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STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF DUKE ENERGY INDIANA, INC.)
FOR A DETERMINATION THAT CERTAIN)
INFORMATION CONTAINED IN THE 2011)
DUKE ENERGY INDIANA INTEGRATED)
RESOURCE PLAN IS CONFIDENTIAL)
PURSUANT TO IND. CODE § 8-1-2-29, IND.)
CODE § 5-14-3, AND 170 IAC 4-7-3(f).)

CAUSE NO. 44110

APPROVED:

AUG 29 2012

ORDER OF THE COMMISSION

Presiding Officers:

Kari A.E. Bennett, Commissioner

Gregory R. Ellis, Administrative Law Judge

On November 1, 2011, Duke Energy Indiana ("Duke Energy Indiana" or "Petitioner") pursuant to 170 IAC 4-7-3(f), filed its Petition ("Petition") in this Cause seeking a determination by the Commission that certain information (the "Confidential Information") contained in its biennial 2011 Integrated Resource Plan ("IRP"), including Critical Energy Infrastructure Information ("CEII"), is confidential, proprietary, competitively sensitive, and/or trade secret, and therefore exempt from public disclosure under Ind. Code § 8-1-2-29 and Ind. Code ch. 5-14-3. Petitioner filed along with its Petition a redacted public version of its IRP and nonredacted parts of its IRP for which it seeks confidential treatment. Also accompanying Duke Energy Indiana's Petition were six sworn affidavits which included: the affidavit of Robert McMurry; the affidavit of Edward F. Kirschner; the affidavit of James W. Fitzgibbons; the affidavit of Robert W. Fleck; the affidavit of Paul Getman; and the affidavit of DeLome D. Fair (collectively, "Affidavits"), which discussed the confidential nature of the Confidential Information. The claimed confidential information, in accordance with 170 IAC 4-7-3(f), has been treated by the Commission as confidential pending a determination as to whether the information is entitled to confidential treatment in accordance with Ind. Code § 8-1-2-29 and Ind. Code ch. 5-14-3.

The Commission issued a Docket Entry on April 23, 2012, instructing Petitioner to submit either revisions to the redacted public version of its IRP or additional testimony demonstrating why certain data was entitled to confidential treatment. On May 29, 2012, Petitioner filed a revised confidential version of its IRP and a revised public version of its IRP.

Based upon the Petition and the Affidavit filed herein, a review of the information filed as confidential, and application of relevant law, the Commission now finds:

1. Commission Jurisdiction. Petitioner is a public utility within the meaning of the Public Service Commission Act as amended, Ind. Code ch. 8-1-2 and as such, is subject to the jurisdiction of the Commission, in the manner and to the extent provided by law. Accordingly, the Commission has jurisdiction over Petitioner and the subject matter of this proceeding.

2. **Petitioner's Characteristics.** Duke Energy Indiana is a public utility corporation organized and existing under the laws of the State of Indiana and having its principal office at 1000 East Main Street, Plainfield, Indiana 46168. Duke Energy Indiana is engaged in rendering electric public utility service in the State of Indiana and owns, operates, manages and controls plants, properties and equipment used and useful for the production, transmission, distribution and furnishing of electric utility service to the public within the State of Indiana. Duke Energy Indiana is authorized by the Commission to provide electric utility service to the public in 69 counties in the central, north central and southern parts of Indiana. Duke Energy Indiana provides electric utility service to over 780,000 residential, commercial, industrial, wholesale and other customers. Petitioner also sells electric energy for resale to municipal utilities, Wabash Valley Power Association, Inc., Indiana Municipal Power Agency, and to other public utilities, which in turn supply electric utility service to numerous customers in areas not served directly by Duke Energy Indiana. Petitioner is a second-tier wholly-owned subsidiary of Duke Energy Corporation.

3. **Relief Requested.** On November 1, 2011, Duke Energy Indiana filed its Petition initiating this Cause and pursuant to 170 IAC 4-7, concurrently submitted its IRP to the Commission with designated portions redacted therefrom. Petitioner requests a determination by the Commission, pursuant to 170 IAC 1-1.1-4 and 170 IAC 4-7-3(f), that designated portions of the IRP filed in this Cause contain confidential, proprietary and/or trade secret information and, therefore, are exempt from public disclosure under Ind. Code § 8-1-2-29 and Ind. Code ch. 5-14-3.

4. **Petitioner's Evidence.** Duke Energy Indiana's Petition indicated that it considers some of the information required by the Commission's IRP Rules to be proprietary, confidential, and trade secrets, as that term is used in Ind. Code ch. 5-14-3, and as such should be protected from and not subject to disclosure. The redacted public version of the Duke Energy Indiana IRP does not include the Confidential Information.

The affidavit of Mr. Robert A. McMurry was submitted along with the Petition in support of certain information being determined to be confidential and exempt from disclosure. Mr. McMurry is employed by Duke Energy Business Services LLC, which is a service company affiliate of Duke Energy Indiana. Mr. McMurry indicated that Duke Energy Indiana requests confidential treatment, including but not limited to certain cost estimates, spreadsheet programs, performance data, Present Value Revenue Requirement, capital and operating costs, which are provided in the IRP at Appendix A, pages 141 through 148, and Appendix D, pages 243, 245, and 246. He explained that Duke Energy Indiana used certain confidential and proprietary information and data in developing its IRP and that some of this data is the confidential information of third parties who take reasonable steps to protect their information. He also indicated that Petitioner had executed confidentiality agreements with the third parties. Mr. McMurry stated some of the data is the confidential information of Duke Energy Indiana. He indicated in his affidavit that the Confidential Information provides actual or potential independent economic value for Duke Energy Indiana and its customers and should be treated as confidential. He also indicated that the information could be used to the detriment of Petitioner and its customers if it is not afforded protection.

Duke Energy Indiana's Petition indicated that some of the information contained in the IRP has been supplied by third parties that consider their information to be confidential and proprietary. Petitioner included affidavits of third parties supporting Duke Energy Indiana's request for confidential treatment of certain information. The affidavit of Mr. James W. Fitzgibbons, Chief Financial Officer of Ventyx Energy, Inc., indicated that Duke Energy Indiana had executed an agreement with Ventyx wherein its proprietary software models and other information would be kept confidential. Mr. Fitzgibbons also indicated that Ventyx derives actual economic value from the licensing and protection of its state-of-the-art software models and would be damaged if the software models were made available to the public. The affidavit of Mr. Robert W. Fleck, Vice President of Gas and Power Consulting, Americas for Wood Mackenzie Inc., indicated Duke Energy Indiana had an agreement with Wood Mackenzie that certain information provided by Wood Mackenzie including forecasts of wholesale market prices, emission allowance prices, capacity prices, and fuel prices, which would be kept confidential. Mr. Fleck's affidavit states that Wood Mackenzie derives actual economic value from the sale and protection of such information and such value would be damaged if the information were made available to the public. The affidavit of Mr. Paul Getman, Executive Director of Moody's Analytics, Inc., indicated that Moody's provided certain information and economic forecasts to Duke Energy Indiana that were used to develop the Duke Energy Indiana load forecast referenced on Page 153 of Appendix B and that this information was provided subject to an agreement to protect Moody's intellectual property rights in the information. Mr. Getman further indicated that Moody's derives actual economic value from the sale and protection of its information and such value would be damaged if the information were redistributed. The affidavit of Mr. DeLome D. Fair, Chief Engineer for Gasification and IGCC Technology of General Electric Company ("GE"), indicated that GE has provided Duke Energy Indiana with certain proprietary cost and performance data related to Duke Energy Indiana's Edwardsport Integrated Gasification Combined Cycle power plant project being constructed (referenced in Appendix A, page 145) and that an agreement was executed that would keep such information confidential. He stated that GE derives actual economic value from the licensing and protection of this information and such value would be damaged if the information were made available to the public.

Duke Energy Indiana's Petition stated the IRP contains certain information previously found by the Federal Energy Regulatory Commission ("FERC") to be Critical Energy Infrastructure Information ("CEII") and that the Commission has recognized as being eligible for exemption from public disclosure pursuant to Ind. Code § 5-14-3-4. The Petition specifically noted 170 IAC 4-7-4(10), (11), (12), (13), and (14) specify certain information to be included in an IRP that is already reported to FERC on Form 715. The affidavit of Edward F. Kirschner, Director of Transmission Planning for Duke Energy Business Services LLC, stated FERC has determined that the entire Form 715 is CEII and has established procedures to protect and limit the availability of such information. Mr. Kirschner indicated that Petitioner takes all reasonable steps to protect this information, including only sharing the information internally on a need to know basis. Duke Energy Indiana filed a public version and a confidential version of its FERC Form 715 with the Commission in CD format on May 29, 2012.

Duke Energy Indiana also indicated that it considered the information listed on page 237-1 of Appendix C to be a trade secret and confidential information. Petitioner identified the

information as avoided costs used in screening the Core Plus Energy Efficiency programs which the Commission previously determined to be confidential in Cause No. 43955.

Duke Energy Indiana's Petition indicated that it has maintained the confidentiality of the Confidential Information by taking all reasonable steps in order to protect the Confidential Information. Duke Energy Indiana further indicated that the Confidential Information provides actual or potential independent economic value for Duke Energy Indiana, its suppliers and its customers and should be treated as confidential.

5. Discussion and Findings. Under Ind. Code § 8-1-2-29, all information submitted to the Commission is open to the public, subject to the provisions of the Indiana Access to Public Records Act ("APRA") found at Ind. Code ch. 5-14-3. The APRA sets out a broad policy in favor of disclosure of information and generally mandates that government agencies make public records available for inspection and copying. The purpose behind Indiana's APRA is codified at Ind. Code § 5-14-3-1, which states, in part, as follows:

A fundamental philosophy of the American constitutional form of representative government is that government 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.

The APRA also provides mandatory and discretionary exemptions from public disclosure for certain categories of information. See Ind. Code § 5-14-3-4. The Indiana Court of Appeals, in interpreting this statute, stated "liberal construction of the statute requires narrow construction of its exceptions." *Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995).

We, therefore, must balance the purpose of the APRA against the protections provided to confidential information. Our analysis begins with the rules pertaining to IRP filing requirements, which authorize a utility to request confidential treatment of certain information submitted as part of the IRP process. See 170 IAC 4-7-3(f).

FERC has determined that the portions of its Form 715 containing CEII should have limited public availability. See 18 C.F.R. § 141.300 and FERC Order No. 630, Final Rule on Critical Energy Infrastructure Information, 102 FERC ¶ 61, 190 (2003). FERC Form 715, Part 1 (Identification and Certification) contains basic contact information which should be filed publicly. Similarly, Parts 4 and 5 contain generic criteria used in evaluating and testing petitioner's system and as such is not generally CEII and therefore is subject to public disclosure. See 18 C.F.R. § 388.112 (2010). The remaining portions of FERC Form 715 contain CEII and are not subject to public disclosure. Ind. Code § 5-14-3-4(a)(3) requires the Commission to keep confidential those public records which are required to be kept confidential under federal law. Therefore, based upon the evidence submitted in this Cause, the Commission finds that portions of Petitioner's FERC Form 715, included in Appendix G of Duke Energy Indiana's IRP, that are consistent with the revised version of the IRP filed on May 29, 2012, qualify for exemption from

public disclosure pursuant to 170 IAC 4-7-3(f) and Ind. Code § 5-14-3-4(a)(3), and are therefore exempt from the public access requirements of Ind. Code ch. 5-14-3 and Ind. Code § 8-1-2-29.

Documents containing trade secret information are exempt from public disclosure under Ind. Code § 5-14-3-4(a)(4). Whether confidential information is a “trade secret” under Indiana law is determined by the Uniform Trade Secrets Act, which defines trade secret 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, form 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. Indiana courts have interpreted this definition to mean that:

[A] protectable trade secret has four characteristics: (1) information, (2) which derives independent economic value, (3) is not generally known, or readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and (4) the subject of efforts reasonable under the circumstances to maintain its secrecy.

Hydraulic Exchange and Repair, Inc. v. KM Specialty Pumps, Inc., 690 N.E.2d 782, 785-786 (Ind. Ct. App. 1998).

Petitioner’s evidence demonstrates that the following portions of its IRP qualify as confidential, proprietary, competitively sensitive and/or containing trade secret information: (1) Revised Appendix A pages 142 through 145; pages 146-1 through 146-6; and page 148, (2) Revised Appendix B pages 153-1 through 153-30; and a CD-Rom containing the confidential hourly load forecast datasets referenced on page 153, (3) Revised Appendix C page 237-1, (4) Revised Appendix D pages 244 through 245; and 246-1, and (5) portions of Revised Appendix G containing Parts 2, 3 and 6 of FERC Form 715. This information has independent economic value from not being generally known or readily ascertainable by proper means and the Petitioner takes reasonable steps to maintain the secrecy of the information. Disclosure of such information would cause harm to Petitioner.

Therefore, based upon the evidence submitted in this Cause, the Commission finds that this information is entitled to confidential treatment and qualifies for an exemption from public disclosure pursuant to 170 IAC 4-7-3(f) and Ind. Code § 5-14-3-4(a)(4), and is therefore exempt from the public access requirements of Ind. Code ch. 5-14-3 and Ind. Code § 8-1-2-29.

6. Method of Protection. In order to protect the confidentiality of the documents designated as confidential by this Order, we find that the following procedures are reasonably necessary and consistent with past Commission practice, and should be implemented consistent with Ind. Code ch. 5-14-3:

- a. The confidential information should be made available solely for inspection by members or employees of the Commission as necessary to review and decide the issues presented by Duke Energy Indiana's IRP.
- b. That the information which is submitted to the Commission be specifically secured and under the control of a responsible person.
- c. Any Commission member or employee who receives access to the confidential information should be under an obligation to secure and maintain exclusive control of the information, and should refrain from and prohibit any direct or indirect public disclosure of the information in any form.
- d. Any documents, materials or reports prepared by Commission members or employees should not have the effect of disclosing the confidential information.

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

1. Those portions of Duke Energy Indiana's revised 2011 Integrated Resource Plan submitted under seal which are described in Finding Paragraph No. 4 and found to be entitled to confidential treatment in Finding Paragraph No. 5 of this Order shall be exempt from disclosure under Ind. Code § 8-1-2-29 and Ind. Code ch. 5-14-3.
2. The Commission and its employees shall follow the procedures set forth in Finding Paragraph No. 6 of this Order when handling the materials described in Ordering Paragraph No. 1.
3. This order shall be effective on and after the date of its approval.

ATTERHOLT, BENNETT, LANDIS, MAYS AND ZIEGNER CONCUR:

APPROVED: AUG 29 2012

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



Brenda Howe
Secretary to the Commission