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DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Application of) REGULATORY DIVISION
Montana-Dakota Utilities Co., a Division of)
MDU Resources Group, Inc., for Authority to) DOCKET NO. D2015.6.51
Establish Increased Rates for Electric Service in)
the State of Montana)
)

MONTANA-DAKOTA UTILITIES CO.'S MOTION FOR AN ORDER PROTECTING
INFORMATION REQUESTED IN DATA REQUESTS MCC-175, MCC-182, AND MCC-186

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. (“Montana-Dakota”), by and through its counsel, hereby submits to the Montana Public Service Commission (“Commission”) this Motion for Protective Order and Brief in Support. This motion is filed pursuant to Admin. R. Mont. 38.2.5001, *et seq.* Montana-Dakota requests a protective order be issued to protect confidential and proprietary information responsive to data requests MCC-175, MCC-182, and MCC-186. Montana-Dakota integrates into its motion a brief in support.

Montana-Dakota also offers the Affidavit of Darcy J. Neigum, Director of System Operations and Planning for Montana-Dakota, in support of this motion. Mr. Neigum is qualified to testify regarding these issues.

FACTUAL AND PROCEDURAL BACKGROUND

Confidential Information Related To Thunder Spirit Wind Project

To meet growing production needs and increase reliability, as well as to replace the expired We Energies contracts, Montana-Dakota has agreed to expand its portfolio of generation assets to include, in relevant part, a 107.5 MW wind project known as Thunder Spirit Wind located near Hettinger, North Dakota (“Thunder Spirit”). In developing that wind project, Thunder Spirit entered into a variety of agreements, including easement agreements with over 40 landowners.

Data request MCC-175 asks Montana-Dakota to provide support for increases in annual easement payments reflected in Adjustment No. 10. Those easement payments are governed by a “Wind Energy Easement Agreement” Thunder Spirit entered into with landowners. The terms of that easement agreement include a confidentiality agreement protecting “the terms of (including the amounts payable under) this Agreement.” Montana-Dakota is not a signatory to that easement agreement.

Thunder Spirit also entered into a “Maintenance and Service Agreement” with Nordex USA, Inc. (“Nordex”), concerning the maintenance, service and availability warranty of the forty-three (43) Nordex wind turbines located at the Thunder Spirit wind farm in Adams County, North Dakota. Nordex will provide, under a maintenance service arrangement (“MSA”), for the initial operation and maintenance of the project wind turbines excluding major complements like turbine blades, generators, gearboxes, bedplates, and tower sections.

Data request MCC-186 asks Montana-Dakota to “provide a copy of the Nordex USA, Inc. MSA agreement related to the Thunder Spirit Wind facility.” The terms of the Nordex MSA agreement expressly provide that the “Agreement . . . shall be considered proprietary and trade secret and shall not be provided to another Person without prior written approval of the other Party.” Montana-Dakota is not a signatory to the Nordex MSA Agreement.

Confidential Information Related To Montana-Dakota’s Compliance With MATS Rule At Its Lewis & Clark Station By Entering Into Contract With URS Corporation

To comply with the Environmental Protection Agency’s adoption of the “Mercury and Air Toxics Standards” Rules (“MATS Rule”), Montana-Dakota initiated a study with URS Corporation (“URS”), a consulting engineer experienced in modifying wet scrubbers similar to the one located at Montana-Dakota’s Lewis & Clark Station in Sidney, Montana. Montana-Dakota has entered into an agreement with URS to design and install modifications to the existing scrubber at the Lewis & Clark Station to comply with the MATS Rule.

Data request MCC-182 asks Montana-Dakota to “provide a copy of the URS contract for the MATS project at Lewis & Clark.” Montana-Dakota’s contract with URS is governed by a confidentiality agreement. That confidentiality agreement establishes that “each of the Parties may have a proprietary interest in information that it furnishes pursuant to the agreement” and that “except as expressly provided in this Agreement, the Parties shall keep in confidence and shall not disclose any Confidential Information of the other Party without the prior written permission of the disclosing Party or use any Confidential Information for other than the purposes for which it is supplied.”

URS has informed Montana-Dakota that it considers the contract it signed with Montana-Dakota to contain confidential and proprietary information, and URS furthermore has forbidden

Montana-Dakota from sharing that confidential and proprietary information, except with persons who agree to maintain the confidential nature of URS's proprietary information.

* * * * *

Following a thorough legal and factual examination, Montana-Dakota and its legal counsel, have determined that the information the MCC has requested in data requests MCC-175, MCC-182, and MCC-186 is confidential and entitled to protection from public disclosure pursuant to Admin. R. Mont. 38.2.5001, *et seq.* Neigum Affidavit, ¶ 16.

Specifically, Montana-Dakota believes that third-party proprietary information provided to Montana-Dakota, including information regarding: (1) the confidential terms of easement agreements Thunder Spirit entered into with third-party landowners; (2) the confidential and proprietary third-party vendor information URS Corporation provided to Montana-Dakota pursuant to confidentiality agreement; and (3) the confidential and proprietary third-party vendor information Nordex provided to Thunder Spirit pursuant to confidential agreement, all should be protected from public disclosure as required by Montana law.

Montana-Dakota has considered that the Commission is a public agency and that there is a constitutional presumption of access to documents and information in the Commission's possession. Neigum Affidavit, ¶ 17. Montana-Dakota understands that it bears the burden of establishing a *prima facie* showing of confidentiality, factually and legally, and that confidential information is protected only upon Commission approval. Neigum Affidavit, ¶ 17.

Montana-Dakota respectfully submits to the Commission that the confidential information identified herein is entitled to protection because it contains information that qualifies as a "trade secret" under the Commission's administrative rules, or that it is "otherwise legally protectable." *See* Admin. R. Mont. 38.2.5007(2). Montana law establishes that the

Commission “may issue a protective order when necessary to preserve trade secrets . . . or other information that must be protected under law, as required to carry out its regulatory functions.”
Mont. Code Ann. § 69-3-105(2).

CONTACT PERSON

As required by ARM 38.2.5007(3)(a), communications may be made to the undersigned counsel, at the information listed below, regarding this motion and the items to be protected.

IDENTIFICATION OF CONFIDENTIAL INFORMATION

Montana-Dakota seeks a protective order preventing the disclosure of documents responsive to data requests MCC-175, MCC-182, and MCC-186. Specifically, Montana-Dakota seeks a protective order preventing the disclosure of the following (collectively, “Confidential Information”):

- 1) The “Wind Energy Easement Agreement” Thunder Spirit entered into with third-party landowners;
- 2) A copy of the URS contract for the MATS project at Lewis & Clark; and
- 3) A copy of the Nordex USA, Inc. MSA agreement related to the Thunder Spirit Wind facility.

FACTUAL AND LEGAL BASIS FOR PROTECTION

The Commission should grant Montana-Dakota’s motion and protect the Confidential Information from public disclosure because it qualifies as “trade secret” under the Commission’s administrative rules or is “otherwise legally protectible.” *See* Admin. R. Mont. 38.2.5007(2). The Confidential Information also complies with the definition of “trade secret” found at Montana Code Annotated § 30-14-402(4) (“‘Trade secret’ means information or computer software, including a formula, pattern, compilation, program, device, method, technique, or

process, that: (a) 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 (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy”). Thus, the Confidential Information contains “constitutionally protected property rights.” *Great Falls Tribune Co. v. Great Falls Pub. Sch., Bd. of Trustees, Cascade Cnty.*, 255 Mont. 125, 130, 841 P.2d 502, 505 (1992).

The PSC historically has granted motions to protect information similar to the Confidential Information identified above. For example, the PSC generally has protected “pricing information and technical information” as well as “proprietary equipment specification and configuration information” submitted by third-parties to regulated utilities. Docket No. D2013.10.77, Order No. 7334d, ¶ 6; *see also* Docket No. D2015.2.18, Order No. 7395c, ¶ 12. The PSC also has granted motions to protect “contracts where [regulated utilities are] required to keep the contract confidential or where disclosure of such information would harm [the regulated utility’s] competitive position,” including contract “prices paid for easements.” *See* PSC Docket N.2000.5.76, Order No. 6253, p. 1 (ordering that “the material and information described by Touch America in the Motion” is confidential) (quoted portion above comes from Touch America’s motion, dated May 25, 2000); *see also* PSC Docket No. D2011.5.41, Order No. 7159b, ¶¶ 6, 11 (granting Invenenergy’s motion to protect “all cost estimates, price information . . . lease and easement agreements, . . . [and] third party submittals”). Furthermore, the PSC consistently has protected bidding information submitted to regulated utilities. *See* D2001.7.93, Order No. 6361 (protecting “supply bid information”); *see also* D2013.10.77, Order No. 7334c, ¶ 15 (protecting “project pricing, organizational structure, energy projections, financial projections, site control, environmental impacts and attributes, and the Site Map”).

Under Montana law, “it is a well-established principle of agency law that an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure.” *Waste Mgmt. Partners of Bozeman, Ltd. v. Montana Dep't of Pub. Serv. Regulation*, 284 Mont. 245, 257, 944 P.2d 210, 217 (1997).

Furthermore, the Confidential Information satisfies all of the necessary criteria for a protective order under the Commission’s rules. It is: (1) information; (2) secret; (3) subject to efforts reasonable under the circumstances to maintain its secrecy; (4) not readily ascertainable by proper means; and (5) derives independent economic value, or a competitive advantage is derived, from its secrecy. Admin. R. Mont. 38.2.5007(4)(b).

1. The Confidential Information qualifies as “information” under the Commission’s rules.

Under the Commission’s administrative rules, “information” is defined as:

knowledge, observations, opinions, data, facts, and the like, whether recorded or communicated in writing, orally, electronically, or otherwise, and whether provided through pleadings, reports, exhibits, testimony, work papers, or similar items or attachments to such items, or in response to discovery, subpoena, order, audit, investigation, or other request.

Admin. R. Mont. 38.2.5001(3).

The Confidential Information is comprised of knowledge, data and facts that are recorded in writing. Neigum Affidavit, ¶¶ 4-15. Therefore, the Confidential Information satisfies the first element necessary to qualify for a protective order.

2. The Confidential Information is secret.

The Commission’s administrative rules do not define the term “secret.” The ordinary meaning of “secret” is “something that is kept or meant to be kept unknown or unseen by others.” OXFORD DICTIONARY OF ENGLISH 1608 (3d ed. 2010). The Uniform Trade Secrets Act defines “trade secret” as

information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) 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 (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Mont. Code Ann. § 30-14-402(4) (emphasis added).

Montana-Dakota does not share the Confidential Information or disclose it to the public. Neigum Affidavit, ¶ 18. Its disclosure is not required by law and is not published or otherwise made publicly available. Neigum Affidavit, ¶ 18. Montana-Dakota has adopted reasonable measures to maintain the secrecy of the Confidential Information. Neigum Affidavit, ¶ 19. As a result, the Confidential Information is not generally known and is not readily ascertainable by other persons. Neigum Affidavit, ¶ 18. Therefore, it satisfies the “secrecy” element necessary for a protective order under Admin. R. Mont. 38.2.5007(4)(b)(iii).

3. The Confidential Information is subject to reasonable efforts under the circumstances to maintain its secrecy.

Montana-Dakota does not share or disclose the Confidential Information. Neigum Affidavit, ¶ 18. Montana-Dakota has enacted policies to protect the secrecy of the Confidential Information. Neigum Affidavit, ¶ 19. Montana-Dakota does not share or disclose the Confidential Information and only those Montana-Dakota employees and representatives with a direct need to know are authorized to access the Confidential Information. Neigum Affidavit, ¶ 18. Furthermore, Montana-Dakota has adopted reasonable security measures to maintain the secrecy of the Confidential Information. Neigum Affidavit, ¶ 19. For these reasons, the Confidential Information is subject to efforts reasonable under the circumstances to maintain its secrecy.

4. The Confidential Information is not readily ascertainable by proper means.

The Confidential Information is not within the public domain. Neigum Affidavit, ¶ 18. Only those Montana-Dakota employees and representatives with a direct need to know are authorized to access it. Neigum Affidavit, ¶ 18. Additionally, Montana-Dakota has adopted reasonable security measures to ensure that the Confidential Information is not readily ascertainable. Neigum Affidavit, ¶ 19. Therefore, Montana-Dakota's Confidential Information is not readily ascertainable by proper means, as required by Admin. R. Mont. 38.5.5007(4)(b)(v).

5. The Confidential Information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy.

The Commission's administrative rules establish that Montana-Dakota must derive some economic value or competitive advantage from the Confidential Information's secrecy. *See* Admin. R. Mont. 38.2.5007(4)(b)(vi). Montana-Dakota, Thunder Spirit, Nordex and the third-party landowners bound by the easements in question obtain economic value and a competitive advantage from keeping the Confidential Information secret. Neigum Affidavit, ¶ 20. Montana-Dakota is able to solicit highly confidential and proprietary information from third-parties due to Montana-Dakota's close working relationship with those third-parties, as well as Montana-Dakota's investment of the substantial time and money necessary to establish those essential business relationships. Neigum Affidavit, ¶ 20.

Disclosing the Confidential Information to the public would damage the economic interests of Montana-Dakota because Montana-Dakota would be less likely to receive highly confidential and proprietary information from third parties; thus, Montana-Dakota would not have access to information necessary to make good business decisions. Disclosing the Confidential Information to the public also would damage the economic interests of Thunder Spirit and Nordex by providing their competitors with an advantage they would not otherwise

have and that would allow them to know and undercut their proposals in future bidding processes. Neigum Affidavit, ¶ 21.

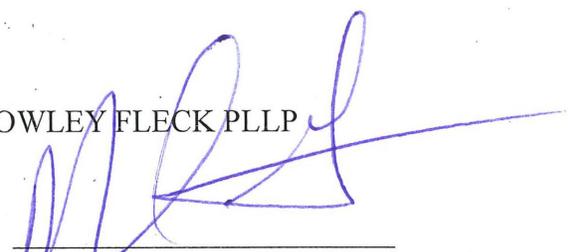
Finally, disclosure of the Confidential Information ultimately would harm those who benefit from Montana-Dakota's business endeavors—Montana-Dakota's Montana energy consumers. Montana-Dakota's ability to maintain the confidentiality of proprietary information provided by third parties like Thunder Spirit, Nordex, and others facilitates Montana-Dakota's ability to solicit and receive third-party proprietary information within the scope of its business operations. This in turn allows Montana Dakota to make optimal business decisions, which ideally provide Montana energy consumers with the most efficient energy at the best available prices. Public disclosure of this information would have a chilling effect on Montana-Dakota's future business endeavors. As a result, Montana energy consumers would ultimately be harmed. Neigum Affidavit, ¶ 22.

CONCLUSION

For the foregoing reasons, Montana-Dakota respectfully requests the Commission grant its motion for protective order.

Dated this 26th day of October, 2015.

CROWLEY FLECK PLLP

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Attorneys for Montana-Dakota

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2015, the foregoing Montana-Dakota Utilities Co.'s Motion For An Order Protecting Information Request in Data Request MCC-175, 182 and 186 was served via electronic and U.S. mail on:

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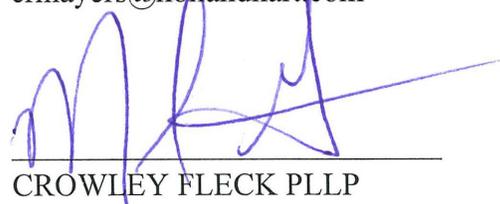
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DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF MONTANA-DAKOTA) REGULATORY DIVISION
UTILITIES CO., a Division of MDU Resources)
Group, Inc., for Authority to Establish Increased) DOCKET NO. D2015.6.51
Rates for Electric Service)
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)

AFFIDAVIT OF DARCY J. NEIGUM

STATE OF NORTH DAKOTA)
)
:ss
County of Burleigh)

I, Darcy J. Neigum, declare and state under penalty of perjury as follows:

1. I am the Director of System Operations and Planning for Montana-Dakota Utilities Co. (“Montana-Dakota”), a Division of MDU Resources Group, Inc. As Director of System Operations and Planning, I have managerial responsibility for overseeing the day-to-day operations of Montana-Dakota’s electric control center and System Operations & Planning Department.
2. I am familiar with the information the Montana Consumer Counsel (the “MCC”) is seeking in this docket in data requests MCC-175, MCC-182, and MCC-186. I have personal knowledge of the facts stated herein. Any opinions expressed herein are based on my experience, as well as my knowledge of the information.
3. My principal place of business is 400 North Fourth Street, Bismarck, North Dakota 58501.

Confidential Information Related To Thunder Spirit Wind Project

4. To meet growing production needs and increase reliability, as well as to replace the expired We Energies contracts, Montana-Dakota has agreed to expand its portfolio of generation assets to include, in relevant part, a 107.5 MW wind project known as Thunder Spirit Wind located near Hettinger, North Dakota (“Thunder Spirit”). Thunder Spirit currently is being constructed by ALLETE Clean Energy. Once construction is completed, Montana-Dakota will acquire Thunder Spirit.

5. In developing that project, Thunder Spirit entered into a variety of agreements, including easement agreements with over 40 landowners.

6. Data request MCC-175 asks Montana-Dakota to provide support for increases in annual easement payments reflected in Adjustment No. 10.

7. Those easement payments are governed by a “Wind Energy Easement Agreement” Thunder Spirit entered into with landowners. The terms of that easement agreement include a confidentiality agreement protecting “the terms of (including the amounts payable under) this Agreement.”

8. Montana-Dakota is not a signatory to that easement agreement.

9. Thunder Spirit also entered into a “Maintenance and Service Agreement” with Nordex USA, Inc. (“Nordex”), concerning the maintenance, service and availability warranty of the forty-three (43) Nordex wind turbines located at the Thunder Spirit wind farm in Adams County, North Dakota. Nordex will provide, under a maintenance service arrangement (“MSA”), for the initial operation and maintenance of the project wind turbines excluding major complements like turbine blades, generators, gearboxes, bedplates, and tower sections.

10. Data request MCC-186 asks Montana-Dakota to “provide a copy of the Nordex USA, Inc. MSA agreement related to the Thunder Spirit Wind facility.” The terms of the Nordex MSA agreement expressly provide that the “Agreement . . . shall be considered proprietary and trade secret and shall not be provided to another Person without prior written approval of the other Party.”

11. Montana-Dakota is not a signatory to the Nordex MSA Agreement.

Confidential Information Related To Montana-Dakota’s Compliance With MATS Rule At Its Lewis & Clark Station By Entering Into Contract With URS Corporation

12. To comply with the Environmental Protection Agency’s adoption of the “Mercury and Air Toxics Standards” Rules (“MATS Rule”), Montana-Dakota initiated a study with URS Corporation (“URS”), a consulting engineer experienced in modifying wet scrubbers similar to the one located at Montana-Dakota’s Lewis & Clark Station in Sidney, Montana. Montana-Dakota has entered into an agreement with URS to design and install modifications to the existing scrubber at the Lewis & Clark Station to comply with the MATS Rule.

13. Data request MCC-182 asks Montana-Dakota to “provide a copy of the URS contract for the MATS project at Lewis & Clark.”

14. Montana-Dakota’s contract with URS is governed by a confidentiality agreement. That confidentiality agreement establishes that “each of the Parties may have a proprietary interest in information that it furnishes pursuant to the agreement” and that “except as expressly provided in this Agreement, the Parties shall keep in confidence and shall not disclose any Confidential Information of the other Party without the prior written permission of the disclosing Party or use any Confidential Information for other than the purposes for which it is supplied.”

15. URS has informed Montana-Dakota that it considers the contract it signed with Montana-Dakota to contain confidential and proprietary information, and URS furthermore has

forbidden Montana-Dakota from sharing that confidential and proprietary information, except with Persons who agree to maintain the confidential nature of URS's proprietary information.

* * * * *

16. Prior to requesting this protective order, Montana-Dakota engaged in a thorough legal and factual examination to determine whether the information requested in data requests MCC-175, MCC-182, and MCC-186 is confidential and proprietary. With the assistance of legal counsel, Montana-Dakota has made a good faith determination that the documents responsive to data requests MCC-175, MCC-182, and MCC-186 (collectively, the "Confidential Information") contain confidential and proprietary trade secrets entitled to protection against public disclosure pursuant to Admin R. Mont. 38.2.5001, *et. seq.*

17. Montana-Dakota has considered that the Montana Public Service Commission ("Commission") is a public agency and that there is a constitutional presumption of access to documents and information in the Commission's possession. Montana-Dakota understands it bears the burden of establishing a *prima facie* showing of confidentiality, factually and legally, and that confidential information is protected only upon Commission approval.

18. Montana-Dakota has not otherwise shared the Confidential Information or disclosed the Confidential Information to the public. Disclosure of the Confidential Information is not required by law and is not published or otherwise made public. Only those Montana-Dakota employees and representatives with a direct need to know are authorized to access the Confidential Information. Thus, the Confidential Information is not readily ascertainable by proper means.

19. Montana-Dakota has adopted reasonable measures to maintain the secrecy of the Confidential Information: securing its business offices and facilities, restricting access via

individual access cards, locking main building doors, locking file cabinets, password-protecting computer files, and using automated e-mail encryption. Montana-Dakota also shreds confidential documents that are no longer in use. Thus, the Confidential Information is subject to efforts reasonable under the circumstances to maintain its secrecy.

20. The Confidential Information derives independent economic value from its secrecy, and Montana-Dakota and the third-party individuals and entities that provided proprietary and confidential information to Montana-Dakota also derive economic value from its secrecy. Montana-Dakota is able to solicit highly confidential and proprietary information from third-parties due to Montana-Dakota's close working relationship with those third-parties, as well as Montana-Dakota's investment of the substantial time and money necessary to establish those essential business relationships.

21. Disclosing the Confidential Information to the public would damage the economic interests of Montana-Dakota because Montana-Dakota would be less likely to receive highly confidential and proprietary information from third parties; thus, Montana-Dakota would not have access to information necessary to make good business decisions. Disclosing the Confidential Information to the public also would damage the economic interests of Thunder Spirit and Nordex by providing their competitors with an advantage they would not otherwise have and that would allow them to know and undercut their proposals in future bidding processes.

22. Finally, disclosure of the Confidential Information ultimately would harm those who benefit from Montana-Dakota's business endeavors—Montana-Dakota's Montana energy consumers. Montana-Dakota's ability to maintain the confidentiality of proprietary information provided by third parties like Thunder Spirit, Nordex, and others facilitates Montana-Dakota's

ability to solicit and receive third-party proprietary information within the scope of its business operations. This in turn allows Montana Dakota to make optimal business decisions, which ideally provide Montana energy consumers with the most efficient energy at the best available prices. Public disclosure of this information would have a chilling effect on Montana-Dakota's future business endeavors. As a result, Montana energy consumers would ultimately be harmed.

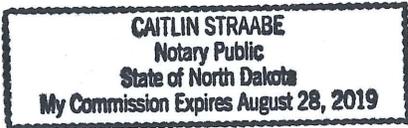
Dated this 23rd day of October, 2015.



Darcy J. Neigum
Director of System Operations and Planning
Montana-Dakota Utilities Co.

SUBSCRIBED and SWORN to before me this 23rd day of October 2015.

(SEAL)




Notary Public for the State of North Dakota
Printed Name: Caitlin Straabe
Residing at: Burleigh County
My Commission Expires: 8/28/2019