

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF THE CITY OF FORT )  
 WAYNE, INDIANA FOR APPROVAL TO )  
 ADJUST ITS RATES AND CHARGES AND ) CAUSE NO. 44162  
 ISSUE BONDS TO PROVIDE FUNDS TO )  
 DEFEASE EXISTING INDEBTEDNESS AND ) APPROVED:  
 FINANCING IMPROVEMENTS TO ITS ) DEC 27 2012  
 WATERWORKS )

ORDER ON RECONSIDERATION

**Presiding Officers:**  
**Carolene Mays, Commissioner**  
**David E. Ziegner, Commissioner**  
**Aaron A. Schmoll, Senior Administrative Law Judge**

On October 17, 2012, the Commission issued its Order in this Cause (“October 17 Order”). On November 7, 2012, City of Fort Wayne (“City”) filed its *Verified Motion to Correct Error; Petition for Reconsideration and Rehearing; and/or Motion to Stay Sole Issue of Confidentiality* (“Petition”). Also on November 7, 2012, the City filed its Notice of Appeal with the Indiana Court of Appeals (“the Court”). General Motors LLC (“GM”) filed its Response to the Petition on November 21, 2012, and the City filed its Reply on November 29, 2012. On December 7, 2012, the *Notice of Completion of Clerk’s Record* was filed with the Court, which transferred jurisdiction over the case to the Court. On December 12, 2012, the Court granted a stay of the appeal to remand jurisdiction to the Commission in order to rule on the Petition.

Based upon the applicable law and the evidence herein, this Commission now finds:

Reconsideration of Paragraph 8 of our October 17 Order.

Our October 17 Order states as follows with respect to the issue of confidentiality, which is the sole issue from which the City seeks relief:

**8. Confidentiality.** On July 25, 2012, General Motors filed its *Motion for a Protective Order and Finding of Confidential Information* (“Motion”). In its Motion, General Motors indicated that certain usage data related to water consumption was trade secret information, and therefore should not be disclosed by Petitioner. General Motors included with its *Motion* the Affidavit of David Shenefield, Site Utility Manager for General Motors. On July 27, 2012, Petitioner filed its *Response*. At the July 31, 2012 hearing, the parties presented additional argument on the *Motion* and the Presiding Officers took the matter under advisement. Following the hearing, on August 1, 2012, General Motors filed its written *Reply* to Petitioner’s *Response*, and also filed a written objection to Petitioner’s Late-Filed Exhibits, which were identified at the hearing but not offered at that time.

On August 10, 2012, Petitioner filed its *Supplemental Response* to the *Motion*. On August 14, 2012, General Motors filed its *Motion to Strike*, to which Petitioner filed its *Response* on August 21, 2012. Finally, on August 28, 2012, General Motors filed its *Reply*.

This Commission has previously found that customer-specific usage data may constitute trade secret information, and thus, be subject to confidential treatment pursuant to Ind. Code § 5-14-3-4 and Ind. Code § 24-2-3-2. *See, e.g., Northern Indiana Pub. Serv. Co.*, Cause No. 43969, at 72 (IURC, Dec. 21, 2011). As General Motors stated at the hearing, usage information related to the inputs into its industrial process can provide important information related to its business operations, which are not generally known and which provide value to General Motors in having them remain confidential. The information at issue in this case, like in Cause No. 43969, is specific customer utility usage data, and Mr. Shenefield adequately set forth the basis for confidential treatment of the GM-specific water usage.

However, Petitioner has previously disclosed such usage information for prior years, and that information is no longer subject to confidential treatment due to its prior public disclosure. Petitioner asserts that its prior bond issuances require that it continue to disclose the usage and revenue information of its largest customers to its bondholders as an ongoing condition of the bond issuance. However, our review of the Official Statements Petitioner offered at the hearing show that only the identity of the largest customers is required to be disclosed. *See, e.g., Pet. Ex. 12 at G-3* (“Appendix B—Largest Waterworks Customers”). Thus, disclosure of customer-specific information is not required by the continuing disclosure requirements of the underlying bonds. That Petitioner improperly released this information in the past provides no justification for continued disclosure of the confidential information.

Accordingly, we grant General Motor’s request for a protective order on a going forward basis.<sup>1</sup>

<sup>1</sup> At the hearing, Petitioner stated that its sewer bonds contain similar disclosure provisions. Although not before us, there is no justification for disparate treatment of the confidential information regardless of whether the bonds are issued on behalf of the water or sewer utility. Given that our protective order is directed to the parties, Fort Wayne should also treat General Motors customer specific usage sewer information (which is based on water usage) as confidential on a going forward basis.

October 17 Order at 10-11.

The City seeks to have the Commission set aside its finding that GM’s usage data is trade secret, and the Commission’s grant of a protective order to prevent the parties from disclosing the usage data on a going forward basis. We address each issue in turn.

The October 17 Order found that GM's usage data, on a going forward basis, is trade secret and exempt from disclosure pursuant to Ind. Code §§ 5-14-3-4(a) and 24-2-3-2. Pursuant to the Commission's procedural rules, a finding of confidentiality dictates how the Commission will treat confidential information. The October 17 Order set forth the basis for finding the GM usage information confidential, and we affirm that finding on reconsideration and the Commission will treat the information as confidential if submitted under seal.

However, the issue in this case is not how the Commission will treat GM's usage information, but how the City should treat the information. The City, as a "public agency" under Ind. Code § 5-14-3-2(m), is also subject to Ind. Code ch. 5-14-3 ("the Access to Public Records Act"). As such, the City is required to protect trade secret information from disclosure, and any "public agency" employee who discloses information that is exempt from disclosure under Ind. Code § 5-14-3-4(a) is subject to criminal penalties under Ind. Code § 5-14-3-10. Further, a person who was denied access to public records may challenge the denial of a public records request in trial court, and the public agency that denied access has the burden of demonstrating the confidentiality of the record, and subject to attorney fees and costs if the denial of access to the record was improper. Accordingly, the Access to Public Records Act creates an obligation for every public agency to determine whether a given record is confidential or not. While the Commission has made its determination that GM's usage data to be trade secret, ultimately the City must make its own determination with respect to that information in order to comply with the Access to Public Records Act.

With this background, we turn to the main dispute between the parties: the Commission's grant of a protective order. The Commission's procedural rules provide for a protective order to "prevent or limit discovery of trade secret . . . information." 170 IAC 1-1.1-4(f). However, the information for which GM seeks to restrict disclosure is not information provided in response to discovery, but is the information that the City will provide to bondholders and other entities in obtaining its long term financing.<sup>1</sup> Accordingly, we look to the Access to Public Records Act for guidance.

Even if the City treated the usage information as trade secret, Section 4 of the Access to Public Records Act states that records subject to Section 4(a) "are excepted from section 3 of this chapter and 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.*" (emphasis added). The Commission generally follows the Indiana Trial Rules; however, the Commission is not a "court" that can order disclosure of records excepted from disclosure.

Further, while we tend to agree with GM that nondisclosure agreements between the City and bondholders could provide a reasonable resolution to address the disclosure of confidential

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<sup>1</sup> The October 17 Order contemplated that specific usage information was not required to be disclosed. However, having considered the Petition and other post-Order filings, the Continuing Disclosure Agreements do address disclosure of customer-specific usage data. We make no finding as to whether customer-specific usage information constitutes "operating data" under 17 CFR § 240.15c2-12, or whether changes in reporting of customer-specific data are "material."

information,<sup>2</sup> the Access to Public Records act did not provide the Commission the authority to order disclosure of confidential information to third parties, as discussed above.

Finally, although the Commission has jurisdiction over the City and the parties to this Cause, the Commission does not have jurisdiction over the bondholders to whom the usage data would be provided. This fact weakens the protection any Commission-granted protective order regarding the data. Given our foregoing discussion, we reconsider our grant of a protective order as set forth in our October 17, 2012 Order, and deny GM's motion for protective order. Although the Commission declines to grant GM a remedy with respect to this issue, we note that Ind. Code ch. 24-2-3 may provide an avenue for GM to obtain the relief sought here from a trial court of competent jurisdiction.

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

1. The Commission's October 17, 2012 Order is modified as set forth herein.
2. For purposes of the Commission, GM usage data, on a going forward basis, is determined to be confidential and exempt from public access and disclosure by the Commission pursuant to Ind. Code § 24-2-3-2 and § 5-14-3-4.
3. GM's Motion for Protective Order is denied.
4. This Order shall be effective on and after the date of its approval.

**ATTERHOLT, BENNETT, LANDIS, MAYS AND ZIEGNER CONCUR:**

**APPROVED:      DEC 27 2012**

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

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

<sup>2</sup> Indiana Code 5-14-3-6.5 provides that a "public agency that receives a confidential public record from another public agency shall maintain the confidentiality of the public record." Accordingly, the City could provide information to the Indiana Finance Authority under seal without disclosing the information.