

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

APPLICATION OF INDIANA MICHIGAN)
POWER COMPANY, AN INDIANA)
CORPORATION, FOR APPROVAL OF 20)
MW_{AC} CLEAN ENERGY SOLAR PROJECT;)
FOR APPROVAL OF RELATED)
ACCOUNTING AND RATEMAKING)
INCLUDING: TIMELY RECOVERY OF COSTS)
INCURRED DURING CONSTRUCTION AND) **CAUSE NO. 45245**
OPERATION OF THE PROJECT THROUGH)
I&M'S BASIC RATES OR A SOLAR POWER)
RIDER, APPROVAL OF DEPRECIATION)
PROPOSAL, AND AUTHORITY TO DEFER)
COSTS UNTIL SUCH COSTS ARE)
REFLECTED IN RATES; AND FOR)
APPROVAL OF SALE OF RENEWABLE)
ENERGY CREDITS.)

**INDIANA MICHIGAN POWER COMPANY'S RESPONSE TO DOCKET ENTRY
DATED JULY 3, 2019 AND TO OUCC'S MOTION TO DISMISS, OR, IN THE
ALTERNATIVE, MOTION TO STAY PROCEEDING**

Applicant, Indiana Michigan Power Company (I&M), by counsel, respectfully submits its Response to the Indiana Utility Regulatory Commission's Docket Entry in this Cause dated July 3, 2019 ("Response"), attached hereto as Exhibit A. In accordance with this Docket Entry, I&M also hereby responds in opposition to and asks the Commission to deny the Office of Utility Consumer Counselor's ("OUCC") Motion to Dismiss, or, in the Alternative, Motion to Stay Proceeding ("Motion"). In support of this Response to the OUCC Motion, I&M states as follows:

1. The relief sought in the Motion is unreasonable because the OUCC has the information it sought in discovery. I&M provided the most recent draft agreement between I&M and Notre Dame for the purchase and sale of renewable energy credits ("RECs")

("Notre Dame Contract") and the most recent draft of the Engineering, Procurement, and Construction contract ("EPC Contract") to the OUCC via large file transfer at 7:41 p.m. on Tuesday, July 2, 2019, which was the day after I&M's transmittal of its initial response to the OUCC's first set of discovery. During the time that elapsed between the initial and supplemental response, I&M continued to work to secure approval to provide the draft agreements subject to a non-disclosure agreement. Additionally, I&M provided the OUCC information consistent with that included in Exhibit A in writing on Monday, July 9, 2019 and communicated the information regarding the status of the agreements to the OUCC orally on Wednesday, July 3, 2019. The issuance of a supplemental discovery response is not uncommon and should not constitute a *per se* basis for dismissal or delay of the case.

As shown by the attached Response and the draft agreements themselves, all essential pieces of information have been provided to the OUCC. To the extent there was any confusion as to the status of the agreements the matter has been clarified by I&M providing the draft agreements and the associated clarifying information. In particular, both the project cost estimate and the compensation to be received from Notre Dame are the same as communicated in I&M's June 12, 2019 filing in this Cause. Therefore, the one outstanding issue identified in Exhibit A and formal execution of the documents should have no material adverse effect on the OUCC's ability to assess either the proposed Clean Energy Project or the Company's proposal to sell RECs to Notre Dame and flow that benefit through to customers as stated in the Company's prefiled testimony.

2. The OUCC motion is premature. The OUCC Motion was filed without the OUCC first seeking to resolve any discovery dispute informally as contemplated by Ind. Tr. Rule 26(F). It was also filed within a few days of I&M compromising on the procedural matters and governing statutory deadline. This is perplexing. I&M values its relationship with the OUCC, has a long track record of cooperating in discovery, and has previously offered to facilitate the OUCC's understanding of the Company's filing through discussions among the parties' respective technical resources.¹ The Company renews its standing offer to use technical discussions to facilitate the OUCC's discovery and understanding of the proposed project.

Furthermore, the Commission's rules provide that no continuance of a scheduled hearing shall be granted for inability to complete discovery unless the parties have complied with the provisions of 170 IAC 1-1.1-16, which include compliance with Ind. Tr. Rule 26(F). Because the OUCC Motion seeks to change the procedural posture of this case, the OUCC should reasonably be expected to have proceeded in accordance with Ind. Tr. Rule 26(F) before filing its Motion. Doing so may have allowed the OUCC and I&M to devote their resources to the merits of the proposed Project instead of to motion practice.²

3. The OUCC's contentions regarding the burden of proof lack merit. As the Commission has previously explained, the party with the burden of proof in a proceeding

¹ As stated in Applicant's Filing of Proposed Procedural Schedule (§7) the OUCC declined the Company's previous offer to facilitate the OUCC's review through technical meetings between the parties' respective technical resources.

² While the OUCC advised I&M that the Motion was being filed, that contact was made contemporaneous with the filing thereof and not within a timeframe that would have allowed I&M to advise the OUCC of the status of the discovery or otherwise attempt to resolve the OUCC's concern informally.

has the burden of going forward with evidence. *Indiana & Michigan Power Company*, Cause No. 39314 (IURC 11/12/93), p. 4. Thus, I&M has the burden of presenting a *prima facie* case regarding its proposed Solar Project. “A ‘prima facie case’ is one which presents ‘such evidence as is sufficient to establish a given fact and which if not contradicted will remain sufficient.’” *Id.*

The substantive legal standard applicable to filing under Ind. Code § 8-1-8.8-11 is whether the proposed project is reasonable and necessary. I&M presented substantial evidence in the form of prefiled testimony showing the South Bend Solar Project is reasonable and necessary and otherwise in accordance with Ind. Code § 8-1-8.8-11. Once I&M presented its *prima facie* case, other parties, like the OUCC, “have the burden of going forward with their evidence.” *Id.* The OUCC contention otherwise appears to blur the distinction between the burden of going forward with the evidence by filing a *prima facie* case and the ultimate burden of persuasion.

The OUCC’s unsupported contention that evaluation of a project under Ind. Code § 8-1-8.8-11 cannot be complete without the inclusion of the executed agreements lacks merit. OUCC Motion ¶7. The relevant details of the agreements have been finalized and the open matter identified. As shown in the attached Response, there are no open issues in the Notre Dame Contract and the EPC Agreement is nearly finalized.

Furthermore, the governing statute does not require contract approval. The governing statute requires a Commission determination that the proposed Clean Energy Project is “reasonable and necessary” and the Company’s prefiled case-in-chief provides extensive evidence supporting the conclusion that it is. More specifically, the Company’s substantial evidence in this Cause includes the following:

- a. **Description of project, including project size** (20 MW_{AC} solar facility; designed to use First Solar Series 6 thin film solar panels with single axis tracking supports and a total of 26 invertors and transformers and one generator step-up transformer);
- b. **Project location** (South Bend area (northeast corner of the intersection of Bittersweet Road and Cleveland Road, on an I&M owned 210 acre site); location is in close proximity to the I&M Twin Branch Generation Office, Interstate 90, and the University of Notre Dame);
- c. **PJM** (electrically interconnected to the PJM Interconnection (PJM) through a 34.5 kV tie line to the I&M-owned Capital Avenue Substation and be required to follow all PJM interconnection and operational rules; I&M entered the PJM interconnection queue on March 19, 2018; status of PJM's interconnection process);
- d. **Project construction and schedule** (SBSP facility will be designed and constructed by a qualified EPC contractor selected by a competitive Request for Proposal (RFP) process; description of RFP and contractor selection process; status of EPC process; the EPC contract is expected to be awarded in June 2019, with a notice to proceed contingent on the granting of regulatory approval; the start of construction for the Project is scheduled to occur in May of 2020, with completion on or before December 31, 2020);
- e. **Need for project and consistency with IRPs** (2015 IRP specifically identified 20 MWs of new solar capacity in 2020, which aligns with the solar capacity amount requested for approval in this filing; 2019 IRP includes additional solar resources; to efficiently achieve 350 MW of installed solar investment by 2030; I&M needs to begin planning and installing resources in the near future);
- f. **Project benefits** (zero-carbon source of electricity that can further diversify I&M's generation portfolio; allows I&M to add to its experience in integrating solar generation into its portfolio; addresses customer demand and expectations; furthers consumer education about renewable energy, encourages solar development and supports economic development; consistent with Indiana energy policy);
- g. **Project cost estimate** (\$37 million based on a competitive procurement process, with expected issuance of a notice to proceed to the EPC contractor in April 2020 and project construction to start in or around May 2020);
- h. **Company solar experience** (EPC contracting process; solar specification; approved equipment supplier list; project and construction management; ongoing operation and maintenance);

- i. **Proposed timely cost recovery and other accounting and ratemaking** (recognize in rates via pending rate case or Solar Project Rider); and
- j. **Treatment of RECs** (proposed long term sale of RECs, pricing methodology for the sale and proposed use of REC proceeds).

See also index of filing included as Exhibit A to Petition.

Notably, the Company's evidence in this Cause provides more details than were available for the Company's previous solar projects approved by the Commission. For example, in I&M's previous solar project proceeding the testimony explained that one or more third party contractors *would be* hired via a competitive RFP process. *Indiana Michigan Power Company*, Cause No. 44511 (IURC 2/4/15), p. 3. In the instant case, the Company has firmed up the project cost estimate *by already* conducting the RFP and negotiating an EPC contract. In Cause No. 44511, the Company's testimony presented the criteria that *would be* used to develop the project site list. *Id.* In the instant case, the location and cost thereof *have already been* identified and secured. In Cause No. 44511, the Company described how the project would be integrated into the PJM operating system. *Id.* The Company's testimony in the instant case also provides this information. In Cause No. 44511, the cost estimate approved by the Commission was based on *indicative pricing*. *Id.* at 3, 9. In this case, the Company has firmed up the cost estimate by acquiring the site and negotiating an EPC agreement based on a competitive solicitation. In other words, the cost estimate reflects actual costs to a much greater degree than the previous case.

The Commission has previously recognized that renewable resources are beneficial in efforts to retain and attract industrial and commercial customers seeking to meet renewable energy goals and has done so without requiring the execution of a written

agreement. *Southern Indiana Gas and Electric Company*, Cause No. 45086 (IURC 3/20/19), p. 26 (noting utility discussions with one customer and letter of intent with another). The Commission has also approved other utility construction projects without expressly approving the underlying agreements or requiring such agreements to be in existence prior to project approval. *E.g.*, *Duke Energy Indiana*, Cause No. 45002 (IURC 5/30/2018), p. 5 (following a competitive procurement process, Duke Energy Indiana intends to contract with EPC firm and procure the major solar and battery equipment directly from suppliers.), p. 10 (noting petitioner's intent to contract with an EPC firm); *Indianapolis Power & Light Company*, Cause No. 44339 (IURC 514/2014), pp. 6-7 (approving CCGT project with evidence explaining that EPC solicitation and contract award would follow; also approving Harding Street Refueling with procurement of major contracts through a competitive bidding process to follow).

The pre-approval process necessarily requires a balancing of the need for a proposed project to be developed to a point that will allow it be assessed with the risk that the cost incurred to do so may not be recoverable if the project is not approved. Additionally, it can be challenging to obtain firm contractor pricing and commitments in advance of a project actually having been approved. Moreover, in Cause No. 44242, where circumstances were such that the utility was able to execute a firm price EPC contract subject to Commission approval, the utility was accused by an intervenor of treating the Commission as a mere "rubber stamp." See *Indianapolis Power & Light Company*, Cause No. 44242 Post-Hearing Brief of Joint Intervenors, p. 2.

At bottom, I&M has endeavored to solidify details and move the project forward in a reasonable manner while balancing the need for review and Commission approval. At

the time the Petition and supporting testimony were filed, I&M and Notre Dame had reached an agreement as outlined in the filing and the Company expected to award the EPC contract by the end of June. The need to finalizing the remaining item in the EPC contract and execute the formalized written agreements has not changed the key terms thereof or the estimated cost of the Project.

Conclusion

The proposed South Bend Solar Project warrants timely consideration by the Commission. The Company's prefiled case-in-chief presents the information necessary for the project to be assessed and approved. Moreover, the status of the relevant agreements has been clarified without undue delay. The OUCC has the information it sought in discovery. Accordingly, the OUCC Motion should be denied.

Respectfully submitted,



Teresa Morton Nyhart (Atty No. 14044-49)

Jeffrey M. Peabody (Atty No. 28000-53)

Barnes & Thornburg LLP

11 South Meridian Street

Indianapolis, Indiana 46204-3535

Nyhart Phone: (317) 231-7716

Peabody Phone: (317) 231-6465

Fax: (317) 231-7433

Nyhart Email: tnyhart@btlaw.com

Peabody Email: jpeabody@btlaw.com

Attorneys for INDIANA MICHIGAN POWER
COMPANY

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served upon the following via electronic email, hand delivery or First Class, United States Mail, postage prepaid this 12th day of July, 2019 to:

Jason Haas
Office of Utility Consumer Counselor
PNC Center
115 W. Washington St., Suite 1500 South
Indianapolis, Indiana 46204
infomgt@oucc.in.gov
THaas@oucc.IN.gov

Jennifer A. Washburn
Margo Tucker
Citizens Action Coalition
1915 West 18th Street, Suite C
Indianapolis, Indiana 46202
jwashburn@citact.org
mtucker@citact.org



Teresa Morton Nyhart

Teresa Morton Nyhart (No. 14044-49)ni
Jeffrey M. Peabody (No. 28000-53)
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Nyhart Phone: (317) 231-7716
Peabody Phone: (317) 231-6465
Fax: (317) 231-7433
Email: tnyhart@btlaw.com
jpeabody@btlaw.com

Attorneys for INDIANA MICHIGAN POWER COMPANY

DATA REQUEST NO. 1-1

Request

Provide a copy of the most recent draft agreement between I&M and Notre Dame ("Notre Dame Contract").

Response

The most recent draft Purchase and Sale Agreement for Renewable Energy Credits ("Notre Dame Contract") is included herewith at IURC DR 1-1 Attachment 1. This agreement is final except for the need to insert the bank account and contact information. The draft agreement was previously provided to the OUCG in discovery as "OUCG DR 1-10 Attachment 1.pdf." While I&M provided the draft to the OUCG per a nondisclosure agreement, the Company has since confirmed that the document may be filed publicly. The parties are working to execute the document. I&M plans to update this response to provide the executed document with the bank account details redacted.

INDIANA MICHIGAN POWER COMPANY
IURC JULY 3, 2019 DOCKET ENTRY
IURC CAUSE NO. 45245

DATA REQUEST NO. 1-2

Request

Provide a copy of the most recent draft of the Engineering, Procurement, and Construction contract ("EPC Contract").

Response

The most recent draft of the Contract Letter, Exhibit A, and Exhibit B for engineering, procurement, and construction of the South Bend Solar Project (redacted) are attached to this submission as IURC DR 1-2 Attachments 1, 2 and 3. Unredacted documents are being submitted to the Commission as a confidential filing per the Commission's June 19, 2019 Docket Entry granting I&M's Motion for Protective order. These materials were previously provided to the OUCC in discovery as "OUCC DR 1-25 Confidential Attachment 2.zip" with the caveat that the file reference on the header of the Statement of Work in Exhibit A has since been corrected to refer to version 11 rather than version 1.

INDIANA MICHIGAN POWER COMPANY
IURC JULY 3, 2019 DOCKET ENTRY
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DATA REQUEST NO. 1-3

Request

For both the Notre Dame Contract and the EPC Contract, provide an update on the current status of the contract negotiations, including, but not limited to, when I&M anticipates each contract will be executed.

Response

Notre Dame Contract – The parties have reached agreement on all terms of this contract. The remaining items are the bank account and contact information as shown on page 3 draft agreement provided in response to IURC 1-1 above.

EPC Contract – The parties have reached agreement on all terms of this contract except for one open item: the form of surety that the EPC contractor will provide in lieu of letter of credit. I&M and the Contractor are working to resolve this open item and I&M will provide the executed agreement once it is available.

INDIANA MICHIGAN POWER COMPANY
IURC JULY 3, 2019 DOCKET ENTRY
IURC CAUSE NO. 45245

DATA REQUEST NO. 1-4

Request

For both the Notre Dame Contract and the EPC Contract, identify the provisions that are still being negotiated.

Response

Notre Dame Contract – none.

EPC Contract – As described in response to question 3 above, the parties are negotiating one open item: the form of surety that the EPC contractor will provide in lieu of letter of credit. The contractor's surety will be addressed in Section 26 of the Scope of Work ("SOW"). (The SOW is one file included in Exhibit A of the EPC Contract). In addition, the contractor's form of surety bond will be made an attachment to the contract. There is a placeholder on page 3 of the Contract Letter to insert language concerning potential tariffs, which will read as follows: "Contractor and Owner agree that in the event Contractor's costs increase due directly or indirectly to the imposition of tariffs on the steel or aluminum components of the Equipment, the Contract Price shall be equitably adjusted in accordance with Article 14.0, Changes in Work and Extra Work, of the AEP General Terms and Conditions for Engineering, Procurement, and Construction Work, as modified as set forth in the Contract."