FILED
November 30, 2018
INDIANA UTILITY
REGULATORY COMMISSION

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

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

RESPONSE OF THE SETTLING PARTIES
TO THE COMMISSION'S NOVEMBER 29, 2018 DOCKET ENTRY

BP Products North America, Inc. ("BP") and Whiting Clean Energy, Inc. ("WCE") (together "Petitioners"), by counsel and on their behalf and on behalf of Northern Indiana Public Service Company, LLC ("NIPSCO") and the Indiana Office of Utility Consumer Counselor ("OUCC") (collectively with the Petitioners the "Settling Parties"), hereby submit the following Response to the Commission's November 29, 2018 Docket Entry which asks:

Question:

Please explain further why WCE is not a "public utility" for purposes of Ind. Code §8-1-2-1 and Ind. Code ch. 8-1-8.5 nor an "energy utility" for purposes of Ind. Code ch. 8-1-2.5 given that WCE and BP state in their Petition that any of WCE's excess electric capacity will be made available for sale to NIPSCO or at wholesale in the MISO market.

Response:

The definition of "energy utility" in Ind. Code §8-1-2.5-4 "means a public utility . . . within the meaning of IC 8-1-2-1." The definition of "public utility" in Ind. Code ch. 8-1-8.5

does not have any statutory reference, but it would be consistent with principles of statutory construction to treat the definition of "public utility" in that Code chapter as consistent with the definition in Indiana Code §8-1-2-1.

In the December 29, 1999 Order in Cause No. 41530 (the "1999 Order"), the Commission declined the exercise of jurisdiction over WCE pursuant to Ind. Code §8-1-2.5-5, subject to certain stated conditions. Under the circumstances presented at that time, the Commission found WCE to be a "public utility" within the meaning of Ind. Code §8-1-2-1 and therefore an "energy utility" for purposes of Ind. Code §8-1-2.5-2.

The 1999 Order based the "public utility" finding on two grounds. First, at that time WCE, an indirect affiliate of NIPSCO, was planning to sell all of its electric power output into the wholesale market as an Exempt Wholesale Generator ("EWG"). Second, as an entity controlled by an unrelated third-party, WCE planned to sell steam service at retail to the Whiting Refinery. See 1999 Order at 5. As noted in the evidence submitted in this proceeding, there have been material changes in circumstances since the issuance of the 1999 Order. Specifically, WCE has self-certified with the FERC as a Qualified Facility ("QF") to supply both power and steam to support the Whiting Refinery, and in addition WCE has been acquired by a BP affiliate.

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

change in ownership, therefore, materially alters the basis for the "public utility" finding in the 1999 Order with respect to the provision of steam.

Regarding the 1999 Order's determination of public utility status due to WCE's marketing of power at wholesale as an EWG there has likewise been a material change in status. WCE has self-certified as a QF with the FERC and in that capacity will be supplying both power and steam to support BP's operations at the Whiting Refinery. As noted in the 1999 Order, "The Commission has found in prior cases that a business that *only* generates electricity and then sells that electricity directly to public utilities is itself a public utility." *See* 1999 Order at 2 (emphasis added). *See also id.* at 5 ("the power will be generated *solely* for the sales for resale") (emphasis added). As an EWG, then, WCE was treated as a merchant plant for purposes of Indiana law.

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

In addition to the self-supply of power, a QF is also entitled under both Indiana and federal law to sell excess power not consumed by the host industrial operation to the electric utility serving the location or into the wholesale market. *See* Ind. Code §§8-1-2.4-4(a)(1) & 6(b); 16 U.S.C. §§824a-3(b), 824a-3(m). Neither Indiana nor federal law, however, contemplate imposition of public utility status on a QF.

An entire chapter of the Indiana Code, 8-1-2.4, is devoted to addressing alternate energy production, cogeneration, small hydro facilities, and private generation projects. The statutory

provisions in that chapter expressly contemplate sales to electric utilities (*see id.* §§4(a)(1), 6(b)), but do not include any provision calling for regulation of the QF or other private facility as a "public utility."

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

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

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

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

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

Id. §3 (emphasis added).

Corresponding provisions of federal law, including statute and FERC regulations, also explicitly exempt QFs from regulation under state public utility laws. *See* 16 U.S.C. §824a-

3(e)(1); 18 C.F.R. §292.602(c). Notably, those provisions, while preserving state commission authority with respect to sales of excess power by a QF to an electric utility, are clear the exercise of that authority does not entail treatment of the QF as a "public utility."

Treatment of a QF as distinct from a "public utility" is further consistent with past regulatory treatment under Indiana law. In Cause No. 43674, the Commission addressed service issues involving NIPSCO and a cogeneration facility supporting an industrial customer, including terms for sale of power to NIPSCO, without any suggestion that the operator of the cogeneration facility should be treated as a "public utility." *See* April 7, 2010 Order in Cause No. 43674.

Similarly, the Commission's net metering rules, which also involve self-supply facilities and potential wholesale transactions, have a structure corresponding to the treatment of QFs in which the net metering facilities are exempt from revenue requirement and associated regulation under Ind. Code 8-1-2. *See* 170 Ind. Admin. Code §4-4.2-3. Net metering customers, accordingly, have not been regarded as having "public utility" status and have not been required to seek a declination of jurisdiction.

For the foregoing reasons, and in light of a non-precedential settlement restricted to the facts and circumstances at issue in this proceeding that do not require addressing all possible situations that might support a different conclusion in a future case, the Settling Parties submit that as a QF, WCE will not be a "public utility" as defined by Indiana law and should not be regulated as one.

Accordingly, the Settling Parties submit that the requested finding, that WCE is no longer a "public utility" and therefore that the conditional declination of jurisdiction in the 1999 Order is moot, is consistent with applicable law.

Counsel for Petitioners are authorized to represent to the Commission that NIPSCO and the OUCC have provided the authority to submit this joint filing.

Respectfully submitted,

LEWIS & KAPPES, P.C.

/s/ Todd A. Richardson

Todd A. Richardson, Atty No. 16620-49
Joseph P. Rompala, Atty No. 25078-49

One American Square, Suite 2500
Indianapolis, Indiana 46282-0003
Telephone: (317) 639-1210
Facsimile: (317) 639-4882
Email: TRichardson@Lewis-Kappes.com
JRompala@Lewis-Kappes.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served via electronic mail, this 30th day of November, 2018, upon the following:

Christopher C. Earle
M. Bryan Little
NISOURCE CORPORATE SERVICES – LEGAL
150 W. Market Street, Suite 600
Indianapolis, IN 46204
cearle@nisource.com
blittle@nisource.com

Nikki G. Shoultz
Kristina Kern Wheeler
BOSE MCKINNEY & EVANS LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
nshoultz@boselaw.com
kwheeler@boselaw.com

William Fine
Randall Helmen
Jeffrey Reed
Robert Mork
OFFICE OF UTILITY CONSUMER COUNSELOR
115 W. Washington Street, Suite 1500 South
Indianapolis, IN 46204
wfine@oucc.in.gov
rhelmen@oucc.in.gov
jreed@oucc.in.gov
rmork@oucc.in.gov
infomgt@oucc.in.gov

/s/ Todd A. Richardson
Todd A. Richardson

LEWIS & KAPPES, P.C.
One American Square, Suite 2500
Indianapolis, IN 46282-0003
Telephone: (317) 639-1210
Facsimile: (317) 639-4882