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STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION BY)
CRAWFORDSVILLE ENERGY, LLC FOR)
CERTAIN DETERMINATIONS BY THE)
COMMISSION WITH RESPECT TO ITS)
JURISDICTION OVER PETITIONER'S)
ACTIVITIES AS A GENERATOR OF ELECTRIC)
POWER)

CAUSE NO. 44101

APPROVED: JUL 03 2012

ORDER OF THE COMMISSION

Presiding Officers:
David E. Ziegner, Commissioner
Loraine L. Seyfried, Chief Administrative Law Judge

On October 24, 2011, Crawfordsville Energy, LLC ("Petitioner") filed its Verified Petition with the Indiana Utility Regulatory Commission ("Commission"). Petitioner requested the Commission decline to exercise its jurisdiction over Petitioner's purchase, ownership, operation, and expansion of an existing coal-fired electric generating plant ("Facility") located in the City of Crawfordsville, Indiana ("City"). The Facility is currently owned by Crawfordsville Electric Light & Power ("CEL&P"), which is the municipal electric utility owned and operated by the City.

On May 1, 2012, pursuant to notice given and published as required by law, an evidentiary hearing was held at 9:30 a.m. in Room 222, PNC Center, 101 West Washington Street, Indianapolis, Indiana. Both Petitioner and the Indiana Office of Utility Consumer Counselor ("OUCC") appeared and participated in the hearing. At the hearing, Petitioner's and the OUCC's prefiled testimony and exhibits were offered and admitted into evidence without objection.

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

1. Notice and Jurisdiction. Notice of the evidentiary hearing in this Cause was given as required by law. Petitioner indicates that it intends to own, operate, and control plant and equipment within this State for the production of electricity, which will qualify it to be a "public utility" as defined under Ind. Code § 8-1-2-1 and an "energy utility" as defined under Ind. Code § 8-1-2.5-2. Therefore, 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 Indiana. Petitioner's principal place of business is 532 Connecticut Street, Gary, Indiana 46402. As a party to the Asset Purchase Agreement ("Agreement") with the City and CEL&P, Petitioner will purchase, own, and operate the assets of the Facility ("Facility Assets"), as those terms are defined in the Agreement.

Petitioner's sole member is Sterling Energy Group, LLC ("Sterling Energy Group"), an Indiana limited liability company. Sterling Energy Group is also the sole member of two other

limited liability companies: (1) Sterling Energy, LLC (“Sterling Energy”), an Illinois limited liability company and (2) Sterling Natural Resources, LLC (“Sterling Natural Resources”), an Indiana limited liability company.¹ Sterling Energy specializes in retrofits for coal-fired energy plants. Sterling Natural Resources owns the rights to coal and waste coal reserves in Southern Indiana. Sterling Natural Resources also has the rights to use a synthetic binder to create stoker-sized coal pellets from waste coal.

Petitioner intends to file an application with the Federal Energy Regulatory Commission (“FERC”) for a determination that it is an exempt wholesale generator (“EWG”) with respect to the Facility. The Facility may utilize pulverized waste coal for fuel. All sales by Petitioner of electric power and energy produced by the Facility will be for resale into the wholesale market and Petitioner will not make any sales at retail. Petitioner’s sales of electricity will be at rates subject to FERC jurisdiction. Under the Agreement, CEL&P has agreed to provide Petitioner with access to the electricity transmission grid through its existing transformers at a CEL&P tariff rate to be approved by this Commission.

3. Relief Requested. Petitioner requests that, pursuant to Indiana Code § 8-1-2.5-5, the Commission decline to exercise its jurisdiction to: (1) require Petitioner to obtain a certificate of public convenience and necessity to purchase the Facility under Ind. Code ch. 8-1-8.5, the Powerplant Construction Act, and (2) decline to regulate Petitioner’s purchase, ownership, and operation of, or other activities in connection with, the Facility.

4. Petitioner’s Direct Evidence. Mr. William J. Harrington, Petitioner’s Chief Operating Officer, testified in support of Petitioner’s requested relief. Mr. Harrington also sponsored Petitioner’s Exhibit A-1, which is a copy of the Agreement dated August 22, 2011. According to Mr. Harrington, the Facility is a 25 MW power plant consisting of three units: two coal-fired units and one diesel generator for black start capability. The Facility is located on about 16 ½ acres of land in Crawfordsville, Indiana and was originally constructed in 1938. The Facility’s newest boiler was placed in operation over forty years ago. Mr. Harrington stated that the Facility is small, old, and runs on stoker grade coal, which is expensive and is not competitive in the current market. He stated the Facility has not operated as a baseload plant for the past few years, primarily due to the cost of fuel and the terms of payment for dedicated capacity under the former Capacity Purchase Agreement between CEL&P and its wholesale supplier, the Indiana Municipal Power Agency (“IMPA”). Mr. Harrington indicated that, to his knowledge, the Facility has been operating at an annual loss.

Mr. Harrington testified that Petitioner proposed to purchase the Facility after responding to a CEL&P notice requesting bids for its purchase. Following months of negotiation, Petitioner, as Purchaser, the City and CEL&P, as Seller, entered into the Agreement. The Agreement was approved by the Crawfordsville City Council on August 22, 2011. At closing, Petitioner has agreed to pay the City a purchase price of \$975,000.

¹ At the time of filing the Verified Petition in this Cause, Petitioner’s sole member was Fuel Streamers of Indiana, LLC, a member of a group of companies known as Fuel Streamers Group. However, in December 2011, Fuel Streamers Group decided to focus its efforts on the European market. Accordingly, as of February 2012, Sterling Energy Group is Petitioner’s sole member.

Mr. Harrington stated Petitioner has the technical capability to own and operate the Facility because, as part of the Agreement with the Seller, it agreed to retain the thirteen CEL&P employees who currently operate the Facility. In addition, Petitioner has access to a number of engineering firms and the expertise of Sterling Energy. The management of Sterling Energy Group, which includes Mr. Harrington, has more than 100 years of collective experience in power generation.

Mr. Harrington said Sterling Energy Group is in the process of raising equity capital to permit Petitioner to complete the transaction, own, and operate the facility on an ongoing basis. As a part of the Agreement, the City, through its Redevelopment Commission, has agreed to use its best efforts to help Petitioner achieve tax increment financing to improve the Facility in the future. Mr. Harrington indicated that no additional environmental permits are necessary because CEL&P will transfer its existing permits to Petitioner at closing.

Mr. Harrington stated that Petitioner's acquisition and operation of the Facility is in the public interest. The Facility has not operated economically for more than two years, and Petitioner will make the necessary capital expenditures to improve the Facility's economics. Mr. Harrington noted that the latest State Utility Forecasting Group report shows a continuing need for additional generating capacity in Indiana. Petitioner's acquisition and improvement of the Facility will allow it to maintain existing capacity and enhance capacity in the future. In addition, as part of the Agreement, Petitioner has agreed to enter into good-faith negotiations with CEL&P and IMPA, its wholesale power supplier, so that Petitioner may provide emergency electric service to CEL&P in the event of transmission failure. Mr. Harrington testified Petitioner also has agreed to pay CEL&P a host benefit fee in the future, which will be based upon the price of power and the amount of power Petitioner is able to sell in the wholesale market. Petitioner further agreed to maintain the employment of the existing thirteen CEL&P employees for at least one year.

Mr. Harrington concluded that competitive forces will serve as an adequate check on future prices and, because Petitioner will be regulated by FERC and other agencies, additional regulation by the Commission would be wasteful and would inhibit Petitioner's ability to compete with other merchant generating facilities in the Midwest.

5. OUC's Evidence. Mr. Ronald L. Keen, a Senior Analyst with the OUC's Resource Planning and Communications Division, testified on behalf of the OUC. Mr. Keen described the Facility and the proposed project. He said that, after modifications, the Facility would burn pulverized waste coal, which is low-energy-value coal mined during normal coal mining operations and then discarded on site.

Mr. Keen testified Petitioner's proposed renovations will benefit energy generation in Indiana because, eventually, the proposed renovations will allow the Facility to produce up to 100 MW. He said because the Facility will sell energy in the wholesale power market, Petitioner will not recover its costs from Indiana ratepayers through rate base, rate of return, or other methods typically associated with retail-rate based generation. In addition, competitive forces in the wholesale market should force Petitioner to operate the Facility efficiently and effectively.

In addition, Mr. Keen testified Petitioner's proposed renovations will benefit the City's residents because the Facility will provide service to the City in the event of a transmission failure by IMPA, the City's primary supplier. The Agreement also provides that Petitioner will pay the City

a host benefit fee based on the price of energy and the amount of energy the Facility sells in the wholesale market.

Mr. Keen recommended the Commission issue a certificate of public convenience and necessity to Petitioner, then decline to exercise jurisdiction over the purchase, ownership, operation, and expansion of the Facility until such time as Petitioner fails to abide by any applicable laws or Commission Orders. He also recommended Petitioner file specific reports with the Commission and the OUCC until such time as the Facility is operational.

Finally, Mr. Keen testified that Petitioner should advise the Commission and the OUCC if it intends to materially increase, decrease, or otherwise change the Facility's capacity or operation. Petitioner should also notify the Commission and the OUCC if the plan for the Facility is suspended or abandoned. If suspended, Petitioner should provide quarterly reports for a period of up to three years following the commencement of such suspension.

6. Commission Discussion and Findings. Petitioner requests that, pursuant to Indiana Code § 8-1-2.5-5, the Commission decline to exercise its jurisdiction to (a) require Petitioner to obtain a certificate of public convenience and necessity to purchase and expand the Facility under Indiana Code ch. 8-1-8.5 and (b) regulate Petitioner's purchase, ownership, and operation of, or other activities in connection with, the Facility.

Pursuant to Ind. Code ch. 8-1-2.5, the Commission may decline to exercise its jurisdiction over an energy utility, including its jurisdiction to issue certificates of public convenience and necessity under Ind. Code ch. 8-1-8.5 for the purchase of a facility for the generation of electricity. *See, e.g., Wildcat Wind Farm I*, Cause No. 44044 (IURC Sept. 14, 2011). In order for the Commission to decline to exercise jurisdiction over Petitioner pursuant to Indiana 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.

According to the evidence presented, Petitioner's ownership and operation of the Facility is for the sale of the power generated by it into the wholesale market, and the entities purchasing the power may include public utilities inside and outside of Indiana. Petitioner's property "is used in a business that is public in nature and not one that is private." *Foltz v. City of Indianapolis*, 130 N.E.2d 650, 659 (Ind. 1955). Accordingly, Petitioner's business is "impressed with a public interest" and renders service "of a public character and of public consequence and concern" The Commission has found in prior cases that a business which only generates electricity and then sells it directly to public utilities is a public utility. *See, e.g., Benton County Wind Farm, LLC*, Cause No. 43068 (IURC Nov. 20, 2007); *AES Greenfield, LLC*, Cause No. 41361 (IURC March 11, 1999); *Commonwealth Edison of Indiana, Inc.*, Cause No. 36093 (IURC June 12, 1980). Consequently, we find that upon acquisition of the Facility, Petitioner will be a "public utility" pursuant to Ind. Code § 8-1-2-1 (and thus an "energy utility" pursuant to Ind. Code § 8-1-2.5-2) and Ind. Code § 8-1-8.5-1.

Ind. Code § 8-1-2.5-5(a) authorizes the Commission to decline to exercise, in whole or in part, jurisdiction over an "energy utility" if the public interest requires it. In determining whether the public interest will be served, the Commission shall consider the following:

1. Whether technological or operating conditions, competitive forces, or the extent of regulation by other state or federal regulatory bodies render the exercise, in whole or in part, of jurisdiction by the Commission unnecessary or wasteful.

2. Whether the commission's declining to exercise, in whole or in part, its jurisdiction will be beneficial for the energy utility, the energy utility's customers, or the state.

3. Whether the commission's declining to exercise, in whole or in part, its jurisdiction will promote energy utility efficiency.

4. Whether the exercise of commission jurisdiction inhibits an energy utility from competing with other providers of functionally similar energy services or equipment.

Ind. Code § 8-1-2.5-5(b). Thus, the Commission considers the evidence presented by the parties in light of these factors to determine whether the public interest will be served in declining to exercise its jurisdiction.

In determining whether the public interest would be served by such a declination, the Commission considers, among other things, whether Petitioner's proposal would significantly and negatively impact an Indiana electricity supplier or its customers. The evidence in this Cause demonstrates Petitioner does not intend, nor does it request authority, to sell electricity generated by the Facility to the general public or to any retail customer. Instead, Petitioner intends to apply to FERC to become an EWG, and the power will be generated solely for resale in the wholesale market subject to the jurisdiction of FERC. Petitioner's costs will not be recovered through a rate base/rate of return or other process typically associated with public utility rates. Instead, Petitioner's wholesale rates and charges for the sale of energy will be filed with FERC and are required to be just and reasonable, in conformity with standards set by FERC.

As part of the Commission's public interest analysis regarding any proposed declination of jurisdiction, the Commission generally evaluates the proposed construction and operation of facilities such as the one at issue in this Cause based on a number of factors including the following:

a. Location: As part of its public interest determination, the Commission may consider whether or not the location of a proposed facility, or its expansion, is compatible with the surrounding land uses. In determining compatibility, the Commission may evaluate and consider any evidence of compliance with local zoning and land use requirements.

In deciding whether to decline jurisdiction over Petitioner and the Facility, the Commission has the authority to consider whether the public interest will be served by the Facility being in its planned location. In making such determination, the Commission must consider the potential for adverse effects on Indiana "electricity suppliers" (as that term is used in Ind. Code ch. 8-1-2.3), their customers, or a local community. With specific regard to the Facility, Petitioner has demonstrated that the local community in Crawfordsville supports the proposed transaction. The Facility has been in existence and operating for many years and occupies approximately 16 ½ acres

of land in Crawfordsville, Indiana. In addition, the Facility does not currently require any additional environmental permits, but Petitioner has indicated it will comply with any future permitting requirements.

b. Need: In determining the public interest, the Commission will review and make a determination of need (i.e., whether the development of additional generating capacity will serve the public interest). To demonstrate need, entities must provide evidence that a proposed facility will meet the demands of the market; a mere assertion that the wholesale market is competitive is insufficient to meet this standard.

The evidence presented in this Cause indicates a need for the anticipated power generation. Mr. Harrington testified that the latest State Utility Forecasting Group report shows a continuing need for additional generating capacity in Indiana. Petitioner's acquisition and improvement of the Facility will allow the Facility to maintain existing capacity and to potentially provide additional capacity in the future. The Facility may also provide electric service for Crawfordsville residents in the event of a transmission failure by the City's primary supplier.

c. Financing: To ensure that Indiana consumers are not adversely affected by the proposed development of generation plants in Indiana, developers must demonstrate the proposed financing will not jeopardize retail electric supply. In assessing the financing to ensure the long-term economic viability of a proposed project, the Commission may consider the developer's ability to finance, construct, lease, own and operate generating facilities in a commercially responsible manner. Petitioner has adequately demonstrated that it has the technical and managerial capability to operate the Facility. The evidence indicates that Petitioner's operation and development of the Facility will not adversely affect ratepayers or consumers, or otherwise jeopardize retail electric supply because Petitioner intends to sell only into the wholesale market. Petitioner should also be able to finance acquisition of the Facility with equity capital to be raised by its immediate parent company, Sterling Energy Group, and committed to providing the Commission with a report one week prior to the closing of the acquisition of the Facility.

7. Reservation of Certain Jurisdiction. In addition to determining whether the public interest would be served if the Commission declines jurisdiction, the Commission also must consider what actions it must take to ensure that the public interest is served throughout the commercial life of the Project. Specifically, the Commission must determine the extent to which it must reserve its authority over Petitioner's activities involving affiliate transactions and transfers of ownership.

a. Affiliate Transactions. To ensure that the Commission's declination of jurisdiction over an "energy utility" is in the public interest, the Commission must be assured that adequate consumer protections are in place should an "energy utility" subsequently become an affiliate, as defined in Indiana Code § 8-1-2-49, of any regulated Indiana retail utility. While the Commission is declining jurisdiction over Petitioner's affiliate transactions initially, the Commission reserves its authority to regulate Petitioner should it become an affiliate of any regulated Indiana retail utility.

Accordingly, should Petitioner become an affiliate of any regulated retail utility operating in Indiana, it shall immediately notify the Commission and the OUCC. Further, Petitioner shall obtain prior Commission approval with respect to the sale of any electricity to any such affiliated, regulated Indiana retail utility. The Commission also notes that it retains certain authority under Section 201 of the Federal Power Act to examine Petitioner's books, accounts, memoranda, contracts, and records consistent with the limitations contained therein. 16 U.S.C. § 824.

b. Transfers of Ownership. The Commission reserves its jurisdiction under Indiana Code § 8-1-2-83, and requires Petitioner to obtain prior Commission approval of any transfer of Petitioner's franchise, works, or system. Petitioner, however, shall not be required to seek prior approval of any transfers of ownership of the Facility or its assets involving: (1) the grant of a security interest to a bank or other lender or collateral agent, administrative agent, or other security representative, or a trustee on behalf of bondholders in connection with any financing or refinancing (including any lease financing); (2) a debtor in possession; or (3) a foreclosure (or deed in lieu of foreclosure) on the property owned by Petitioner or ownership interests in Petitioner.

8. Reporting Requirements. It shall be a condition of this Order and our continued partial declination of jurisdiction over Petitioner, that Petitioner file with the Commission Annual Reports as provided in Ind. Code § 8-1-2-49, and provide such other information as the Commission may from time to time request. These reporting requirements are intended to ensure the Commission obtains reliable, up-to-date information in a timely manner necessary to carry out its statutory obligations regarding the Commission's State Utility Forecasting Group and the OUCC. The Commission finds that within thirty days of a final Order in this Cause Petitioner shall file an Initial Report which provides, to the extent such information is available and applicable, the following:

1. Project ownership and name(s) of the Facility;
2. Name, title, address, and phone number(s) for primary contact person(s) for the Facility;
3. Anticipated total output for the Facility;
4. Manufacturer, model number, and operational characteristics of any new boiler or turbine unit(s) that will be used;
5. A copy of any and all Interconnection System Impact Studies;
6. Notice of Petitioner's designation as an EWG by FERC;
7. Expected in-service (commercial operation) date; and
8. A copy of the engineering/construction timelines and critical milestones for the Facility.

Petitioner shall file subsequent reports within thirty (30) days following the end of each calendar quarter until the quarter which occurs after commercial operation has been achieved, and

which immediately precedes the Annual Report filing date. Thereafter, subsequent reports should be filed as an addendum to Petitioner's Annual Report and include, at a minimum, the following:

1. Any changes of the information provided in the Initial Report;
2. A copy of any Interconnection System Impact Studies not previously submitted to the Commission;
3. Notice of the establishment of any independent financial instrument, including form and amount;
4. Achievement of construction milestones and such events as the procurement of major equipment, receipt of major permits material to the construction and operation of the Facility, construction start-up, initial energization, and commercial operation; and
5. The nameplate existing for utility sales once commercial operation is achieved.

The Petitioner shall also file with the Commission any Annual Report required to be filed with FERC.

9. Notification of Changes in Capacity or Operation. In the event that the Petitioner intends to materially increase, decrease, or otherwise materially change the Facility's capacity or operation, Petitioner must seek and obtain the Commission's prior approval.²

10. Conclusion. Pursuant to the provisions set forth in Indiana Code § 8-1-2.5-5, the Commission declines to exercise its jurisdiction over Petitioner, including the need for a CPCN, other than as set forth in this Order. The evidence in this Cause demonstrates that the characteristics of Petitioner as a producer of power solely for sale for resale subject to FERC's jurisdiction render the exercise of full jurisdiction by the Commission over Petitioner and the Facility unnecessary. In addition, the partial declination to exercise jurisdiction over Petitioner and the Facility may facilitate needed generation capacity in Indiana, which is beneficial for Petitioner, those public utilities that may indirectly have access to the power produced, and to the State of Indiana. We further conclude that the Commission's partial declination to exercise jurisdiction over Petitioner will promote energy utility efficiency.

Because Petitioner is not granted authority to offer its power for sale at retail to the general public, any revenue that it derives from the sale of electricity to another public or municipal utility for resale by the latter is not subject to the public utility fee.

11. Required Findings as to EWG Status. Based on the foregoing, the Commission further finds that allowing the Facility Assets to be sold by Seller and transferred to Petitioner (a) will benefit consumers; (b) is in the public interest; and (c) does not violate Indiana law. These findings are made to satisfy the requirements of federal law and permit Petitioner to obtain EWG

² A material change includes the following: an increase or decrease of greater than five MW in the Facility's capacity, changes in operating entities, changes in fuel supply, transfers of assets, and changes identified in case law.

status because the Facility was in service in retail rates as of October 24, 1992. *See* 18 CFR 366.7 (incorporating the requirements of 15 U.S.C. § 79z-5a(c)); *see also* Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005, Order No. 667-B, 71 Fed. Reg. 42750 (July 28, 2006).

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

1. Petitioner is hereby determined to be a “public utility” within the meaning of Ind. Code §§ 8-1-2-1 and 8-1-8.5-1 and an “energy utility” within the meaning of Ind. Code § 8-1-2.5-2.

2. The Commission declines to exercise its full jurisdiction over Petitioner pursuant to Ind. Code § 8-1-2.5-5. The Commission retains continuing jurisdiction over Petitioner to the extent required to ensure that Petitioner complies with all of the conditions contained in this Order.

3. Petitioner shall not sell at retail in the State of Indiana any of the electricity generated by the Facility without further Order of the Commission so long as retail power service remains subject to Commission regulation.

4. Petitioner shall submit to the Commission all information required by the terms of this Order.

5. This Order shall be effective on and after the date of its approval.

ATTERHOLT, BENNETT, LANDIS, MAYS AND ZIEGNER CONCUR:

APPROVED: 'JUL 03 2012

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



Shala M. Coe
Acting Secretary to the Commission