

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF DUKE ENERGY INDIANA, INC.)
FOR A DETERMINATION THAT CERTAIN)
INFORMATION CONTAINED IN THE 2015)
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. 44698

APPROVED: FEB 24 2016

[Handwritten signatures and initials in blue ink, including "ARW" and "JAH"]

ORDER OF THE COMMISSION

Presiding Officers:

James F. Huston, Commissioner

Gregory R. Ellis, Administrative Law Judge

On November 2, 2015, Duke Energy Indiana, LLC (“Duke Energy Indiana“ or “Petitioner“) pursuant to 170 IAC 1-1.1-4 and 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 2015 Integrated Resource Plan (“IRP“) 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. 5-14-3.¹ Petitioner filed along with its Petition a redacted public version of its IRP (Volumes 1 and 2) and the nonredacted parts of its IRP for which it seeks confidential treatment. Also accompanying Duke Energy Indiana’s Petition were four sworn affidavits which included: the affidavit of Scott Park of Duke Energy Progress, Inc.; the affidavit of Eric J. Hughes, Vice President and Product Manager, System Optimizer; Planning and Risk with ABB Enterprise Software, Inc. (“ABB“); the affidavit of Karl Zandi, Managing Director of Moody’s Analytics, Inc. (“Moody’s“); and the affidavit of Seth Schwartz, President of Energy Ventures Analysis, Inc. (collectively, “Affidavits“), which discussed the confidential nature of the Confidential Information. The Presiding Officers issued a docket entry on January 15, 2016, instructing Petitioner to submit revisions to the confidential and public versions of its IRP containing information that it had omitted or provide additional testimony demonstrating why certain confidential information should not be submitted to the Commission. On January 22, 2016, Petitioner filed its response to the docket entry, which supplemented the Affidavits and provided additional information about the confidential nature of certain information contained in the IRP. On January 26, 2016, Petitioner filed a revised confidential version of its IRP. 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.

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 On January 6, 2016, Duke Energy Indiana filed its *Notice Of Change Of Legal Name* with the Commission. The legal Name of Duke Energy Indiana, Inc. was changed to Duke Energy Indiana, LLC.

1. **Commission Jurisdiction.** Ind. Code § 8-1-8.5-3 requires a public utility to submit an IRP to the Commission. Petitioner is a public utility as defined by Ind. Code § 8-1-2-1 and Ind. Code § 8-1-8.5-1. Under Ind. Code § 8-1-2-29 and 170 IAC 4-7-3(f), the Commission has jurisdiction to determine confidentiality of information to be submitted by Petitioner. Therefore, the Commission has jurisdiction over Petitioner and the subject matter of this Cause.

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.

3. **Relief Requested.** In its Petition, Duke Energy Indiana 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 indicates 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 2015 Duke Energy Indiana IRP does not include the Confidential Information. Duke Energy has provided, under seal, to the Commission the non-redacted information that it considers confidential. The following items were submitted under seal: Figure A-1 No CO₂ (Page 164); Figure A-1 with CO₂ (Page 165); Figure A-2 No CO₂ (Page 166); Figure A-2 with CO₂ (Page 167); Figure A-3 (Page 168); Figure A-4 (No CO₂) (Page 169); Figure A-4 (with CO₂) (Page 170); Figure A-5 (System) (Page 173); Figure A-5 (New CCs) (Page 174); Figure A-5 (New CT) (Page 175); Figure D-1, NO_x and SO₂ Allowance Price Forecasts (Page 233), data inputs for fuel costs and annual and variable O&M costs referenced on page 171 of Appendix A, Load Forecast Dataset referenced on page 181 in appendix B, avoided costs used in screening energy efficiency and demand response that were referenced on page 227 in Appendix C, and the annual avoided costs referenced on page 234 in Appendix D. Duke Energy Indiana's Petition indicated that it has taken all reasonable steps to maintain the confidentiality of the Confidential Information contained in the IRP.

A. **The Affidavit of Scott Park.** Mr. Park's affidavit was submitted along with the Petition in support of certain information being determined to be confidential and exempt from disclosure. He explained that in developing the 2015 IRP, Duke Energy Indiana used certain confidential and proprietary information and data. He stated some of this data is the confidential information of third parties who take reasonable steps to protect their confidential information, such as only releasing such information subject to confidentiality agreements and some of the data is the confidential information of Duke Energy. He explained that in developing the 2015 IRP, Duke Energy Indiana used certain cost estimates, spreadsheet programs, performance data, capital costs, and operating costs developed internally by Duke Energy Indiana engineers.

Mr. Park explained that Duke Energy Indiana used System Optimizer and Planning and Risk models developed by ABB in developing the 2015 IRP. These models are subject to a licensing

agreement with ABB, which contains confidentiality provisions. He also explained that Duke Energy Indiana used data developed by Moody's, which Moody's considers to be confidential and proprietary. Duke Energy Indiana agreed not to publish or make available to others such information without Moody's prior written consent. He further noted that Duke Energy Indiana used data provided by Energy Ventures Analysis, Inc. ("Energy Ventures") such as forecasts of wholesale power market prices, emission allowance prices, capacity additions, and fuel prices in developing the 2015 IRP.

Mr. Park indicated the capital and operating costs values of the chosen plan in the IRP should be treated as confidential. If equipment vendors knew these values, such equipment vendors would be able to discern the relative differences in cost between various equipment and technologies and be able to price their equipment or technology accordingly, to the detriment of Duke Energy Indiana, and its customers. He also noted the avoided costs and the average \$/MWh of the chosen plan in the IRP should be treated as confidential. He explained that if companies wishing to sell power to Duke Energy Indiana knew these costs, such potential sellers would be able to price their power accordingly, to the detriment of Duke Energy Indiana, and its customers.

Mr. Park described the other data for which Duke Energy Indiana seeks confidential treatment are unit cost and unit performance information contained in the System Optimizer and Planning and Risk input and output files. If fuel suppliers knew Duke Energy Indiana's forecasted fuel prices, by station, such fuel suppliers would have an advantage in negotiating future fuel prices, to the detriment of Duke Energy Indiana, and its customers. If emission allowance brokers or emissions equipment vendors knew Duke Energy Indiana's forecasted emissions, by station, such brokers or vendors would have an advantage in negotiating future emission allowance or emissions control equipment sales, to the detriment of Duke Energy Indiana, and its customers. Furthermore, if competitors of Duke Energy Indiana knew of such forecasts, they would have an advantage in competing for new business against Duke Energy Indiana.

Mr. Park concluded the Confidential Information provides actual or potential independent economic value for Duke Energy Indiana and its customers and should be treated as confidential. He indicated that Duke Energy Indiana takes all reasonable steps to protect the Confidential Information, including, but not limited to, only sharing such information internally on a need to know basis, and not releasing such information outside of Duke Energy without appropriate confidentiality protection.

B. The Affidavit of Eric J. Hughes. Mr. Hughes indicated that ABB provides proprietary software to Duke Energy Shared Services, Inc. (n/k/a Duke Energy Business Services, LLC) pursuant to a software license and agreement dated December 15, 2006, whereby Duke Energy Shared Services, Inc. and its subsidiaries would keep such software models and other information confidential. He noted that steps have been taken to protect the confidentiality of such information. Mr. Hughes also indicated that ABB derives actual economic value from the licensing and protection of its software models and would be damaged if they were made available to the public.

C. The Affidavit of Karl Zandi. Mr. Zandi indicated that Moody's provided certain information and economic forecasts to Duke Energy Corporation pursuant to an agreement whereby Duke Energy Corporation and its subsidiaries could use such information in the ordinary course of its business subject to the terms and conditions of the agreement. He stated the

information has not been redistributed, produced, published or otherwise furnished to third parties without similar agreements or other appropriate means to protect the intellectual property rights of Moody's in the information. Mr. Zandi further indicated that Moody's derives actual economic value from the sale and protection of its intellectual property rights in the information.

D. The Affidavit of Seth Schwartz. Mr. Schwartz indicated that Energy Ventures provided certain information including power market issues, the cost and performance of new capacity, load growth assumptions, natural gas prices, forecasts of wholesale market prices, emission allowance prices, capacity additions, and fuel prices pursuant to an agreement whereby Duke Energy Indiana would keep such information confidential. Mr. Schwartz noted that steps have been taken to protect the confidentiality of such information. His affidavit stated Energy Ventures 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.

E. Duke Energy Indiana's Response to Docket Entry Questions. Duke Energy Indiana's response to the Presiding Officers' docket entry questions indicated pages 173-175 that were submitted under seal and labeled as Figure A-5 were supported by the affidavits of Mr. Hughes, Mr. Zandi, and Mr. Schwartz. Those three pages are outputs of Duke Energy Indiana's modeling for its IRP. They were derived using the software licensed by Mr. Hughes's company (ABB) and included inputs Duke Energy Indiana obtained from Mr. Zandi's (load forecasting information from Moody's) and Mr. Schwartz's (fundamental forecast information from Energy Ventures) companies. In addition, Mr. Schwartz's affidavit supports the confidentiality of the information found on the page 233 and labeled as Figure D-1. Duke Energy also submitted documents, previously omitted from the confidential version of its IRP, on January 26, 2016, which contained: the data inputs referenced on page 171 of Appendix A, the Load Forecast Dataset referenced on page 181 of Appendix B, the Avoided Cost referenced on page 227 of Appendix C, and the Annual Avoided Cost referenced on page 234 of Appendix D.

5. Discussion and Findings. Ind. Code § 8-1-8.5-3 requires public utilities to submit an IRP to the Commission. 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).

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, 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. 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 2015 IRP qualify as confidential trade secret information: Figure A-1 No CO2 (Page 164); Figure A-1 with CO2 (Page 165); Figure A-2 No CO2 (Page 166); Figure A-2 with CO2 (Page 167); Figure A-3 (Page 168); Figure A-4 (No CO2) (Page 169); Figure A-4 (with CO2) (Page 170); Figure A-5 (System) (Page 173); Figure A-5 (New CCs) (Page 174); Figure A-5 (New CT) (Page 175); Figure D-1, NOx and SO2 Allowance Price Forecasts (Page 233), data inputs referenced on page 171 of Appendix A, Load Forecast Dataset referenced on page 181 of Appendix B, Avoided Cost referenced on page 227 of Appendix C, and Annual Avoided Cost referenced on page 234 of Appendix D. 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 could cause harm to Petitioner.

Therefore, 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 2015 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.

STEPHAN, MAYS-MEDLEY, HUSTON, WEBER, AND ZIEGNER CONCUR:

APPROVED: FEB 24 2016

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



Shala M. Coe
Acting Secretary to the Commission