

STATE OF IOWA
DEPARTMENT OF COMMERCE
BEFORE THE UTILITIES BOARD

FILED WITH
Executive Secretary
May 15, 2013
IOWA UTILITIES BOARD

IN RE:)	
)	
INTERSTATE POWER AND LIGHT)	DOCKET NO. EEP-2012-0001
COMPANY)	
)	ARGUMENT AND INFORMATION
)	REQUESTED BY ADMINISTRATIVE
)	LAW JUDGE
)	
)	

COMES NOW the Iowa Customers for Energy Efficiency (ICEE) and, as requested by the Administrative Law Judge, (ALJ) provides an update on further discussions between the parties and argument specific to the remaining individual data requests.

STATUS

Amended Testimony.

On May 14, 2013, the ICEE filed a motion for leave to amend its direct testimony to clarify and amend the parts of the testimony that appeared to be unclear during discussion at the May 9, 2013 prehearing. The ICEE had never sought to have, in this proceeding, its specific members permitted to opt-out of IPL's energy efficiency programs; ICEE does not believe the Board could do that in an EEP docket in any event. The ICEE believes that the revised testimony is clearer on this important point.

In general, the thrust of the amendments is (a) to clarify that a statement made about energy efficiency achieved was based on data from Interstate Power and Light Company's (IPL) Cadmus report and was general in nature, not derived from the ICEE members specifically; and (b) to explain that the ICEE's opt-out process proposal asks the Iowa Utilities Board (Board) to permit such opt-outs as part of IPL's planning process, but to design the parameters of the process, including eligibility, in a separate

rulemaking or tariff proceeding.

All parties to this proceeding have been notified of the ICEE's motion for leave to amend and have a copy of the amended testimony. The motion for leave to amend is pending before the Board.

Compromises.

The ICEE does not waive its objections to any of the Environmental Intervenor's data requests. In the interest of moving forward, the parties have reached a compromise as to Environmental Intervenor DRs 1, 9, 10, 11, 12, and 13. Therefore, the data requests that remain before the Administrative Law Judge are Environmental Intervenor DRs 2, 3, 4, 5, 6, 7, and 8.

ARGUMENT

In General.

The ALJ has asked for argument on the specific data requests remaining in dispute. There are arguments that are common to each of the remaining data requests. ICEE asserts that these data requests are not relevant to this proceeding, ask for confidential trade secret information, and are unduly burdensome.

The scope of discovery, as defined by Rule 1.503(1), is that parties may obtain discovery regarding any matter, *not privileged*, which is *relevant* to the subject matter in the pending action. Even if some of the requested information is found to be relevant, Rule 1.504(1) establishes in relevant part that the court in which the action is pending may order that the discovery not be had if good cause is shown that a trade secret or other commercial information might be disclosed or if it imposes an unduly burdensome task on a party.

As the ICEE mentioned previously, we have offered to meet with members of the Environmental Intervenors and provide them with information about what energy efficiency strategies companies employ to make their plants run efficiently; what kinds of energy efficiency programs are not workable; and answer other questions they may have.

Because the Environmental Intervenors agreed to accept narrative responses that did not identify the individual companies now or in the future, we were able to reach compromise on some of the requests. However, they would not agree to that condition to responses to the remaining requests.

The remaining requests (2-8, although ICEE believes 5 is also resolved) all have in common that the “hook” argued by EI, and the relevance concern expressed by the ALJ, was the possibility that individual ICEE members were seeking to opt-out, and the requests allegedly sought information on the impact of eligibility for such opting out. Now that ICEE has clarified that no individual member can opt-out through this proceeding, the specific individual data for any one company no longer has any relevance. An opt-out *policy* (as opposed to an individual company’s request to opt-out) is either a good idea or not at a *utility-wide* level. At the meeting with the ALJ, EI admitted it can get utility-wide data from IPL. The data for a small minority of customers is not representative, and therefore not relevant. To say EI can get detailed information on the inner workings of private, competitive businesses just because they are who EI can get its hands on penalizes intervention. Moreover, one issue raised by EI was that because the opt-out proposal had a usage threshold as a proposed criteria, the usage data for any ICEE member was relevant to determine if they would likely opt-out. That is not correct: the suggested threshold roughly matched the existing IPL tariff criteria for who would obtain Large General Service or Bulk Power. ICEE would stipulate that all of its members fit in those classifications – it is the common feature that defines ICEE. Accordingly, all ICEE members would theoretically qualify on usage and individual data beyond that is not relevant. Note that this does not mean that any individual company would meet other criteria that the Board may establish, or that any individual would decide to opt-out – those are decisions that will be made later, not in this docket.

The following is a discussion of the requests in which we were unable to reach compromise and arguments specific to those requests.

Data Request Two

Data Request Two states as follows:

For each separately metered facility, please provide a detailed description of the energy use of the facility including but not limited to:

- a. the average energy use and capacity demand of each separately metered facility by day, week, month, season and year;
- b. whether that separately metered facility has any on-site generation capabilities, the capacity of any on-site generation and the frequency of use of the on-site generation over the course of IPL's current plan period;
- c. the energy budget by month and year since 2003.

Relevance:

At the meeting on this issue, the ALJ correctly indicated that Request 2 was likely not relevant - and that was before ICEE clarified that specific company opt-outs were not a part of this proceeding. In its Motion to Compel, the Environmental Intervenors stated that the individual companies' energy use, demand and energy budget is relevant to IPL's proposed plan and issues to be addressed. (Motion to Compel, para. 6). They didn't explain why the information requested by Data Request #2 is relevant to deciding whether IPL's proposed plan is reasonable. They did not explain why the information in Data Request #2 is relevant to any other issues in the plan.

Information about a customer's energy use, demand capacity, the use of on-site generation, and energy budget is not relevant to the investigation of IPL's five-year energy efficiency plan. This case is about IPL's plan. It is not about the business of a private company. This information is not discoverable under Rule 1.503(1).

First, it can not result in admissible evidence because the six customers who have been asked to provide this information constitute only one third of one percent of IPL's industrial customers. There are approximately 1650 industrial customers in IPL's service territory.¹

At best, it would produce a dangerously unreliable sample of possibly atypical industrial customer usage and other information that could provide misleading

¹ IE-1. Annual Reports. **Note** also that the Environmental Intervenors believed there were only two members of the ICEE when they served these data requests. (Motion to Compel at 1).

information to the Board.

Much more meaningful information is readily available to the Environmental Intervenors. If the Environmental Intervenors want to submit testimony regarding the trend in industrial energy usage in IPL's service territory, the information about that issue that may be relevant is the aggregate industrial usage trend in IPL's service territory. The Environmental Intervenors could track the energy usage of IPL's industrial customers by reviewing IPL's annual reports. For example, the reports show that for the past three years, IPL's industrial customer class has used approximately 6.7 million MWH of energy per year.

The Environmental Intervenors attempted to show relevance by stating that energy usage information was mentioned in Mr. Brubaker's statement in testimony that energy consumption had decreased by 17% from 2002 to 2010.² In fact, they offered to amend their request to parallel the years mentioned in Mr. Brubaker's testimony (Motion to Compel, para. 7).

However, a reading of that testimony shows that it quotes and cites information from the U.S. Energy Information Administration about industrial energy usage in America and does not in any way refer to the six companies that are members of the ICEE. The fact that that industrial customer general energy consumption statistics are quoted in the ICEE'S testimony does not make the energy consumption of a small slice of IPL's industrial customers relevant to the issues in this case.

If, by stating this information is relevant because it is related to "other issues" in this proceeding, the Industrial Intervenors are referring to the ICEE's proposal for opt-out, this argument also fails. As amended, the ICEE proposal for opt-out does not propose parameters, eligibility guidelines, or other criteria. (ICEE Amended Direct Testimony at 13 -14). To allow the utilities and customers to participate in the specifics of an opt-out process, Mr. Brubaker recommends the criteria and other specifics of an opt-out program be decided in a rulemaking proceeding and not during this energy

² **Note** that these data requests were served on March 26, 2013 and the ICEE's direct testimony was not filed until April 16, 2013. Thus, the EI had not seen the ICEE's testimony when it served these data requests.

efficiency proceeding. Therefore, the amount of energy used, the capacity demand, the energy budget, and on-site generation information requested of these companies could not supply evidence relevant to the decisions to be made in this energy efficiency proceeding regarding the ICEE's proposal for opt-out.

Note that Mr. Brubaker also testifies that individual members of the ICEE may or may not decide to opt-out when a program becomes available. (ICEE Amended Direct Testimony at 14).

Confidential Information

In addition, Data Request #2 asks for information that is highly-sensitive, confidential and the trade-secrets of the companies. Pursuant to Rule 1.504, the ICEE requests the Administrative Law Judge issue a protective order finding the information sought by Data Request Two is trade secret, confidential commercially-sensitive information that may not be had.

As shown by the affidavits filed by company members of the ICEE, The information is carefully guarded. In fact, since energy usage (the information requested by Data Request #2) is one of the highest costs for most plants, it is one of the more guarded parts of its information. By reverse engineering, the company's competition could gain an advantage. If this information were known, it could provide competitors with information on how busy a plant is and provide a benchmark for how efficiently it operates. Exposing these companies to the danger of this information getting into the hands of these companies' competitors is not justified by the very limited relevance to this proceeding. Pursuant to Rule 1.504, the ICEE requests the Administrative Law issue a protective order finding the information sought by Data Request Two is trade secret, confidential commercially-sensitive information that may be disclosed and find that it may not be had.

As described previously, the ICEE has good reasons to believe it is not sufficient to enter into a protective agreement with the Environmental Intervenors. The Environmental Intervenors have not demonstrated that they have the capacity to protect this information nor can they compensate the members of the ICEE if this information was inadvertently released. The information requested by Data Request

#2 is the most vulnerable to abuse if it was released. Just this month, several lap-top computers containing confidential private company energy information were stolen from a demand-side management company in Indiana. These companies can not risk that happening to their businesses in Iowa.

Unduly Burdensome

The amount of time and expense it would require to produce this information for each plant of each company that operates in IPL's service territory is not justified by the limited relevance to the issues in IPL's energy efficiency proceeding. Even though the Environmental Intervenors have limited their requests in this proceeding to the last five years, this is a large amount of data that would require several employees' time and effort to compile. The upper management and legal departments of the companies would spend time reviewing the information before it could be provided. This would require much time and expense. This burden is disproportionate to the minimal levels of relevance and probative value offered by any admissible evidence which may actually be discovered as a result of compelled disclosure. Pursuant to Rule 1.504, the ICEE states it has shown good cause and requests the Administrative Law Judge issue a protective order finding the information sought by Data Request Two is unduly burdensome and expensive to produce and find that the information may not be had.

Redundant Request

As to the portion of the request that asks for on-site generation information, without waiving any objections, the ICEE has agreed to provide an unidentified narrative response to that question as it is posed in DR 10. Therefore, we believe 2(b) to be redundant.

Data Requests Three and Five³

³ In its most recent correspondence, EI did not list Request 5 as one on which we had reached compromise. At the meeting with the ALJ, however, EI represented that if Requests 3 and 4 were answered, Request 5 would be withdrawn. In any event, since

Data Request Three states as follows:

3. For each separately metered facility, please provide a detailed description of the use of IPL's energy efficiency programs since 2003 including but not limited to:
 - a. Energy audits and feasibility studies;
 - b. Measures installed that are part of IPL's prescriptive rebate;
 - c. Measures installed under IPL's custom rebate;
 - d. Optimization , retro-commissioning and/or operational and process changes implemented;
 - e. Training on efficient building operations and efficient technologies for operations and maintenance staff received;
 - f. Design assistance to improve the efficiency of industrial processes;
 - g. Combined heat and power projects;
 - h. The renewables pilot program;
 - i. Customer costs to complete for each project; and
 - j. Estimated energy savings for each project.

Data Request Five states as follows:

5. For each separately metered facility, please provide the total dollars invested in energy efficiency projects each year since 2003.

Relevance

What is being asked of these companies is to provide the Environmental Intervenor with an immense amount of information about their use of IPL's energy efficiency programs over several years in the past. Note that they are not asking what the companies' views are about the programs that are offered in IPL's proposed plan and are the subject of this proceeding. The Environmental Intervenor only wants to know what these six companies have done in the past, how much it cost in the past, and how much energy savings they earned.

The information about what programs were used and what were not used in the past is not relevant to this proceeding and would not lead to admissible evidence. The Environmental Intervenor attempts to argue that the information requested by Data Requests 3 and 5 is relevant by saying this information would identify if there are

Data Request Five requests the same information requested by 3i, they will be discussed together.

industrial customers who effectively use IPL's programs (Reply at 2). However, IPL has provided numbers of users of these past programs, energy savings, and costs. Even that aggregate information is not highly relevant in evaluating the new programs proposed by IPL.

The Environmental Intervenors also say that the anecdotal information they could get from this small portion of IPL's industrial customers would "allow the parties to evaluate plan proposals and party testimony with that knowledge and is therefore relevant to this proceeding." (Reply at 2). However, this logic suffers from the same problems as Data Request 2. The six customers who have been asked to provide this information constitute only one third of one percent of IPL's industrial customers. At best, it would produce a dangerously unreliable sample of possibly atypical industrial customer usage of IPL's energy efficiency plans in the past and other information that could provide misleading information to the Board.

It is telling that the Environmental Intervenors have not been able to explain how this detailed information is relevant to the review of IPL's proposed energy efficiency plan.

The Environmental Intervenors refer to parts of the ICEE's Direct Testimony to provide relevance to their data requests. They cite Maurice Brubaker's statements at page 8 and 9 of his Direct Testimony (note the clarification at page 9 of the Amended Direct Testimony) about the industrial customers' performance in energy efficiency measures as if he were talking about the performance of the individual members of the ICEE. What they overlook is that Mr. Brubaker is referring to the statewide assessment by the Cadmus Group Inc. that talks about all sectors of society. When he mentions the Cadmus results about industrial performance, he is **not** mentioning the members of the ICEE's energy efficiency performances and this should not serve to provide relevancy to Data Requests 3 and 5.

If the Environmental Intervenors claim the relevance of the information requested by Data Requests 3 and 6 is related to the ICEE's proposal for an opt-out program, that argument also fails. In his Amended Direct Testimony, Maurice Brubaker proposes that any criteria for an opt-out would be considered in a subsequent

rulemaking proceeding. Thus, if the relevance of this requested information is related to the individual ICEE's members' energy efficiency performances as a criteria for qualifying for an opt-out, that question will not be discussed as part of this energy efficiency proceeding and, thus, the information is not relevant.

Again, it is telling that the Environmental Intervenors cannot explain why they need to know this information to prosecute their case about IPL's proposed energy efficiency plan. This information is not relevant and is not discoverable under Rule 1.503(1).

Confidential Information

The information requested by Data Requests 3 and 5 is highly confidential competitively-sensitive information that is not known outside of the companies. Even IPL is not privy to all of this company information. If a competitor knew of the specific energy efficiency programs a company used, it could calculate competitively-sensitive information about the company. Process changes are kept secret within a company as are costs of energy efficiency projects and energy savings. As described previously, the ICEE has good reasons to believe it is not sufficient to enter into a protective agreement with the Environmental Intervenors.

Pursuant to Rule 1.504, the ICEE requests the Administrative Law Judge issue a protective order finding the ICEE has established good cause that the information sought by Data Requests Three and Five is trade secret, confidential commercially-sensitive information that may be disclosed and that may not be had.

Unduly Burdensome

Even if the time frame is cut down to five years, these requests require an immense amount of information that would use an inordinate amount of time and expense to compile. This burden is disproportionate to the minimal levels of relevance and probative value offered by any admissible evidence which may actually be

discovered as a result of compelled disclosure. Pursuant to Rule 1.504, the ICEE requests the Administrative Law Judge issue a protective order finding the information sought by Data Requests Three and Five is unduly burdensome and that discovery may not be had.

Data Request Four

Data Request Four states as follows:

4. For each separately metered facility, please provide a detailed description of any implemented energy efficiency or renewable energy efforts outside of IPL's programs since 2003 including but not limited to project costs and estimated energy savings.

Relevance

Data Request Four ask these private companies to provide them with information about what energy efficiency efforts outside of IPL's programs that they have implemented in the past. The Environmental Intervenors want to know what these six companies have done in the past, how much it cost in the past, and how much energy savings they earned. The Environmental Intervenors want to know how energy efficiency is implemented outside of IPL's plan.

The information about what programs outside of IPL's programs were used in the past by a small group of IPL's industrial customers has even less of a relationship to the subject matter of this proceeding and would not lead to admissible evidence. Also the information about the costs and energy savings earned since 2003 (or 2009) is not relevant to the consideration of the reasonableness of IPL's currently proposed energy efficiency plan.

It is obvious that there are private companies, options and internal measures that a customer can do that are not practical to be implemented by a public utility. Why do the Environmental Intervenors want to know that? What would they do with that information? It is telling that the Environmental Intervenors have not been able to

explain how this detailed information is relevant to the review of IPL's currently proposed energy efficiency plan.

Although there is no direct reference with respect to Data Request 4, the Environmental Intervenors refer to parts of the ICEE's Direct Testimony to provide relevance to all of their data requests. They cite Maurice Brubaker's statements at page 8 and 9 of his Direct Testimony (note the clarification at page 9 of the Amended Direct Testimony) about the industrial customers' performance in energy efficiency measures as if he were talking about the performance of the individual members of the ICEE. What they overlook is that Mr. Brubaker is referring to the statewide assessment by the Cadmus Group Inc. that talks about all sectors of society. When he mentions the Cadmus results about industrial performance, he is **not** mentioning the members of the ICEE's energy efficiency performances and this should not serve to provide relevancy to Data Requests 3 and 5.

It is more likely that the Environmental Intervenors want this information to obtain evidence regarding these six customers' eligibility to opt-out of the utility energy efficiency program. But, the argument that the information requested by Data Request 4 is related to the ICEE's proposal for an opt-out program also fails. As we have pointed out previously, in his Amended Direct Testimony, Maurice Brubaker proposes that any criteria for an opt-out would be considered in a subsequent rulemaking proceeding. Thus, if the relevance of this requested information is related to the individual ICEE's members' energy efficiency performances as a criteria for qualifying for an opt-out, that question will not be discussed as part of this energy efficiency proceeding and, thus, the information is not relevant.

Again, it is telling that the Environmental Intervenors cannot explain why they need to know this information to prosecute their case about IPL's proposed energy efficiency plan. This information is not relevant and is not discoverable under Rule 1.503(1).

Confidentiality and Third Party Information

The information requested by Data Requests 3 and 5 is highly confidential competitively-sensitive information that is not known outside of the companies. If a competitor knew of the specific energy efficiency programs a company used, it could calculate competitively-sensitive information about the company. For that reason, information about all internal projects are carefully guarded as are the costs of energy efficiency projects and energy savings.

Also, since this request asks for projects that are not IPL's projects, it may reach into third-party agreements. For example, if a company had entered into a business agreement with a private contractor or firm, the ICEE members would likely not be at liberty to disclose that information to the Industrial Intervenors.

As described previously, the ICEE has good reasons to believe it is not sufficient to enter into a protective agreement with the Environmental Intervenors.

Pursuant to Rule 1.504, the ICEE requests the Administrative Law Judge issue a protective order finding the ICEE has established good cause that the information sought by Data Requests Three and Five is trade secret, confidential commercially-sensitive information that may be disclosed and that may not be had.

Unduly Burdensome

It is likely an even more burdensome task to comb through five to ten years of records to find project information, budget and cost data and estimated energy savings of projects that did not involve IPL. Even if the time frame is cut down to five years, these requests require an immense amount of information that would use an inordinate amount of time and expense to compile. This burden is disproportionate to the minimal levels of relevance and probative value offered by any admissible evidence which may actually be discovered as a result of compelled disclosure. Pursuant to Rule 1.504, the ICEE requests the Administrative Law Judge issue a protective order finding the information sought by Data Request Four e is unduly burdensome and that discovery may not be had.

Data Request Six

Data Request Six provides as follows:

6. For each separately metered facility, please provide a detailed description of every energy efficiency project that was considered but rejected since 2003 and provide a detailed explanation of why the project was rejected.

Relevance

While we have indicated several times that we could provide a narrative unidentified by company response as to the types of barriers the ICEE members run into, the information requested by DR 6 is not relevant to this proceeding. The ALJ correctly noted the likely burden of reassembling company information and decisions outweighs and possible relevance this information could have.

Our members have stated that they generally don't keep records of ideas considered and rejected. A rejection is far too attenuated and involves too many variables - to be relevant to IPL's plan. Rejection of ideas may have nothing to do with the nature of IPL's programs, but reflect other internal capital allocation or staffing issues, macroeconomic issues, perceptions of likely regulation at a federal level or in one or more states in which the company operates, etc. Some of the decisions, particularly as they apply to current or future regulatory compliance, may involve privileged advice from attorneys.

Since ICEE 's testimony does not mention the individual members of the ICEE's energy efficiency projects, decision-making or its eligibility for an opt-out, the relevancy of this request is not tied to being mentioned in its testimony.

Neither is this information relevant to the ICEE's proposal for an opt-out. As stated previously, none of these companies are asking to opt-out in this proceeding.

This information is not relevant and is not discoverable under Rule 1.503(1).

Confidential Information and Information Subject to Privilege

As with the previous requests, the information requested by Data Request 6 is highly confidential competitively-sensitive information that is not known outside of the companies. If a competitor knew of the specific energy efficiency programs a company considered and rejected and why, it could compile competitively-sensitive information about the company. For that reason, information about all internal decisions are carefully guarded as are the costs of energy efficiency projects and energy savings.

In addition, some of the decisions, particularly as they apply to current or future regulatory compliance, may involve privileged advice from attorneys.

As described previously, the ICEE has good reasons to believe it is not sufficient to enter into a protective agreement with the Environmental Intervenors.

Pursuant to Rule 1.504, the ICEE requests the Administrative Law Judge issue a protective order finding the ICEE has established good cause that the information sought by Data Request 6 is trade secret, confidential commercially-sensitive information that may be disclosed and that may not be had.

Unduly Burdensome

We have already discussed the burdensomeness of this request. As mentioned, most companies do not even have this information. It would even be burdensome for a company to search various departments in the company to determine whether they have this kind of record. They are being asked to comb through five to ten years of records to find project information, budget and cost data, meeting decisions and estimated energy savings of projects rejected. Even if the time frame is cut down to five years, these requests require an immense amount of information that would use an inordinate amount of time and expense to compile. This burden is disproportionate to the minimal levels of relevance and probative value offered by any admissible evidence which may actually be discovered as a result of compelled disclosure. Pursuant to Rule 1.504, the ICEE requests the Administrative Law Judge issue a protective order finding the information sought by Data Request Six is unduly burdensome and that discovery may not be had.

Data Request Seven

Data Request Seven provides:

7. For each separate industrial customer that is part of ICEE, please [SIC] a detailed description of the customer's process for evaluating, approving and implementing energy efficiency including:
 - a. If there is a lead staff person for energy efficiency, and if so, who that person is, how that person fits in the customer's organizational structure, and what that person's job duties are;
 - b. Any written policies or procedures for energy efficiency project decisions including applicable budgetary decisions;
 - c. How budgetary decisions to support implementation of projects with necessary capital and other resources are made;
 - d. Whether projects with the following payback periods would be approved:
 - i. Less than 1 year;
 - ii. 1 year;
 - iii. 2 years;
 - iv. 3 years;
 - v. 4 years;
 - vi. 5 years;
 - vii. 10 years.

Relevance

First, the processes used by these six individual companies to evaluate energy efficiency projects is not relevant to the reasonableness of IPL's energy efficiency plan. There is nothing that could come from that information that would lead to admissible evidence. As with most of the other requests, we would be happy to discuss this process in general so that the Environmental Intervenors can have some background information about what happens within a company - but information about these six individual companies is not relevant to this energy efficiency proceeding.

The Environmental Intervenors say that the anecdotal information they could get from this small portion of IPL's industrial customers would "allow the parties to evaluate plan proposals and party testimony with that knowledge and is therefore relevant to this proceeding." (Reply at 2). However, this logic suffers from the same

problems as several of the other Data Requests. The six customers who have been asked to provide this information constitute only one third of one percent of IPL's industrial customers. At best, it would produce a dangerously unreliable sample of possibly atypical industrial customer usage of IPL's energy efficiency plans in the past and other information that could provide misleading information to the Board.

The Environmental Intervenors attempt to justify this request by tying it to the ICEE testimony (which, as you recall, they had not seen when they served all of these data requests on the individual members of the ICEE). They reference Maurice Brubaker's testimony at page 4- 6 in which he talks about in-house decision--making. Although the testimony discusses some of those issues in general, Mr. Brubaker is not in his testimony talking about the members of the ICEE . He bases his conclusions on over 40 years of working with industrial customers. (See, Amended Direct Testimony at p. 4, line 11). The decision making process of these individual six customers is not relevant to this proceeding.

Neither is this information relevant to the ICEE's proposal for an opt-out. As stated previously, none of these companies are asking to opt-out in this proceeding.

We ask the ALJ to find that this information is not relevant and is not discoverable under Rule 1.503(1).

Confidential Information and Information Subject to Privilege

Data Request 7 is perhaps the most invasive among a set of requests that nearly all seek sensitive information. Here, EI wants to explore precisely how the private, deliberative process works within private, non-regulated companies. This information is not even required as a matter of course from *regulated* companies. This information is neither needed nor appropriate to determine whether *IPL's plan* complies with state requirements. As with the previous requests, the information requested by Data Request 7 is highly confidential competitively-sensitive information that is not known outside of the companies. If a competitor knew of the decision-making process and the decisions made by a company, it would possess competitively-sensitive information

about the company. For that reason, information about all internal decisions are carefully guarded as are the costs of energy efficiency projects and energy savings.

In addition, some of the decisions, particularly as they apply to current or future regulatory compliance, may involve privileged advice from attorneys.

As described previously, the ICEE has good reasons to believe it is not sufficient to enter into a protective agreement with the Environmental Intervenors.

Pursuant to Rule 1.504, the ICEE requests the Administrative Law Judge issue a protective order finding the ICEE has established good cause that the information sought by Data Request 7 is trade secret, confidential commercially-sensitive information that may be disclosed and that may not be had.

Unduly Burdensome

Most companies do not even have this information. It would even be burdensome for a company to search various departments in the company to determine whether they have this kind of record. They are being asked to comb through five to ten years of records to find project information, projections, meeting decisions and estimated energy savings and paybacks. Even if the time frame is cut down to five years, these requests require an immense amount of information that would use an inordinate amount of time and expense to compile. This burden is disproportionate to the minimal levels of relevance and probative value offered by any admissible evidence which may actually be discovered as a result of compelled disclosure. Pursuant to Rule 1.504, the ICEE requests the Administrative Law Judge issue a protective order finding the information sought by Data Request Seven is unduly burdensome and that discovery may not be had.

Data Request Eight

Data Request Eight provides:

8. For each separately metered facility, please provide

a detailed description of the potential for energy efficiency at the facility including but not limited to the results of any energy audit or feasibility studies and any comparisons between the facility and similarly situated facilities.

Relevance

This request is an attempt to get information about the assessment of potential for energy efficiency at the plants of the six companies that are members of the ICEE.

At the hearing, the Environmental Intervenors attempted to clarify this request by referring to the assessment of potential in the previously mentioned Cadmus study. Even if potential could be more precisely defined, it does not make what these six individual companies see as their potential relevant to the reasonableness of IPL's energy efficiency plan. The Environmental Intervenors ask for energy audits or feasibility studies which may be redundant to what they ask for in DR 3. On the other hand, they may mean privately conducted audits which would be unavailable third-party information.

In any case, for many of the reasons stated in response to the previous data requests, the information requested is not relevant to the reasonableness of IPL's proposed plan. This case is about IPL's plan. It is not about the business of a private company. This information is not discoverable under Rule 1.503(1).

First, it can not result in admissible evidence because the six customers who have been asked to provide this information constitute only one third of one percent of IPL's industrial customers. There are approximately 1650 industrial customers in IPL's service territory.⁴

At best, it would produce a dangerously unreliable sample of possibly atypical industrial customer usage and other information that could provide misleading

⁴ IE-1. Annual Reports. **Note** also that the Environmental Intervenors believed there were only two members of the ICEE when they served these data requests. (Motion to Compel at 1).

information to the Board.

Much more meaningful information is readily available to the Environmental Intervenors in the Cadmus Report they referenced. That report provides an assessment of potential of all of the industrial class - not just these six unrepresentative companies that are members of the ICEE.

If the Environmental Intervenors assert that the information is relevant because they want to know the information related to the ICEE's members' proposal for opt-out, their inquiry is foreclosed because the parameters of an opt-out are not the subject matter of this proceeding. Further, these six customers have not indicated they will opt-out of the IPL's energy efficiency program if an opt-out is approved.

Confidential Information and Information Subject to Privilege

As with the previous requests, the information requested by Data Request 8 is highly confidential competitively-sensitive information that is not known outside of the companies. If a competitor knew of the potential for energy efficiency at a plant and the results of an audit or a feasibility, it could calculate competitively-sensitive information about the company. For that reason, information about all internal decisions are carefully guarded as are the costs of energy efficiency projects and energy savings.

In addition, some of the decisions, particularly as they apply to current or future regulatory compliance, may involve privileged advice from attorneys and may involve work from third parties that is not available to be disclosed by the individual companies..

As described previously, the ICEE has good reasons to believe it is not sufficient to enter into a protective agreement with the Environmental Intervenors.

Pursuant to Rule 1.504, the ICEE requests the Administrative Law Judge issue a protective order finding the ICEE has established good cause that the information sought by Data Request 8 is trade secret, confidential commercially-sensitive information that may be disclosed and that may not be had.

Unduly Burdensome

The individual companies are being asked to comb through five to ten years of records to find information and data, meeting decisions and estimated energy savings of projects rejected. This is without mentioning the impossibility of finding and disclosing any comparisons between similarly situated companies. Even if the time frame is cut down to five years, these requests require an immense amount of information that would use an inordinate amount of time and expense to compile. This burden is disproportionate to the minimal levels of relevance and probative value offered by any admissible evidence which may actually be discovered as a result of compelled disclosure. Pursuant to Rule 1.504, the ICEE requests the Administrative Law Judge issue a protective order finding the information sought by Data Request Six e is unduly burdensome and that discovery may not be had.

CONCLUSION

The information requested by Data Requests Two through Eight is not relevant to the investigation of the reasonableness of IPL's energy efficiency plan. The information requested includes an individual private company's energy usage, capacity demand, energy efficiency programs, management decisions, audits, feasibility studies and more. This information is also not relevant to whether these six customers - a small portion of Interstate's industrial customers - may be eligible for an opt-out program because criteria and other parameters of an opt-out program will not be considered in this proceeding and, further, these six customers can not be granted that option in this proceeding.

We have always said we would discuss these things with the Environmental Intervenors.

We believe this discovery situation has had a chilling effect on a customer's willingness to participate in proceedings before the Board. We believe that allowing this kind of aggressive information seeking between intervenors to a case could result in unintended consequences. For example, competing intervenors or groups of

intervenor could use the discovery process to obtain sensitive information about each other, information strategically useful for other purposes, and which is more about putting the focus on an intervenor than on the actual party or parties to a regulatory proceeding.

For all the aforesaid reasons, we ask that the ALJ find the Environmental Intervenor's Data Requests 2 through 8 are not relevant to this proceeding and, therefore, beyond the scope of discovery. Even if the ALJ finds some tangential and limited relevance to any of these requests, we ask that the ALJ weigh that limited relevance against the burdensome nature of these request and the risk of disclosure of this highly confidential information.

Respectfully Submitted,

/s/

Victoria J. Place #AT000620
309 Court Avenue #800
Des Moines, Iowa 50309
(515) 875-4834
vplace@courtavenuesuites.com