

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF)
INDIANA MICHIGAN POWER COMPANY FOR)
A COMMISSION DETERMINATION THAT)
DESIGNATED INFORMATION RELATED TO)
AN INTERRUPTIBLE SERVICE CONTRACT BE)
DESIGNATED CONFIDENTIAL INFORMATION)
EXEMPT FROM DISCLOSURE UNDER 170 IAC)
1-1.1-4, I.C. 5-14-3, AND I.C. 8-1-2-29 AND FOR)
APPROVAL OF THE CONTRACT FOR)
INTERRUPTIBLE POWER UNDER TARIFF)
C.S.-IRP2 WITH HARTFORD CITY PAPER LLC)
AND FOR A COMMISSION DETERMINATION)
REGARDING TARIFF C.S.-IRP2 FILINGS)
PURSUANT TO 170 IAC 1-6-1 ET SEQ.)

CAUSE NO. 43878

FINAL ORDER ON
REMAINING ISSUES

APPROVED: FEB 02 2011

BY THE COMMISSION:

Aaron A. Schmoll, Senior Administrative Law Judge

On April 6, 2010, Indiana Michigan Power Company ("I&M" or "Petitioner") filed a Verified Petition for Protection and Nondisclosure of Confidential Information ("Petition") in this Cause. In its Petition, the Petitioner indicates that certain information included in and related to contracts under its Tariff CS-IRP2 (Contract Service Interruptible Power) contains confidential, proprietary and competitively sensitive information ("Confidential Information") and constitutes trade secrets pursuant to Indiana Code §§ 8-1-2-29 and 5-14-3-4 and should be exempt from public disclosure. With its Petition, Petitioner filed the affidavits of William W. Hix and Scott LeBeau ("Affidavits") which discuss the confidential nature of the information. On April 15, 2010, the Presiding Officers issued a Docket Entry which indicated that the Confidential Information would be held as confidential by the Commission on a preliminary basis. The Confidential Information was submitted electronically via the Commission's Electronic Filing System on April 15, 2010. An Attorney's Conference was convened on April 28, 2010 to establish a procedural schedule, which was memorialized in a Docket Entry dated May 10, 2010. On May 12, 2010, the Indiana Office of Utility Consumer Counselor ("OUCC") filed the testimony of Eric M. Hand. On May 24, 2010, I&M filed the rebuttal testimony of Marc E. Lewis and William W. Hix.

On June 4, 2010, Petitioner filed an Unopposed Motion to Continue Evidentiary Hearing, which motion was granted by Docket Entry dated June 7, 2010. On June 11, 2010, Petitioner filed a Motion to Amend Petition and Caption, in which Petitioner sought to amend its Petition to include a request for approval of a contract for Interruptible Power ("Contract") between I&M and Hartford City Paper LLC ("Hartford") entered into pursuant to Tariff CS-IRP2 and for a Commission determination regarding a dispute about the submission of Tariff CS-IRP2 contracts to the Commission pursuant to the Thirty-Day Administrative Filing Procedures and Guidelines set forth at 170 IAC 1-6-1 et seq. ("30-Day filing process"). By its Docket Entry dated June 15,

2010, the Commission granted I&M's *Motion to Amend*. On June 21, 2010, I&M filed the supplemental testimony of William W. Hix. The OUCC filed the supplemental testimony of Eric M. Hand on June 23, 2010. Pursuant to notice given and published as required by law, proof of which was incorporated into the record of this Cause by reference and placed in the official files of the Commission, a public hearing was held on Tuesday, June 29, 2010 at 10:30 A.M. EDT in Judicial Courtroom 222, PNC Center, 101 W. Washington Street, Indianapolis, Indiana. Petitioner and the OUCC participated in the hearing. No members of the general public appeared. At the hearing, the Petition and Affidavits, along with Petitioner's and OUCC's testimony and exhibits, were admitted into evidence.

On July 14, 2010, the Commission entered its Order on Less Than All the Issues which approved the Contract between Hartford and I&M and found that the Confidential Information in and associated with the Contract should be exempt from public disclosure. The present order addresses the remaining issues in this Cause.

Based upon the evidence of record and the applicable law, the Commission now finds:

1. Commission Jurisdiction and Notice. Proper notice in this Cause was given as required by law. Petitioner is a "public utility" within the definition thereof in the Public Service Commission Act, as amended, and as such, is subject to the jurisdiction of the Commission, in the manner and to the extent provided by law. Therefore, the Commission has jurisdiction over the Petitioner and the subject matter of this Cause.

2. Relief Requested. On March 15, 2010, I&M and Hartford City Paper LLC ("Hartford") executed a contract for interruptible power ("Hartford Contract") under Tariff CS-IRP2. Hix Affidavit at ¶ 3. The Hartford Contract includes Confidential Information relating to pricing, interruptibility, and terms negotiated at arms' length between I&M and Hartford. The Confidential Information also includes a fixed cost analysis.

I&M expects to enter into future contracts under Tariff CS-IRP2. Such future contracts will contain the same type of Confidential Information as the Hartford Contract previously approved in this proceeding. Hix Affidavit at ¶ 10. Absent a prior finding of confidentiality by the Commission, I&M will be required to file a petition for a new Cause and finding of confidentiality each and every time it executes an interruptible contract under this tariff. Because the nature of the Confidential Information in such future contracts is the same as the information presented herein, I&M seeks a preliminary finding from the Commission that the Confidential Information associated with future Tariff CS-IRP2 contracts is confidential and, therefore, exempt from public disclosure under Indiana Code §§ 8-1-2-29 and 5-14-3. I&M further requests the Commission permit the Confidential Information in future contracts to be safely submitted on light green paper to the Commission's designated representative; or for such confidential information to be submitted electronically to the Commission using the "Confidential" tab of the Electronic Filing System in lieu of submitting paper documents. I&M believes these Commission determinations would streamline the filing of future contracts and provide for more efficient handling of the Confidential Information.

I&M originally submitted the Hartford Contract for Commission approval pursuant to the 30-Day filing process. The OUCC subsequently filed an objection to the use of the 30-Day

filing process for such contracts. I&M's Motion to Amend Petition and Caption included a copy of I&M's Tariff CS-IRP2, I&M's 30-Day filing, the OUCC's objection and I&M's reply to the OUCC's objection. I&M's Motion to Amend Petition and Caption also included a copy of a letter from the Commission's General Counsel. That letter informed I&M that due to the controversy, I&M's 30-Day filing "will not be presented to the Commission for consideration under the 30-Day filing process. In order for this matter to be considered by the Commission, I&M may file a request for Commission review in a formally docketed proceeding." I&M therefore also requests a Commission determination regarding this dispute.

3. Petitioner's Case-In-Chief. In support of its Petition, Petitioner offered the Affidavits of William W. Hix and Scott LeBeau.

Mr. Hix, Senior Regulatory Consultant with I&M, explained that the Confidential Information includes contract pricing, interruptibility factors, and other terms, negotiated between I&M and Hartford, as well as a fixed cost analysis to demonstrate that the revenues I&M will receive will cover the full variable cost of serving the customer load, plus provide a contribution to the recovery of its fixed costs. Mr. Hix testified that the Confidential Information derives actual or potential independent economic value from being neither generally known to nor readily ascertainable by, persons who could obtain economic value from its disclosure or use. He explained that the Confidential Information would be useful to current and potential competitors of both I&M and Hartford and is not available or ascertainable by such entities through normal or proper means. Mr. Hix stated that disclosure of the Confidential Information would have a substantial and detrimental effect on I&M and Hartford and their respective customers. Mr. Hix also stated that I&M has taken steps to limit access to the Confidential Information to those employees who need to know the information. He stated that the files containing proprietary and confidential information are maintained separately from the general files, and access to those files is restricted.

Mr. Hix also addressed the Company's request for a streamlined process for handling confidential information in future contracts under Tariff CS-IRP2. Mr. Hix explained that it is likely that I&M will enter into similar types of contracts under Tariff CS-IRP2 in the future and such contracts will contain confidential information similar to the Confidential Information in this Cause. He stated that just as in this Cause, the similar type of proprietary and confidential information contained in future Tariff CS-IRP2 contracts would be (a) useful to third parties, such as competitors of the Tariff CS-IRP2 customers and I&M and other I&M customers; (b) not available or ascertainable by third parties through normal or proper means; and (c) the subject of reasonable efforts to maintain its secrecy. In particular, disclosure of the information would unfairly allow third parties to analyze the operations of I&M and Tariff CS-IRP2 customers, make pricing decisions, determine market entry or otherwise gain an unfair advantage in negotiations. He stated that disclosure of the information would cause substantial detriment to the Tariff CS-IRP2 customers and I&M (and ultimately I&M customers).

Mr. Hix explained that absent the adoption of a streamlined procedure, I&M will be required to initiate a new docket by filing a petition requesting protection of confidential information each and every time it executes an interruptible contract. He states that a Commission determination of confidentiality that would cover similar confidential information in and associated with future Tariff CS-IRP2 contracts would provide an efficient system for

processing future contracts. Mr. Hix stated the public version of the contracts would still be required to be filed under I&M's Tariff CS-IRP2 and submitted to the Commission via the 30-day filing procedures.

Mr. LeBeau, General Manager of Hartford, explained that Hartford sells roll stock paper products in extremely competitive regional and national markets and that public disclosure of the Confidential Information could harm Hartford by informing its competitors of specifics of Hartford's power supply arrangement. Mr. LeBeau testified that because energy costs are a major component of the production cost of a paper mill, knowledge of pricing information and Hartford's operational capabilities could benefit Hartford's competitors thereby affecting the competitiveness and profitability of Hartford's facility. He stated that Hartford entered into the contract terms with the expectation that certain terms would be confidential. He added that the public disclosure of the Confidential Information would reveal commercially sensitive information to Hartford's competitors and cause irreparable harm to Hartford. Mr. LeBeau stated that the Hartford Contract is treated as a confidential document within Hartford with access limited to management and employees who need to know the information. He stated that the Confidential Information is not available or ascertainable by competitors through normal or proper means.

4. OUCC's Testimony. Eric M. Hand, Utility Analyst, testified on behalf of the OUCC. Mr. Hand testified that although the OUCC does not object to I&M's request for confidential treatment of specific portions of its contract with Hartford, the OUCC is concerned about I&M's request for a preliminary finding of confidentiality for all future contracts filed pursuant to Tariff CS-IRP2. Mr. Hand stated that he understood that the process described by I&M is the process that has historically applied to Indiana utilities filing special contracts. However, Mr. Hand stated that the OUCC should be given an opportunity to review each contract before making its own determination as to whether to file an objection with the Commission regarding confidential information. He stated that the OUCC will continue to review such filings so as not to cause unreasonable delay. Mr. Hand concluded that the Commission should approve Petitioner's request for confidential treatment of the Hartford Contract, but should deny Petitioner's request to the extent that it seeks a preliminary finding of confidentiality for any other document that has not yet been presented to the Commission and/or the OUCC for review. In his supplemental testimony, Mr. Hand recommended that I&M's future filings specifically state whether the contract allows for emergency interruptions only, or whether the special contract would allow I&M to interrupt for other reasons, such as purely economic opportunities. Mr. Hand also stated that a more detailed Fixed Cost Analysis or workpapers in subsequent filings would be helpful in expediting the OUCC's review of future contracts under Tariff CS-IRP2. Mr. Hand indicated that I&M's experts had worked informally to help the OUCC understand the Fixed Cost Analysis.

5. Petitioner's Rebuttal Testimony. Petitioner offered rebuttal testimony from Marc E. Lewis, I&M's Vice President of External Relations, and William W. Hix, a Senior Regulatory Consultant in the Regulatory Services Department. Mr. Lewis responded to Mr. Hand's concerns about I&M's request for a preliminary finding of confidentiality for all future contracts filed pursuant to Tariff CS-IRP2. Mr. Lewis disagreed with the OUCC's contention that I&M's request is contrary to 170 IAC 1-1.1-4. He discussed each subsection of 170 IAC 1-1.1-4 and explained how I&M's request for a preliminary determination of confidentiality

complies with the Commission's rules regarding confidential or privileged information. Mr. Lewis also explained that I&M's proposal does not seek to shift the burden of proof to the Commission, the OUCC or other interested party. Mr. Lewis testified that if the Commission approves I&M's request for a preliminary determination in this Cause, the OUCC will continue to have an opportunity to review each contract and make objections regarding the confidential nature of the information if the OUCC chooses to do so. Mr. Lewis also distinguished the preliminary ruling which I&M seeks here from final determination of confidentiality. Mr. Lewis described prior instances in which the Commission has approved a streamlined process similar to that proposed by I&M for the submission of confidential information. Mr. Lewis explained that the streamlined process proposed by I&M would be administratively efficient and would offer benefits for both I&M and its customers.

Mr. Hix provided additional background information in support of Mr. Lewis' rebuttal testimony. Mr. Hix described how past Tariff CS-IRP filings were made and indicated that the type of information redacted in the Hartford Contract is the same type of information that was redacted in contracts submitted under the original Tariff CS-IRP pursuant to a preliminary determination of confidentiality entered in Cause No. 40201.

6. Discussion and Findings. Petitioner seeks a preliminary determination that certain information contained in and related to future contracts entered into under Tariff CS-IRP2 is confidential, proprietary, competitively sensitive and trade secret pursuant to the provisions of 170 IAC 1-1.1-4, and Indiana Code § 8-1-2-29 and 5-14-3-4. Petitioner also requests a Commission determination regarding the dispute about the submission of Tariff CS-IRP2 contracts to the Commission pursuant to the 30-Day filing process.

(a) Request for Preliminary Determination. Under Indiana Code § 8-1-2-29, all information submitted to the Commission is open to the public subject to Indiana Code § 5-14-3.

The Commission's rules authorize a utility to request confidential treatment of information. 170 IAC 1-1.1-4. Such requests are also contemplated by I&M's Tariff CS-IRP2. Petitioner's request implicates Ind. Code § 5-14-3-4(a)(4), which provides an exemption for trade secrets. Under Indiana law, "trade secret" is defined as follows:

"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.

Ind. Code § 24-2-3-2.

Petitioner's evidence demonstrates the confidential nature of the information which is the subject of Petitioner's request (herein referred to as the "Confidential Information"). The evidence shows that this type of Confidential Information meets the definition of "trade secret" in Ind. Code § 24-2-3-2, in that the information derives actual or potential independent economic

value from not being generally known to persons who can obtain economic value from its disclosure or use, and the Petitioner and its customers take steps to maintain the secrecy of the information. Petitioner's evidence indicates that disclosure of such Confidential Information would provide third parties, such as competitors of both I&M and other Tariff CS-IRP2 customers with an unfair advantage. The evidence shows that like the Hartford Contract, portions of which the Commission has previously found to contain confidential information, future contracts with other customers will necessarily include information and terms relating to pricing, interruptibility factors and terms negotiated at arms' length between I&M and the proposed Tariff CS-IRP2 customer. With regard to future filings, I&M will also prepare a fixed cost analysis to demonstrate that the revenues the Company will receive under the contract will cover the full variable cost of serving the customer load, plus provide a contribution to the recovery of I&M's fixed costs. While the name of the customer party to future contracts and the specific numbers in the above-referenced categories may differ from the inputs identified the Hartford Contract previously approved in this Cause, the confidential nature of the information will be the same. Therefore, we find that I&M has satisfied the burden of proof necessary to obtain a preliminary determination of confidentiality so as to enable I&M to provide unredacted Tariff CS-IRP2 contracts and associated fixed cost analysis to the Commission in a timely manner.

Our approval of Petitioner's request will allow I&M to securely transmit unredacted copies of future contracts and the associated fixed cost analysis to the Commission based upon the preliminary determination made in this Cause. As Mr. Lewis explained, the OUCC will continue to have an opportunity to review each future contract and make objections regarding the confidential nature of the information if the OUCC chooses to do so. I&M will retain the ultimate burden of proof concerning its filing. The Commission therefore finds that Petitioner's request for a preliminary finding of confidentiality for future contracts submitted pursuant to Tariff CS-IRP2 complies with 170 IAC 1-1.1-4 and should be granted.

Accordingly, Petitioner shall hand deliver the Confidential Information regarding future contracts under Tariff CS-IRP2 to the presiding administrative law judge or such other Commission representative as the Commission shall designate from time to time. The Confidential Information should be on light green paper, in a sealed envelope clearly marked confidential with Cause No. 43878 noted thereon, and will be treated as confidential on a preliminary basis and excepted from public disclosure in accordance with Indiana Code § 5-14-3. In lieu of submitting paper documents, Petitioner may also elect to submit the Confidential Information using the "Confidential" tab of the Commission's Electronic Filing System in lieu of submitting paper documents. Such electronic filings must use the date of the order in this Cause to indicate the date that confidentiality was granted. Documents submitted using the "Confidential" tab of the Electronic Filing System will be treated as confidential on a preliminary basis and excepted from public disclosure in accordance with Indiana Code § 5-14-3. Unless otherwise determined by the Presiding Officer, this docket will be left open to address any questions or concerns regarding such future matters to the extent they arise from time to time.

(b) OUCC Recommendations Regarding Future Filings. As noted above, in his supplemental testimony, Mr. Hand included two general recommendations regarding I&M's future filings. By its post-hearing filing, I&M informed the Presiding Officer that I&M, in its

future filings, is willing to (a) specifically state whether the contract allows for emergency interruptions only, or whether the special contract would allow I&M to interrupt for other reasons, such as purely economic opportunities; and (b) work with the OUCC to satisfy Mr. Hand's request that more detail regarding the Fixed Cost Analysis or workpapers be provided in the future. The Commission appreciates I&M's efforts in this regard, and orders it to make such efforts in future filings.

(c) 30-Day Filing Process. This matter concerns a 30-Day filing submitted by I&M pursuant to its Tariff CS-IRP2. See I&M, IURC Tariff No. 15, First Revised Sheet No. 30. Tariff CS-IRP2 was issued pursuant to the Commission's March 4, 2009 Order in Cause No. 43306. This tariff authorizes I&M to offer eligible customers the opportunity to receive interruptible service pursuant to a contract that complies with the minimum requirements set forth in the tariff.

With regard to the 30-Day filing process, Tariff CS-IRP2 provides as follows:

Upon receipt of a request from the Customer for interruptible service, the Company will provide the Customer with a written offer containing the rates and related terms and conditions of service under which such service will be provided by the Company. **If the parties reach an agreement based upon the offer provided to the Customer by the Company, such written contract will be filed with the Commission under the 30-day filing procedures.** The contract shall provide full disclosure of all rates, terms and conditions of service under this tariff, and any and all agreements related thereto, subject to the designation of the terms and conditions of the contract as confidential, as set forth herein. (Emphasis added).

As noted above, the 30-Day filing procedures are set forth at 170 IAC 1-6. In addition to the above referenced language regarding the protection of confidential information, Tariff CS-IRP2 (Original Sheet No. 30.1) further provides as follows:

All terms and conditions of any written contract under this schedule shall be protected from disclosure as confidential, proprietary trade secrets pursuant to Indiana Code 5-14-3 if:

- a. either the Customer or the Company requests a Commission determination of confidentiality, and
- b. the Commission finds that the party requesting such protection has shown good cause, by affidavit, for protecting the terms and conditions of the contract.

With respect to the terms for interruptible service, Tariff CS-IRP2 was modified from its predecessor, Tariff CS-IRP, which was withdrawn following issuance of the Commission's March 4, 2009 Order in Cause No. 43306 (except for the existing load of customers receiving service). IURC Tariff No. 15, Original Sheet No. 27. The provisions of Tariff CS-IRP2 were addressed in testimony and identified in the Settlement Agreement approved in Cause No. 43306. Although the tariff was presented for review in Cause No. 43306, the OUCC did not

raise any objections to the provisions regarding the 30-Day filing process or contract confidentiality in Cause No. 43306.

Under the Commission's 30-day filing rule, Sections 3(6) and (7) expressly recognize that the 30-Day filing process may be used for filings where the Commission has already approved or accepted the use of the 30-Day filing process for the change or otherwise ordered the filing to be made under this rule. As explained above, Tariff CS-IRP2 has been approved by the Commission and provides that the contracts entered into thereunder shall be submitted to the Commission using the 30-Day filing process. We find that the filing of redacted Tariff CS-IRP2 contracts via the 30-Day filing process is consistent with I&M's previously approved tariff and is appropriate under the Commission's 30-Day filing process. Any such filing is subject to objections as a 30-Day filing under 170 IAC 1-6-7. We further find that I&M may file redacted copies of future contracts reached under Tariff CS-IRP2 under our 30-Day filing process.

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

1. Petitioner's request for a preliminary determination that certain information contained in or related to future contracts reached under Petitioner's Tariff CS-IRP2 is entitled to confidential treatment and therefore exempt from public disclosure pursuant to Indiana Code Sections 8-1-2-29 and 5-14-3 is granted.

2. Petitioner shall be and hereby is authorized to use the Commission's Thirty-Day Administrative Filing Procedures and Guidelines process set forth at 170 IAC 1-6 for the submission of redacted contracts entered into under Petitioner's Tariff CS-IRP2, as set forth herein. When Petitioner makes such a filing, Petitioner shall submit confidential information related to the contracts to the Commission and OUCC, as set forth herein.

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

ATTERHOLT, LANDIS, MAYS AND ZIEGNER CONCUR:

APPROVED: FEB 02 2011

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



**Brenda A. Howe
Secretary to the Commission**