrete slab. As the solar arrays are installed, the balance of the plant will be constructed and the electrical connections and communication systems would be installed. He stated that after the equipment is connected, a comprehensive set of measurements and commissioning tests will be performed on all systems followed by testing under fully integrated conditions. Mr. Lee testified that construction waste will be disposed of in accordance with local, state and federal regulations. Sorting and recycling will be performed to the greatest extent possible.

Mr. Lee stated that LCS has considered the environmental impacts of the project and determined that neither construction nor operation of the project will result in negative impacts on land use; endangered species (including the Indiana Bat habitat); or in any destruction or contamination of wetlands and other affected areas. He stated that there will be no impact on water usage because there will be no on-site water usage during the construction or operation phases. Mr. Lee also noted that the projects will adhere to occupational noise exposure governed by federal and state regulations. Noise source controls administrative procedures and worker hearing protection will be provided and the projects will follow all OSHA requirements for construction worker noise exposure. Mr. Lee testified that except for a fence permit for the East Chicago Facility, all permits have been received for both Facilities and there has not been any opposition – either oral or written – at any stage of the project.

Mr. Lee testified that as part of the lease agreements with Buckeye, LCS is required to remove the solar equipment and restore the soil surface of the leased property following the termination of the lease. Furthermore, the lease required LCS to post security funds in an amount sufficient to ensure decommissioning of facility and removal of the solar equipment, consistent with industry standard practices and in compliance with permitting requirements of the local and state government. As such, Mr. Lee stated that LCS deposited \$200,000 cash in escrow to satisfy such security requirements, which is consistent with a third party estimate of cost to satisfy the requirements of the lease. As for use of the project at the end of the PPA period, Mr. Lee testified that if the project is unable to secure a new PPA, then an economic feasibility analysis will be performed at the then current avoided cost rates to determine the future of the project.

Mr. Lee testified that LCS has the managerial and operational expertise to operate a solar facility. He explained that LCS's engineering, procurement, and construction ("EPC") contractor is Global Resource Options, Inc., dba groSolar. He stated that the EPC contractor will be responsible for all the engineering, design, installation and start-up and commission of the Facilities. Mr. Lee testified that groSolar has approximately \$50 million in annual revenues, employs over thirty people, has been in business for fifteen years, and has been responsible for the installation of 100 MW of solar capacity to date. Mr. Lee testified that groSolar has responsibility for ongoing operations and maintenance via a 20-year O&M Agreement.

Mr. Lee testified that LCS expects the total project to cost approximately \$21 million, including equipment and development costs. He stated that the project is being funded by an affiliate of D. E. Shaw Renewable Energy Investments, LLC, in partnership with an affiliate of US Bancorp Community Development Corporation. According to Mr. Lee, all funds required to construct the projects have been secured.

Mr. Lee testified that LCS does not seek the power of eminent domain or other rights and powers of an Indiana utility. He stated that LCS secured the right to occupy the acreage on which the solar arrays will be sited and there is no need for Lake County Solar to use the power of eminent domain to connect its Facilities to its interconnection point with NIPSCO.

Mr. Lee also verified that LCS is not requesting the Commission establish electric rates, noting that LCS will recover its costs and any return under the terms of the PPA with NIPSCO. Mr. Lee also stated that LCS will not receive any local real and personal property tax exemptions that are not otherwise provided for under Indiana state law.

Mr. Lee stated that according to the most recent forecast of the Indiana Future Electricity Requirements issued in September, 2011 by the State Utility Forecasting Group (“SUFSG”), over 1,500 megawatts of resource additions will be required during the first half of the forecast period (2013-2028) and an additional 3,000 megawatts will be needed during the second half (pp. 1-5). Therefore, he concluded that the energy to be produced by Lake County Solar is needed. Mr. Lee also noted that the energy is the type (e.g., solar) of energy that is needed, observing that the proposed Facilities are consistent with the policies and objectives of the State of Indiana to encourage renewable green energy projects as a sustainable and environmentally neutral alternative for the state’s electric consumers.

Mr. Lee concluded that the project is in the public interest because there is a need for the electric output to be generated by the project. He noted that NIPSCO’s purchase of the renewable, emission-free energy under Experimental Rate 850 was approved by the Commission, and it appears that the Commission wishes to encourage facilities that offer alternative energy production. Mr. Lee stated that investment in these important alternative energy resources would be discouraged if Lake County Solar were required to comply with the costly and time-consuming requirements of Ind. Code ch. 8-1-8.5. He also noted that LCS is fostering economic growth within the local community through the potential creation of approximately 100 temporary construction jobs and the provision of a substantial capital investment for the State of Indiana and Lake County. Mr. Lee also observed that exercising jurisdiction over LCS would be inconsistent with the Commission’s pattern of declining jurisdiction over other alternative energy providers, such as wind energy projects. Mr. Lee testified that LCS is aware of and willing to abide by the reporting recommendations tailored to the specific characteristics of a solar generation facility offered by the OUCC in Cause No. 44304.

5. OUCC’s Testimony. Mr. Keen testified that Petitioner’s request for declination of Commission jurisdiction is similar to the requests by Indy Solar I, LLC; Indy Solar II, LLC; and Indy Solar III, LLC, in Cause No. 44304. Mr. Keen described the LCS Facilities and noted their proposed location and point of interconnection with NIPSCO.

Mr. Keen stated that Petitioner has not requested use of public rights-of-way, eminent domain or other rights and powers of an Indiana utility. He said the typical life span of solar panels for these types of facilities have a warranty period of 25 years. Mr. Keen testified that Petitioner indicated the 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 according to Petitioner, if at the end of the 15 year term of the PPAs the projects were unable to secure a new PPA, an economic feasibility analysis would be performed at the then current avoided cost rates to determine the future of the project.

Mr. Keen testified that Petitioner satisfies the definition of “public utility” found in Ind. Code § 8-1-2-1 because the Petitioner’s ownership, development, financing, maintenance, and operation of the 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 project is 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 the Petitioner is fostering economic growth within the local community through the potential creation of temporary construction jobs and a full time permanent position associated with the completed project. He stated the project demonstrates Indiana can be a viable location to develop solar energy generation Facilities.

Mr. Keen agreed with the Petitioner that there is a need for additional resources of electric generation. According to the SUFG report, over 6,240 MW of additional capacity will be needed by 2020. Mr. Keen noted that the Petitioner’s proposed new solar facility will provide needed capacity for Indiana residents as older generating assets continue to be retired and new assets are constructed, especially during off-peak hours.

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 the OUCC is not concerned about specific environmental issues associated with construction of the project. He also noted that as part of the Lake County Commissioners approval process, Petitioner has posted security funds of \$200,000 cash in escrow for decommissioning of the Facilities and removal of the solar equipment followed by restoration of the soil surface.

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. Mr. Keen recommended that within 30 days of a final, unappealable Commission order, Petitioner file an initial report containing the information set forth in his testimony. He also proposed that Petitioner 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 Petitioner’s 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 Petitioner’s request to decline jurisdiction over the construction, ownership and operation of, and other activities in connection with, the project.

6. **Commission Discussion and Findings.** Consistent with prior determinations, if the Commission finds from the record evidence that Petitioner is a public utility for purposes of Ind. Code § 8-1-8.5-1 (the “Power Plant Act”), then Petitioner 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 Petitioner pursuant to Ind. Code ch. 8-1-2.5, the Commission must first determine whether Petitioner is a public utility 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 Petitioner’s ownership, development, financing, construction and operation of the 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 Petitioner’s. Consequently, for purposes of the ownership, development, financing, construction and operation of the Facilities, we find that the Petitioner 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 Petitioner is a “public utility,” 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 those owned by the Petitioner. 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, Petitioner satisfies these limitations. The expected output of each of the Facilities is approximately 2.7 MW and together is less than 80 MW. The Petitioner will sell the entire output to NIPSCO, which will be utilized for industrial, commercial or residential purposes. Finally, the electricity produced by the Facilities will be the only source of electricity to be sold by Petitioner, and the electricity will not be sold directly to residential customers. Accordingly, we find that the Facilities are alternate energy production facilities that satisfy the limitations of Ind. Code § 8-1-2.4-5 and are therefore exempt from the requirements of Ind. Code ch. 8-1-8.5.

As the owner of alternate energy production facilities, the Petitioner is 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 the 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, Petitioner is 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 NIPSCO. Petitioner's PPAs with NIPSCO for the sale of electricity under Experimental Rate 850 will be submitted to the Commission after the facilities are in operation per the Order in Cause No. 43922.

While Petitioner satisfies the criteria to be considered a public utility, the Legislature exempted facilities such as the 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 PPA contract between the facility and the utility managing the contract. Therefore, no further declination of Commission jurisdiction is required for the Facilities. This conclusion is wholly consistent with the historical treatment previously afforded qualifying facilities under 170 IAC 4-4.1 and with our determination in Cause No. 44304 regarding the Indy Solar facilities. Further, we note that this treatment has historically been accomplished without a docketed proceeding seeking facility specific declination. However, to the extent that Petitioner modifies its operations such that it is no longer subject to Ind. Code §§ 8-1-2.4-5, 8-1-8.5-7 and 170 IAC 4-4.1, then it shall be required to seek the appropriate Commission approval of operating authority.

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

1. Petitioner is a public utility within the meaning of Ind. Code chs. 8-1-2 and 8-1-8.5
2. Petitioner owns "alternate energy production facilities" that comply with the limitations contained in Ind. Code § 8-1-2.4-5, and therefore Petitioner is exempt under Ind. Code § 8-1-8.5-7 from the requirement to obtain a certificate of public convenience and necessity.

3. Petitioner is 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.

ATTERHOLT, BENNETT, LANDIS AND ZIEGNER CONCUR; MAYS ABSENT

APPROVED: JUN 26 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**