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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 AS A LATE-FILED EXHIBIT

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 from its preliminary cost modeling to

comply with the Clean Power Plan, which the Commission requested as a late-filed exhibit in this matter.

Montana-Dakota also offers the Affidavit of Darcy J. Neigum (“Neigum Affidavit”), 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

In 2015, the Environmental Protection Agency (“EPA”) published administrative rules governing carbon emissions, which are known as the Clean Power Plan. Neigum Aff. ¶ 6. Under the Clean Power Plan, each state must limit its total power sector carbon emissions to the target levels established by the EPA. *Id.* The EPA provides each state mass and rate allowances sufficient to meet this target level. *Id.* The states then distribute the allowances to regulated utilities. *Id.* If a state does not act, the EPA will act in its place. *Id.* The utilities must obtain adequate allowances for their carbon emissions. If they are unable to do so, they must purchase or otherwise obtain surplus allowances from another source. *Id.*

To evaluate options for complying with the Clean Power Plan, Montana-Dakota prepared preliminary cost modeling. *Id.* ¶ 7. The preliminary modeling was based on initial information. It was incomplete and non-conclusive and will not be used as the basis for Montana-Dakota’s final decision-making. *Id.* Like all preliminary modeling, it was based on a number of assumptions, including the published Clean Power Plan rules and a number of other factors, and provided various outcomes. *Id.*

While the hearing in this matter was ongoing on February 9, 2016, the United States Supreme Court stayed implementation of the Clean Power Plan, pending judicial review. *Id.* ¶ 8. The Court’s ultimate decision and the EPA’s subsequent actions, interpretation of the Clean

Power Plan rules, and additional rulemakings will necessarily impact the assumptions and outcomes of Montana-Dakota's preliminary modeling. *Id.* Other factors may also change the assumptions and outcomes contemplated by the preliminary modeling. *Id.*

As a result, Montana-Dakota's preliminary Clean Power Plan modeling will almost certainly change. *Id.* ¶ 9. If so, the final version of Montana-Dakota's Clean Power Plan modeling, as well as its ultimate decisions, will necessarily differ from its preliminary modeling. *Id.*

At the hearing, the Commission requested Montana-Dakota submit a late-filed exhibit containing information from its preliminary cost modeling to comply with the Clean Power Plan. *Id.* ¶ 3. Montana-Dakota has prepared an exhibit pursuant to the Commission's request and seeks a protective order to prevent public disclosure. *Id.* Unlike final modeling data, the preliminary cost modeling data is confidential and public disclosure could result in negative economic impacts on Montana-Dakota and consumers it serves. *Id.* ¶ 4.

Montana-Dakota has performed a legal and factual examination that the information is legally protectable. *Id.* ¶ 5. It 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. *Id.* 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. *Id.*

Montana-Dakota respectfully submits to the Commission that the confidential information identified below 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(4)(b). 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 information to be protected.

IDENTIFICATION OF CONFIDENTIAL INFORMATION

Montana-Dakota seeks a protective order preventing the disclosure of information from its preliminary cost modeling to comply with the Clean Power Plan (“Confidential Information”). A late-filed exhibit containing the Confidential Information was prepared at the Commission’s request.

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 protectable.” *See* Admin. R. Mont. 38.2.5007(2).

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 from its secrecy. Admin. R. Mont. 38.2.5007(4)(b).

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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 communicated electronically and in writing. 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 or disclose the Confidential Information. Neigum Aff. ¶ 10. It is not within the public domain. *Id.* ¶ 11. Disclosure of the Confidential Information is not required by law and is not published or otherwise made publicly available. *Id.* Therefore, the Confidential Information meets the definition of secret under the Commission’s rules.

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

Montana-Dakota has met the requirements of ARM 38.2.5007(4)(b)(iv) by adopting reasonable measures to maintain the secrecy of the Confidential Information. *Id.* ¶ 10. Montana-Dakota does not share or disclose its preliminary modeling. *Id.* Only Montana-Dakota employees and representatives with a direct need to know have authorization to access it. *Id.* The Confidential Information is kept in password-protected computers and in locked physical facilities that are not available to the public at any time. *Id.* Hard copies are destroyed when no longer needed. *Id.*

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

The Confidential Information is not within the public domain. *Id.* ¶ 11. Disclosure of the Confidential Information is not required by law and is not published or otherwise made publicly available. *Id.* As stated above, the Confidential Information is electronically and physically protected. *Id.* ¶ 10. Therefore, the 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.

The Commission's administrative rules establish that Montana-Dakota must derive some economic value from the Confidential Information's secrecy. *See* Admin. R. Mont. 38.2.5007(4)(b)(vi). Public disclosure of the Confidential Information could have damaging economic impacts on Montana-Dakota and the customers it serves. *Neigum Aff.* ¶¶ 12-14. Disclosure of the Confidential Information may influence outcomes of the yet to be filed implementation plans driving up the cost of service for Montana-Dakota's customers. *Id.* ¶ 12.

In addition, agencies may use the Confidential Information to force Montana-Dakota into decisions the agencies see as optimal, despite the fact these options may substantially increase the cost of service to Montana-Dakota's customers. *Id.* ¶ 13.

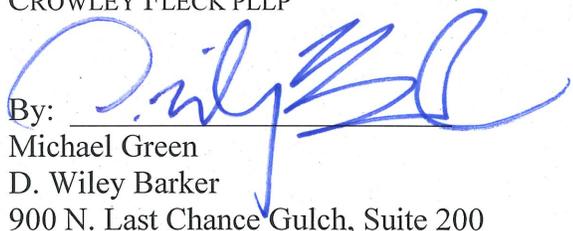
Moreover, the preliminary information was incomplete and non-conclusive. *Id.* ¶ 14. Public disclosure may result in misperceptions regarding Montana-Dakota's available or intended options to comply with the Clean Power Plan. *Id.* Montana-Dakota seeks to avoid any misinterpretation of this data and any suggestion it will reflect its final decision-making in any way. *Id.*

CONCLUSION

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

Dated this 4th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2016, the foregoing Montana-Dakota Utilities Co.'s Motion for an Order Protecting Information Requested as a Late-Filed Exhibit was served via electronic and U.S. mail on:

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D. Wiley Barker

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)
)
)
)

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. Montana-Dakota's principal place of business is 400 North Fourth Street, Bismarck, North Dakota 58501.

2. I am responsible for and have personal knowledge of Montana-Dakota's preliminary cost modeling to comply with the Clean Power Plan. I am also familiar with the Montana-Dakota's efforts to ensure its preliminary modeling remains confidential.

3. At the hearing in this matter on February 9-10, 2016, the Public Service Commission ("Commission") requested Montana-Dakota submit a late-filed exhibit containing

information from its preliminary cost modeling to comply with the Clean Power Plan. Montana-Dakota has prepared an exhibit pursuant to the Commission's request and seeks a protective order to prevent public disclosure of this information.

4. Unlike final modeling data, the preliminary cost modeling data is confidential and public disclosure could result in negative economic impacts on Montana-Dakota and the Montana consumers it serves.

5. Montana-Dakota has performed a legal and factual examination that the information is legally protectable. It 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. 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.

6. In 2015, the Environmental Protection Agency ("EPA") published administrative rules governing carbon emissions, which are known as the Clean Power Plan. Under the Clean Power Plan, each state must limit its total power sector carbon emissions to the target levels established by the EPA. The EPA provides each state mass and rate allowances sufficient to meet this target level. The states then distribute the allowances to regulated utilities. If a state does not act, the EPA will act in its place. The utilities must obtain adequate allowances for their carbon emissions. If they are unable to do so, they must purchase or otherwise obtain surplus allowances from another source.

7. To evaluate options for complying with the Clean Power Plan, Montana-Dakota prepared preliminary cost modeling. The preliminary modeling was based on initial information. It was incomplete and non-conclusive and will not be used as the basis for Montana-Dakota's

final decision-making. Like all preliminary modeling, it was based on a number of assumptions, including the published Clean Power Plan rules and a number of other factors, and provided various outcomes.

8. On February 9, 2016, the United States Supreme Court stayed implementation of the Clean Power Plan, pending judicial review. The Court's ultimate decision and the EPA's subsequent actions, interpretation of the Clean Power Plan rules, and additional rulemakings will necessarily impact the assumptions and outcomes of Montana-Dakota's preliminary modeling. Other factors may also change the assumptions and outcomes contemplated by the preliminary modeling.

9. As a result, Montana-Dakota's preliminary Clean Power Plan modeling will almost certainly change. If so, the final version of Montana-Dakota's Clean Power Plan modeling, as well as its ultimate decisions, will necessarily differ from its preliminary modeling.

10. Montana-Dakota has adopted reasonable measures to maintain the secrecy of this information. Montana-Dakota does not share or disclose its preliminary modeling. Only Montana-Dakota employees and representatives with a direct need to know are authorized to access the preliminary modeling. Preliminary modeling information is kept in password-protected computers and in locked physical facilities that are not available to the public at any time. Hard copies of the preliminary modeling are destroyed when no longer needed.

11. Montana-Dakota's preliminary modeling information is not within the public domain. Disclosure of the information is not required by law and is not published or otherwise made publicly available. As a result, the preliminary modeling is not generally known and is not readily ascertainable by other persons. It is not readily ascertainable by proper means.

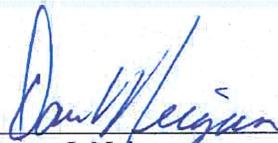
12. Public disclosure of Montana-Dakota's Clean Power Plan preliminary cost modeling information could have damaging economic impacts on Montana-Dakota and the customers it serves. Disclosure of this information may influence outcomes of the yet to be filed implementation plans driving up the cost of service for Montana-Dakota's customers.

13. In addition, agencies may use the information to force Montana-Dakota into decisions the agencies see as optimal, despite the fact these options may substantially increase the cost of service to Montana-Dakota's customers.

14. Moreover, the preliminary information was incomplete and non-conclusive. Public disclosure may result in misperceptions regarding Montana-Dakota's available or intended options to comply with the Clean Power Plan. Montana-Dakota seeks to avoid any misinterpretation of this data and any suggestion it will reflect its final decision-making in any way.

15. For all these reasons Montana-Dakota Utilities seeks a protective order for this information.

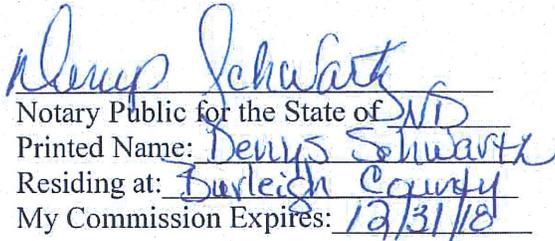
Dated this 4 day of March, 2016.



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

SUBSCRIBED and SWORN to before me this 4 day of March 2016.

(SEAL)



Notary Public for the State of ND
Printed Name: Denys Schwartz
Residing at: Burleigh County
My Commission Expires: 12/31/18

