November 6, 2006

Sent Via Electronic Mail and U.S. Mail

Dwane G. Ingalls
1600 S. Paddock Road
Greenwood, IN 46143

Re: Formal Complaint 06-FC-172; Alleged Violation of the Access to Public Records Act by the Indiana Utility Regulatory Commission and the Office of the Indiana Utility Consumer Counselor

Dear Mr. Ingalls:

This is in response to your formal complaints alleging that the Indiana Utility Regulatory Commission ("IURC") and the Indiana Office of Utility Consumer Counselor ("OUCC"), [collectively, "the Agencies"] violated the Access to Public Records Act by denying copies of certain reports filed with the Commission by the Indianapolis Power and Light Company ("IPL"). I find that the Agencies may not deny the "Elect Plan" annual reports based solely on the Order of the IURC and Settlement Agreement making those reports confidential. In addition, I find that the burden of proving that the reports are trade secrets, either in their constituent parts or as a whole, falls to the Agencies.

BACKGROUND

You made a formal request to the IURC and the OUCC for copies of the annual Optional Pricing and Service Plan reports (commonly called "Elect Plan") filed with the IURC and the OUCC by IPL. These reports were to be filed pursuant to a settlement agreement approved by the Commission on March 18, 1998, under IURC Cause No. 40959.

Beth Krogel Roads, Assistant General Counsel of the IURC wrote to you on September 22, 2006, stating that confidential status was granted to these annual reports pursuant to the terms of the Settlement Agreement approved by the IURC. This denial followed a more specific request that you had made via electronic mail for the revenue figures of IPL that would have

been reported in the Elect Plan reports. This information had been denied as a trade secret under Indiana Code 5-14-3-4(a)(4). The IURC promised to seek an update from IPL as to the confidential status of the documents. If the IURC had received any information from IPL that indicated the reports were no longer confidential, the reports would be made available for inspection and copying.

You made an identical request for the Elect Plan reports to the OUCC. On September 29, 2006, Mr. Anthony F. Swinger, Public Information Officer for the OUCC wrote that the Elect Plan report submitted under Cause No. 40959 was deemed confidential pursuant to the Settlement Agreement and IURC order. Mr. Swinger pointed to page 5, paragraph (e) of the Settlement Agreement as evidence of the confidential nature of the documents. No other reason for nondisclosure was cited by the OUCC.

You filed your formal complaints against the IURC on September 29, 2006 and against the OUCC on October 5, 2006. I assigned number 06-FC-167 to the IURC complaint, and 06-FC-172 to the OUCC complaint. Because the issues in the complaints are identical, you agreed to consolidate 06-FC-167 into 06-FC-172 for purposes of issuing this advisory opinion.

Your complaints take issue with the denial of the Elect Plan reports. With respect to the complaint against the IURC, you complain that the IURC has denied this information as confidential based solely on IPL's general request noticed in the Settlement Agreement under Cause No. 40959. The IURC is claiming that this information falls under IC 5-14-3-4(a)(4) as trade secrets based on an August 4, 2006 e-mail denial to your request for IPL revenue information. However, based on your review of the Order and Settlement Agreement, you find no claim for trade secret status by IPL. You contend that the IURC has no authority to agree to withhold a public record. You also claim that the IPL cannot claim trade secret because as a public utility that enjoys a franchise customer base, information about IPL's customers and the like cannot meet the definition of a trade secret under IC 24-2-3-2. You are concerned that IURC's recent petition to expand the optional pricing and service plan to its customers has a direct impact on customer rates. The public is invited to comment on the expansion under IURC Cause No. 43100, but is hindered by a lack of information about past effects of the plan that would be contained in the Elect Plan reports.

With respect to the complaint against the OUCC, you point to the similar lack of a statutory basis for the denial, where the OUCC cited only the confidential status of the documents pursuant to the Settlement Agreement and Order. You further contend that the Settlement Agreement provides that the Elect Plan reports be submitted to two private advocacy groups, the Citizens Action Coalition of Indiana and United Senior Action [hereinafter, "CAC/USA"]; therefore, any trade secret status was lost because the Elect Plan report was disclosed to the two private groups.

You sent me copies of the Settlement Agreement and Order of March 1998. These documents provide the following as background information. On August 21, 1997, IPL filed with the IURC a verified petition requesting the IURC to decline to exercise in part its jurisdiction over IPL's offering of certain optional pricing and service plans and to adopt alternative regulatory procedures to permit the offering of the voluntary optional pricing and

service plans. On September 8, 1997, Citizens Action Coalition of Indiana filed its petition to intervene. On November 3, 1997, United Senior Action filed its petition to intervene. The petitions to intervene were granted.

Following an evidentiary hearing, the IURC made findings that basically approved the Settlement Agreement entered into between IPL, the OUCC, and United Senior Action and Citizens Action Coalition of Indiana. Hence, the IURC temporarily and partially declined to exercise its jurisdiction to the extent set forth in the Settlement Agreement as of March 18, 1998.

Mr. John Brehm, IPL's Senior Vice President of Finance and Information Services, testified regarding the three optional plans. Customers with a monthly load of less than 2,000 kilowatts of electric demand would be offered the three plans. These plans were to be called "Sure Bill Option," "Fixed Rate Option," and "Green Power," with specifics of each plan described in the Order. The latter "Green Power" plan would provide electing customers with the opportunity to purchase power that is generated by a renewable energy resource commonly referred to as "green power."

Mr. Wayne Schug, IPL's Director of Product Development, described the administrative details of the plans. Should customers be provided a choice of electric providers during the term of the plan, IPL would cancel customer contracts signed under the plans. He described implementation of incentive/discount offers to customers to induce them to enter into one of the option plans. Mr. Schug testified that IPL considered the range of these incentives and discounts to be confidential and that a public filing of this information would likely prejudice the educational nature of the program. IPL further proposed to provide to the IURC, the OUCC and CAC/USA counsel information concerning the descriptions of the pricing options offered to customers and the participation rates under each plan. Mr. Schug testified that this information is deemed to be confidential by IPL and IPL requested that this information be treated confidential by the Commission. The parties had no objection to the request.

The Settlement Agreement recites that IPL will provide a confidential annual report to the IURC, OUCC, and CAC/USA:

> "IPL requested confidential treatment of this annual report. The parties do not object to this request. The report will detail any effect the operation of the Plan has had on IPL's jurisdictional (non-participating) customers, including any effect on the cost of power paid by such customers because of IPL's acquisition of Green Power or otherwise, it being the intent of the parties and the commitment of IPL that jurisdictional customers will not pay higher rates as a result of the costs of Plan implementation."

Settlement Agreement, Paragraph 2(e).

The Settlement Agreement further provides:

> "IPL will provide semi-annually to Green Power Plan participants information showing the amount of power purchased by source."

Settlement Agreement, Paragraph 2(g)(1).

I sent a copy of your complaints to the IURC and the OUCC. I enclose the responses of the Agencies that were not previously provided to you. Ms. Beth Krogel Roads of IURC submitted letters dated October 12, 2006 and October 20, 2006. Ms. Susan Macey, Utility Consumer Counselor, submitted a letter dated October 23, 2006. On behalf of the OUCC, Ms. Claudia Earls, counsel representing IPL, submitted a letter to Ms. Macey to respond to complaint 06-FC-172. I summarize these responses as follows:

Ms. Roads pointed to the response of the IURC to your request for IPL's revenue information as evidence that the IURC, in accordance with the 1998 Order, considered the annual reports to be filed with the IURC and OUCC describing the pricing options offered and the participation rates in each option to be trade secrets of IPL. Under Ind. Code 5-14-3-4(a)(4), the IURC may not disclose records containing trade secrets. Ms. Roads cited the following from IPL's Verified Petition:

> "The information that will result from this program is valuable as a basis for designing customer offerings in a competitive business environment. This is proprietary business information that IPL would keep confidential because it has independent economic value as a result of it not being generally known. Therefore, IPL is requesting that the detailed participation rates and the accounting information be treated as confidential and access to that information be limited to the Commission staff and the OUCC and not be made available to the public or used in any forum."

Hence, the IURC granted confidentiality because the information IPL sought to protect met the definition of a trade secret, according to Ms. Roads. Further, Ms. Roads argues that contrary to the assertion that no trade secret exemption applies because the IPL does not have competition, Ms. Roads stated that independent economic value is not derived only by competitors, but could be derived by any company that wanted a plan similar to IPL's and did not want to incur the time and expense to develop the plan itself. IPL's counsel, in response to the request for updated information regarding the trade secret status of the annual reports, IPL confirmed that the utility continued to treat the annual reports as trade secrets of IPL.

Ms. Roads' October 20 submission responded to my request for case authority on the issue of competition, for information regarding how IPL treats the annual report, the nature of the annual report, and whether IPL considered the entire report nondisclosable as a trade secret. Ms. Earls indicated to Ms. Roads that IPL has maintained tight control of distribution of the Elect Plan reports within IPL and has only distributed the reports to those outside IPL who had agreed to hold the reports confidential. In addition, Ms. Earls explained that although IPL is the only provider of electric service in its geographic area, it must compete with Citizen's Gas and other utilities that could use the information in the Elect Plan annual reports to make its heating products more attractive to customers considering gas heat over electric. Ms. Roads supplied various case authorities, primarily relying on *Credentials Plus, LLC v. Calderone, 230 F. Supp.*

2d 890 (N.D. Ind. 2002) which states that "Indiana does not require a trade secret to provide its holder with a competitive advantage."

In response to your argument that the IURC should not be permitted to declare information a protected trade secret without a specifically supported request by a petitioner, Ms. Roads argued that neither the Trade Secret Act nor the APRA requires that information can be a trade secret only if it has been specifically supported by the person or entity claiming it as a trade secret; if the information meets the definition of a trade secret, it must not be disclosed. Ms. Roads also disputes that the IURC did not follow caselaw and its own rule in failing to specifically find in its Order that the information meets the trade secret definition. Finally, Ms. Roads addresses your contention that the Elect Plan annual report is no longer a trade secret because it has been disclosed to the CAC/USA. So long as the company's disclosures of its trade secrets are required to be kept confidential, the information need not be accorded absolute secrecy.

In describing an effort to redact annual reports to withhold only that information that would constitute a trade secret, Ms. Earls in an October 17 e-mail to Ms. Roads stated that the reports contain information about program participation and methods, participation rates and discounts offered; the timing of bill inserts and the designing of customer communication materials and results of customer surveys. Little else would remain after redaction, and the effort would be substantial. In a later e-mail dated October 23, Ms. Earls listed the types of information in IPL's Elect Plan annual report:

- Customer counts for each of the three programs, including a division between residential and commercial and industrial customers.
- Elect Plan activities undertaken to increase interest in the programs.
- Descriptions of communication and marketing materials and estimated impacts.
- Marketing strategies.
- Results of customer opinion surveys for Elect Plan participants.
- Source of Green Power Renewable Energy Credits.
- Quantity of RECs purchased.
- Premium amounts for Green Power RECs.
- Costs to administer Elect Plan, with a statement that none of the costs were being deferred.

Ms. Earls reiterated that all the items above have independent economic value. IPL has compiled the results of its programs and paid for surveys, and dissemination of this information could allow Citizens Gas, for example, to copy a program to increase the ratio of gas to electric heated homes within IPL's service territory. Others could not replicate the results, and thus the information constitutes a trade secret. Lastly, as more utilities are purchasing RECs, information concerning the source and cost of RECs also has economic value, and should be protected from public disclosure.

Finally, Ms. Macy of the OUCC provided a letter of Ms. Earls in response to 06-FC-172. In this letter, Ms. Earls argues that the OUCC was a signatory to the Settlement Agreement filed with the IURC in Cause No. 40959. The Settlement Agreement provided that the evidence

presented in the Cause, including testimony of Mr. Schug concerning the information that would be provided in IPL's Elect Plan annual report, constituted substantial evidence to support the IURC's approval of the Settlement Agreement. The Order in Cause No. 40959 found that the information is deemed to be confidential and approved the Settlement Agreement in its entirety. The IURC's findings regarding confidentiality are governed by IC 8-1-2-29. Pursuant to section 29, the IURC adopted 170 Indiana Administrative Code 1-1.1-4, which provides that a party wishing to file a paper that it believes is confidential in accordance with IC 8-1-2-29 and IC 5-14-3 shall apply for a finding by the IURC. The IURC may determine that the material is confidential. The IURC made a finding that the Elect Plan annual reports were to be treated as confidential. "IPL believes that the Commission's confidentiality determination is dispositive of Mr. Ingalls' formal complaint."

Finally, you offered rebuttal to the IURC's October 12 letter after the IURC provided you a copy. You agree that the IURC is prohibited from disclosing a trade secret; the dispute is whether the Elect Plan annual report *is* a trade secret. With reference to the Settlement Agreement and Order, you point out that the IURC relied only on conclusory statements of IPL that the Elect Plan annual reports to be filed with the IURC were confidential. The Order fails to refer to any request as related to trade secret. You challenge IPL's assertion that the information in the annual report that is not generally known automatically has independent economic value. Reiterating that IPL can obtain no competitive advantage from withholding the information and citing *Indiana Bell Telephone v. IURC*, you state that the IURC has not sustained its burden to show that the information regarding participation rates in the plan and related accounting information has any value outside the IPL's franchised consumer base.

Further facts and argumentation will be stated as appropriate below.

ANALYSIS

The Access to Public Records Act ("APRA") states:

> [G]overnment is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.

Ind.Code 5-14-3-1.

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). Since it is the public policy of the APRA that it is to be construed liberally in favor of disclosure,

exceptions to that general rule of disclosure are to be narrowly construed. IC 5-14-3-1. *See Robinson v. Indiana University, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995)*.

A public agency may deny a written request for a record if the denial is in writing or by facsimile, and the denial includes the exemption or exemptions authorizing the public agency to withhold the record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c).

Among the types of records that may not be disclosed by a public agency unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery, are records containing trade secrets. IC 5-14-3-4(a)(4). "Trade secret" for purposes of the APRA has the meaning set forth in Indiana Code 24-2-3-2, the Indiana Uniform Trade Secrets Act ("IUTSA"). IC 5-14-3-2(o).

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

IC 24-2-3-2.

Denial Under the APRA

The APRA requires that the public agency denying the record state the specific exemption or exemptions authorizing the withholding of all or part of the public record. IC 5-14-3-9(c). In respect of this requirement, neither the IURC nor the OUCC complied with the legal requirements of the APRA. The earlier denial of the IURC to the request for revenue information on the basis of trade secret could not apply to the request for the Elect Plan annual reports. The denial letters did not contain any reference to Indiana Code 5-14-3-4(a)(4) or to any other APRA exemption. It is axiomatic that the parties to an agreement cannot deem information confidential in abrogation of the Access to Public Records Act. Hence, the Agencies' reliance on the Order of the IURC was not a basis upon which the Agencies could deny the Elect Plan annual report, and the absence of citation to the specific exemption for trade secret constituted an improper denial.

Reliance on the 1998 IURC Order

The Agencies make much of the IURC Order and Settlement Agreement finding that the annual report is accorded confidential treatment. Only if the information sought to be protected is a trade secret or is exempt under any other exemption under the APRA may the IURC maintain its confidentiality. Moreover, I find the reliance on the Order and Settlement Agreement to be faulty for several additional reasons.

First, the Order and Settlement Agreement describe the annual report differently than those components listed by Ms. Earls in the October 23 e-mail. The Settlement Agreement states

that the annual report will detail any effect the operation of the Plan has had on IPL's jurisdictional customers and any effect on the cost of power paid by such customers because of IPL's acquisition of Green Power." The Order recited that the "range of incentives and discounts to be offered" was to be confidential, but the Settlement Agreement does not appear to include those items. The Order further recites that pricing options offered to customers and the participation rates under each plan would be held as confidential. Finally, Ms. Earls claimed that each of the nine components of the annual report listed in the October 23 e-mail would be considered trade secret. This includes premium amounts for Green Power RECs, and the quantity and source of RECs purchased by IPL. These items do not appear to fall within the type of information claimed by IPL to be confidential as recited in the Order and Settlement Agreement.

Second, the Order omits any specific findings to sustain the IURC's finding that the information submitted annually by IPL is confidential. The Order does not refer to trade secrets, only that IPL requested that the information be held as confidential, and that the parties to the Agreement did not object. While it is possible that the IURC heard testimony on the nature of the information as a trade secret, as Ms. Roads suggests may have occurred, it is of no moment if the IURC failed to make specific findings or to articulate its reasons for finding that the information to be submitted is confidential. Despite the fact that the IURC's current rule was not in effect in 1998, the IURC must include specific factual findings on all issues and the findings must be supported by evidence in the record.[1] *Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Commission, 810 N.E.2d 1179 (Ind. Ct. App. 2004).*

Third, the Order and Settlement Agreement that are devoid of particularized findings on the issue of trade secret, and the precatory statements of IPL contained therein are not dispositive of the trade secret issue as IPL claims, because to so find would impermissibly shift the burden of proof to the person requesting the information, in derogation of the APRA. *Cf., Great Falls Tribune v. Mont. Public Ser.Com., 82 P.3d 876, 886 (Mont. 2003).* Accordingly, I do not find the Order and Settlement Agreement to be dispositive of the issue of the trade secret status of the Elect Plan annual reports.

Whether the Elect Plan Annual Report is a Trade Secret

From the trade secret definition in IC 24-2-3-2, a trade secret has four key characteristics:

(1) it is information
(2) which derives independent economic value

[1] In 2000, the IURC promulgated a rule that set out procedures to apply when a party to an IURC proceeding wished to file or submit to the IURC any writing, paper, or other material that the party believes is confidential in accordance with IC 8-1-2-29 and IC 5-14-3. The party shall apply for a finding by the IURC on or before the date the information is required to be filed, that the information is confidential. The IURC may take one or more actions, including to find information to be confidential, in whole or in part, to find information not to be confidential, in whole or in part, or to find that information found not to be confidential should be filed in accordance with the rule. 170 Ind. Admin. Code 1-1.1-4. In addition, parties seeking protective orders to prevent or limit discovery of trade secret or other confidential research, development, or commercial information shall make a separate motion under Trial Rule 26(C). 170 IAC 1-1.1-4(f).

(3) that is not generally known, or readily ascertainable by proper means by other person who can obtain economic value from its disclosure or use, and
(4) it is the subject of efforts reasonable under the circumstances to maintain its secrecy.

Ackerman v. Kimball International, Inc. 634 N.E.2d 778, 783 (Ind. Ct. App. 1994), vacated in part, adopted in part, *652 N.E.2d 507 (Ind. 1995*). The Agencies, in response to the complaint, claim that the information contained in the Elect Plan annual report is trade secret information that is protected from disclosure under the IUTSA and the APRA.

A trade secret is difficult to define with precision. *Amoco Production Co. v. Laird, 622 N.E.2d 912, 916 (Ind. 1993).* Moreover, whether information is a trade secret is a fact-sensitive inquiry. *Id*.

Determining whether the information sought to be protected by the Agencies is a trade secret is made more difficult because the Elect Plan annual report is a document that is not generally created in a particular industry as is a customer list of an insurance company, for example. Moreover, as I stated earlier, the components of the Elect Plan annual report have been variously described, both in the Settlement Agreement and Order, and in the documents submitted in response to this complaint. The most comprehensive listing of the components of the Elect Plan annual report are set out in the October 23 e-mail of Ms. Earls referred to above.

Nevertheless, from the record before me, I can discern several things. The records you seek certainly qualify as information. It also appears to be information that is the subject of efforts that seem reasonable under the circumstances to protect the information from disclosure. I agree with the IURC's assertion that the law does not require total secrecy, so long as the persons to which the information is disclosed are bound to maintain its confidentiality. *Webster Eng'g & Mfg. Co., Inc. v. Francis, 1993 U.S. Dist. LEXIS 14346*. From my review of the Order, it appears that under the Settlement Agreement, the outside parties CAC/USA are required to maintain the report's confidentiality.

The difficult question is whether the information is not generally known or ascertainable by proper means by other persons who can obtain economic value from its disclosure or use. I agree with the IURC that information may be a trade secret even if the holder of the information enjoys a franchise or does not compete. Indiana law does not require a trade secret to provide its holder with a competitive advantage. *Credentials Plus, LLC v. Calderone, supra.*

However, this does not mean that the information a trade secret. There are no Indiana cases on point that determine whether the information contained in the annual report, either individually or in combination, is a trade secret. A trade secret can exist in a combination of characteristics and components. *Nilssen v. Motorola, Inc. 1997 U.S. Dist. LEXIS 12899*.

For the same reason that the IURC Order and Settlement Agreement do not suffice to establish that the information is a trade secret because it is not clear exactly what is sought to be protected, I cannot find conclusively that the information, in its constituent parts or in combination, are or are not a trade secret. I do write to express doubt that all of the information in the annual report is a trade secret.

Some of the information appears to be something that customers will be privy to, and hence may be discoverable by ordinary means. For example, the Settlement Agreement specifically states that IPL will provide semi-annually to Green Power Plan participants information showing "the amount of power purchased by source." *Settlement Agreement Paragraph 2(g)(1)*. Yet, unless I have misinterpreted the information provided by Ms. Earls, the source and price of renewable energy credits (RECs) is deemed by IPL to be a trade secret. Moreover, Ms. Earls stated "as more utilities are purchasing RECs, information concerning the source and cost of RECs also has economic value, and should be protected from public disclosure." This statement seems to look toward such information being a trade secret in the future, not at the present time. In addition, to the extent that marketing materials (but not marketing strategy) would eventually arrive in customer's mailboxes or be posted on the web, trade secret status may not apply to "descriptions of marketing materials."

The APRA states that if a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under this chapter, separate the material that may be disclosed and make it available for inspection and copying. IC 5-14-3-6(a). Hence, if the IURC and OUCC reconsider whether some or all of the Elect Plan annual report is a trade secret, it is required to separate the disclosable information from the nondisclosable information.

A person who has been denied the right to inspect or copy a public record by a public agency may file an action in the circuit or superior court of the county in which the denial occurred to compel the public agency to permit the person to inspect and copy the public record. IC 5-14-3-9(e). Whenever an action is filed under this subsection, the public agency must notify each person who supplied any part of the public record at issue: 1) that a request for release of the public record has been denied; and 2) whether the denial was in compliance with an informal inquiry response or advisory opinion of the Public Access Counselor. Such persons are entitled to intervene in any litigation that results from the denial. IC 5-14-3-9(e). If the issue under review is whether a public agency properly denied access to a public record because the record is exempted under section 4(a), the public agency meets its burden of proof under this subsection by establishing the content of the record with adequate specificity and not relying on a conclusory statement or affidavit. IC 5-14-3-9(f).

A court shall award attorney fees, court costs, and other reasonable expenses of litigation to the prevailing party if the plaintiff filed the action after first seeking and receiving an informal inquiry response or advisory opinion from the public access counselor. IC 5-14-3-9(i).

CONCLUSION

For the foregoing reasons, I find that the Indiana Utility Regulatory Commission and the Office of the Utility Consumer Counselor did not cite the specific exemption in its written denials of the Elect Plan annual reports. I also find that the Utility Regulatory Commission and the Office of the Utility Consumer Counselor must establish that the Elect Plan annual reports contain trade secrets and to disclose any part of the Elect Plan annual reports that do not meet the trade secret exemption.

Sincerely,

Karen Davis
Public Access Counselor

cc: Beth Krogel Roads
Susan Macey