

August 28, 2017

INDIANA UTILITY

REGULATORY COMMISSION

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE VERIFIED)
PETITION OF INDIANAPOLIS POWER &)
LIGHT FOR APPROVAL OF PUBLIC)
LIGHTING AND LED CONVERSION) CAUSE NO. 44981 - NONE
CONTRACT WITH THE CONSOLIDATED)
CITY OF INDIANAPOLIS-MARION)
COUNTY, INDIANA)

**PETITIONER’S MOTION FOR PROTECTION AND NONDISCLOSURE OF
CONFIDENTIAL AND PROPRIETARY INFORMATION**

Indianapolis Power & Light Company (“IPL”), pursuant to 170 IAC 1-1.1-4, Ind. Code § 5-14-3, and Ind. Code § 8-1-2-29, respectfully requests that the Indiana Utility Regulatory Commission (“Commission”) enter a Protective Order prohibiting dissemination outside of the Commission and adopting safeguards for the handling of certain documents to be filed by IPL containing information that is confidential, proprietary, competitively sensitive and trade secret. In support of this motion, IPL represents the following:

1. IPL has filed a Verified Petition with the Commission requesting approval of a Public Lighting and LED Conversion Contract (“Agreement”) by and between the Consolidated City of Indianapolis-Marion County, Indiana (“City”) and IPL.

2. Attachments provided with IPL’s prefiled case-in-chief and supporting workpapers contain information identified as confidential by IPL (the “Confidential Information”). IPL requests the Confidential Information to be exempted from public disclosure.

3. The Confidential Information which IPL requests be protected includes the breakdown of the total Contribution in Aid of Construction (“CIAC”) for the LED conversion

project provided in Attachment WHH-3C (and associated electronic spreadsheet workpapers identified as WP-WHH-3C, WP-1C, WP-2C and WP-3C), the rate development of the rates for the Existing Street Lights converted to LED and for Additional Street lights provided in Attachment WHH-4C (and associated workpapers); and the fixed cost analysis provided in Attachment WHH-5C and associated workpapers (all attached to the prefiled testimony of IPL's Witness William H. Henley).

4. As stated below, IPL will submit an un-redacted version of the attachments that include the Confidential Information once a protective order is entered.

5. The Confidential Information may also be discussed in the evidence, pleadings, workpapers and other submissions to be made in this Cause. A Commission protective order will allow IPL to safely file the Confidential Information with the Commission.

6. As explained in the affidavit of William H. Henley, attached hereto as Exhibit A, the Confidential Information includes competitively sensitive pricing, cost estimates, cost of service information and a fixed cost analysis. More specifically, the Confidential Information includes estimates of costs that will be the subject of competitive solicitations for the LED street light conversion work, the LED fixtures and the contract labor for the installation of the Additional Street Lights. The Confidential Information includes a cost of service study analysis that includes costs for equipment and services IPL purchases through competitive solicitations. The Confidential Information also includes a fixed cost analysis demonstrating that the agreed pricing will generate revenues to cover the incremental cost of providing service under the Agreement while contributing significantly to the recovery of the Company's fixed costs.

7. The Confidential Information: (i) is such that it may derive actual and potential independent economic value from being neither generally known to, nor readily ascertainable by proper means by, other persons who could obtain economic value from its disclosure or use; and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. The disclosure of the Company's contract prices would allow potential suppliers or vendors to know what the Company's expectations are with respect to such products and services. Suppliers or vendors would have the advantage of knowing how to price their bids or negotiate to provide similar services in order to maximize their prices to the disadvantage of IPL and its customers. Knowledge of the Confidential Information would influence IPL's discussions with other existing and potential customers and thereby could have the effect of limiting future benefits to IPL, its other retail customers, and, potentially, the State. Such information would also provide an unfair advantage to potential energy resource competitors. The Confidential Information is competitively sensitive and constitutes a trade secret under Indiana law and is entitled to protection from disclosure by the Commission.

8. The Confidential Information in this proceeding is similar to confidential, proprietary, competitively-sensitive and/or trade secret pricing and cost information previously found to be exempt from public disclosure by the Commission. *See, e.g., Re Petition of Indiana Michigan Power Company*, Cause No. 44530, Docket Entry dated October 14, 2014 (Amendment to SDI Contract and associated fixed cost analysis exempt from public disclosure), affirmed by Order dated December 30, 2014; *Re Petition of Indiana Michigan Power Company*, Cause No. 44655, Docket Entry dated August 17, 2015 (same), affirmed by Order dated November 18, 2015; *Re Indianapolis Power & Light Co.*, Cause Nos. 44576/44602, Docket Entry dated July 15, 2015 (granting motion to protect customer-specific revenue and sales

volume information) affirmed by Order dated March 16, 2016; *Re Duke Energy Indiana, Inc.*, Cause No. 44662, Docket Entry dated September 8, 2015 (pricing and negotiated terms contained in contract between Duke and SDI exempt from public disclosure), affirmed by Order dated January 13, 2016; *Re Indianapolis Power & Light Co.*, Cause No. 38703 FAC 113, Docket Entry dated September 23, 2016 (fuel, storage and transportation pricing, confidential coal contract terms and conditions, projected market energy prices, wholesale margins, and capacity, wind and solar prices and costs exempt from public disclosure), affirmed by Order dated November 22, 2016; *Duke Energy Indiana, Inc.*, Cause No. 38707 FAC 107, Docket Entry dated February 12, 2016 (generator offers and fuel, storage and transportation pricing and pricing projections related to coal management activities exempt from public disclosure), affirmed by Order dated March 23, 2016; *Duke Energy Indiana, Inc.*, Cause No. 38707 FAC 106, Docket Entry dated November 12, 2015 (same), affirmed by Order dated December 27, 2015; also *Re Indianapolis Power & Light Company*, Cause No. 44540, Docket Entries dated October 27, 2014 and March 18, 2015 (projected maintenance and capital maintenance costs, forecasted natural gas prices, electricity prices and emission costs exempt from public disclosure), affirmed by Order dated July 29, 2015; *Re Duke Energy Indiana, Inc.*, Cause No. 44214, Docket Entry dated February 4, 2013 (forward-looking data regarding supply vs. demand balance and power sale transactions exempt from public disclosure), affirmed by Order dated June 19, 2013; *Re Indianapolis Power & Light Company*, Cause No. 43740, Docket Entry dated August 14, 2009 (pricing and other negotiated commercial terms contained in a wind purchased power agreement exempt from public disclosure as trade secret), affirmed by Order dated January 27, 2010; *Re Indianapolis Power & Light Company*, Cause No. 43485, Docket Entry dated June 6, 2008 (same), affirmed by Order dated October 1, 2008.

9. Furthermore, courts interpreting Indiana's trade secret statute have consistently applied the statutory definition of trade secret to the type of information IPL seeks to protect. In *Hydraulic Exchange and Repair, Inc. v. KM Specialty Pumps, Inc.*, 690 N.E.2d 782, 785-86 (Ind. Ct. App. 1998), the Court of Appeals determined that certain "customer pricing" information was trade secret. Similarly, a federal district court interpreting Indiana's statute has held that financial and cost information can be protected as trade secrets. *Bridgestone/Firestone, Inc. v. Lockhart*, 5 F. Supp. 2d. 667, 681 (S.D. Ind. 1998). In *Star Scientific, Inc. v. Carter*, 204 F.R.D. 410, 415 (S.D. Ind. 2001), the court recognized that a protectable trade secret includes any information or compilation which is used in one's business and which gives the business an opportunity to obtain an advantage over competitors who do not have the information.

10. The Commission has previously recognized that trade secrets must be protected when competitors can use the trade secret information to win an advantage in competitive bidding. *Re Investigation into the Propriety of Declining to Exercise Its Jurisdiction*, Cause No. 38561 (IURC 1/18/1989). Therefore, IPL's request is consistent with Commission precedent, otherwise complies with Indiana law and should be granted.

11. IPL has taken steps to limit access to the Confidential Information to those employees who need to know the information. The IPL files containing the Confidential Information are maintained separately from their general records and access to those files is restricted.

12. Based upon the above description of material for which IPL seeks protection and the attached affidavit, IPL requests the Commission enter a preliminary determination that the Confidential Information appears to be confidential and trade secret within the meaning of Ind.

Code § 5-14-3-4(a) as defined by Ind. Code § 24-2-3-2, for the limited purpose of allowing IPL to safely submit or otherwise make available the Confidential Information under seal for an *in camera* inspection by the presiding Administrative Law Judge and Commission for a final determination of the appropriateness of IPL's request for protection. Once a preliminary determination is made that the Confidential Information is exempt from public disclosure, IPL will submit the Confidential Information to the Presiding Administrative Law Judge using the Commission's Online Services Portal.

13. IPL requests that the Commission protect the confidential and proprietary information from disclosure and limit access to those Commission employees with a need to review the confidential and proprietary information. Further, IPL requests that the Commission not disclose the information to persons outside the Commission unless the person has entered into an appropriate protective agreement with IPL.

14. Upon a preliminary determination that the Confidential Information is confidential and/or trade secret, IPL proposes that the Commission issue a Docket Entry adopting procedures to assure the protection of the Confidential Information provided by IPL.

15. IPL has provided the Confidential Information to the Indiana Office of Utility Consumer Counselor ("OUCC") pursuant to the Standard Form Nondisclosure Agreement between IPL and the OUCC. While no other party has intervened as of the date of this Motion, should a subsequently filed petition to intervene be granted IPL is willing to consider providing the Confidential Information to an intervenor pursuant to an appropriate protective agreement that is acceptable to IPL. If necessary, IPL will request that the Commission enter a protective order safeguarding the dissemination of the Confidential Information.

16. Once a preliminary determination of confidentiality has been made, IPL will provide the Confidential Information subject to and contingent upon the right to retrieve the Confidential Information before it can be disclosed to any members of the public should the Commission upon a final determination find that the material submitted under seal should not be protected.

WHEREFORE, IPL respectfully requests that the Commission make and enter appropriate orders in this Cause:

- (i) Finding the Confidential Information to be preliminarily confidential for the limited purpose of allowing IPL to safely file the Confidential Information with the Commission under seal;
- (ii) Thereafter make a final determination that the Confidential Information is exempt from public disclosure under Ind. Code § 8-1-2-29 and § 5-14-3-4;
- (iii) Implementing procedures to insure that the Confidential Information is appropriately secured and made available only to the appropriate Commission employees of the Commission's Staff on a need-to-know basis, and who are under an obligation not to disclose such confidential information to any third party; and
- (iv) Granting to IPL such other relief as may be appropriate.

Respectfully submitted,



Teresa Morton Nyhart (14044-49)

Jeffrey M. Peabody (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 Petitioner

Indianapolis Power & Light Company

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the forgoing was served by hand delivery, electronic transmission or United State Mail, first class, postage prepaid on the Office of Utility Consumer Counselor, 115 W. Washington Street, Suite 1500 South, Indianapolis, Indiana 46204, (infomgt@oucc.in.gov).

Dated this 28th day of August, 2017.



Jeffrey M. Peabody

AFFIDAVIT OF WILLIAM H. HENLEY

William H. Henley, upon his oath, deposes and states:

1. I am employed by Indianapolis Power & Light Company ("IPL") as Vice President, Regulatory and Government Affairs. In that capacity, I am responsible for state regulatory matters and related legislative matters, resource planning, and policy matters related to MISO.

2. I have personal knowledge of the confidential, proprietary, competitively-sensitive and trade secret nature of the Confidential Information addressed herein and in the accompanying Motion through direct contact with this information and through my investigation with other IPL employees who work directly with the Confidential Information. I have personal knowledge of efforts taken by IPL to maintain the secrecy of the Confidential Information through direct contact with these efforts and through my investigation of these efforts with other employees who work directly with these procedures.

Description of the Confidential Information for Which Protection is Sought

3. IPL is requesting that certain confidential information to be included as an attachment in this proceeding be exempted from public disclosure as confidential, proprietary, competitively sensitive and trade secret information (the "Confidential Information").

4. More specifically, the Confidential Information is set forth in the following attachments to my prefiled direct testimony and my supporting workpapers.

a. Attachment WHH-3C. This attachment breaks down the estimated Contribution in Aid of Construction ("CIAC") to be made for by the City for the LED conversion under the Agreement which is the subject matter of this Cause. The break down of the CIAC includes IPL's estimate of the LED fixture costs and IPL's estimate of the cost of the contractor services

for the conversion work. Confidential Workpapers WP-1C (LED Conversion Rates), WP-2C (NEW light Rates) and WP-3C (Install Costs) provide details underlying the CIAC estimate provided in Attachment WHH-3C and the electronic version provided as workpaper WHH-3C.

b. Attachment WHH-4C. Page 2 of Attachment WHH-4C and the electronic spreadsheet provided as workpaper WHH-4C set forth the rate development of the rates for the Existing Street Lights converted to LED and for Additional Street lights. The attachment and associated spreadsheet include the competitively sensitive information described above as well as similar information such as the cost of poles and other equipment IPL uses in the provision of service.

c. Attachment WHH-5C. This attachment provides a fixed cost analysis demonstrating that the agreed pricing will generate revenues to cover the incremental cost of providing service under the Agreement while contributing significantly to the recovery of the Company's fixed costs.

5. IPL will submit an un-redacted version of the attachments and the supporting workpapers that includes the Confidential Information once a protective order is entered.

**The Information Contained in Confidential Information
Derives Independent Economic Value By
Reason of the Fact that it is Not Publicly Available**

6. The Confidential Information is not readily available in the public domain and IPL takes steps to protect this information from public disclosure. Such information is competitively sensitive and a trade secret because competitors, suppliers, and customers may use such data to gain a competitive advantage over IPL. The work and equipment purchase underlying the CIAC estimate and rate development will be the subject of competitive solicitations. The disclosure of the Company's expected contract prices would negatively affect

the negotiation or competitive bidding process by allowing supplies, customers and potential contractors to know what the Company's expectations are with respect to such products or services. Such third parties would have the advantage of knowing how to price bids or negotiate to provide or purchase services in order to maximize their prices to the disadvantage of IPL and its customers. The Confidential Information, if disclosed to suppliers, contractors and customers or otherwise made publicly available, would have a substantially detrimental effect on IPL and its stakeholders. Public disclosure of such competitively-sensitive information would provide considerable economic value to such third parties, who could use such information to the detriment of IPL and its customers.

**The Information is Not Generally Known, Readily Ascertainable
by Proper Means by Other Persons Who Can
Obtain Economic Value from its Disclosure or Use**

7. The Confidential Information is not available or ascertainable by other parties through normal or proper means. No reasonable amount of independent research could yield this information to other parties.

**The Information is the Subject of Efforts Reasonable
Under The Circumstances to Maintain Its Secrecy**

8. The Confidential Information has been the subject of efforts that are reasonable under the circumstances to maintain its secrecy. IPL restricts the access of information to only those employees, officers and representatives of IPL who have a need to know about such information due to their job and management responsibilities. IPL limits public access to buildings housing the Confidential Information by use of security guards. IPL's files containing the Confidential Information are maintained separately from IPL's general records and access to those files is restricted. Within IPL, access to this information has been and will continue to be disclosed only to those employees, officers and representatives of IPL who have a need to know about such information due to their job and management responsibilities.

Outside IPL, this information is only provided to certain persons who have a legitimate need to review the information to participate in this Cause and who sign a confidentiality agreement.

Further the Affiant sayeth not.

Dated: 8-28-17

William H. Henley
William H. Henley

STATE OF INDIANA)
)
COUNTY OF MARION) SS:

Before me, the undersigned, a Notary Public in and for said County and State, appeared William H. Henley, who having been duly sworn upon his oath, attested that the foregoing statements are true to the best of his knowledge, information and belief.

WITNESS my hand and seal this 28th day of August 2017.



Denise L. Simmons
Signature, Notary Public

Printed: DENISE L. SIMMONS

My Commission Expires:

4-11-2020

My County of Residence:

MARION