

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

IN THE MATTER OF MONTANA-) REGULATORY DIVISION
DAKOTA UTILITIES CO., a Division of)
MDU Resources Group, Inc., for Authority) DOCKET NO. D2015.6.51
to Establish Increased Rates for Electric)
Service) ORDER NO. 7433a

PROTECTIVE ORDER

PROCEDURAL HISTORY

1. On October 9, 2015, Montana-Dakota Utilities Co. (MDU) filed an *Application for Authority to Establish Increased Rates for Electric Service in the State of Montana* with the Montana Public Service Commission (Commission). The Commission issued a *Notice of Application and Intervention Deadline* on July 8, 2015, and granted intervention to the Montana Consumer Counsel, the Alliance For Solar Choice, and the Montana Large Customer Group on August 6, 2015.

2. Data request PSC-018 issued by the Commission on September 23, 2015, asked MDU for information regarding Thunder Spirit and other wind proposals. On October 9, 2015, MDU filed its responses to PSC data requests issued on September 23, 2015, and filed a *Motion for an Order Protecting Information Request in Data Request PSC-018*, and the supporting affidavits of Stephen Peluso and Darcy J. Neigum.

3. Staff Attorney Laura Farkas was appointed as examiner for the limited purpose of disposing of discovery disputes (including objections to data requests and motions to compel) and motions for protective order in this proceeding. Order 7433 ¶ 15 (Sept. 8, 2015).

FINDINGS OF FACT

4. MDU seeks to protect “the disclosure of documents responsive to data request PSC-018...” Specifically, MDU seeks to protect the following: (1) MDU’s analysis of the Thunder Spirit and other wind proposals submitted in response to the March 2013 request for

proposals (RFP); (2) MDU's description of the price increases and other power purchase agreement (PPA) amendments that would have been necessary for Thunder Spirit Wind to obtain financing; and (3) MDU's description of the differences between the amended PPA MDU executed with ALLETE Clean Energy, Inc. (ACE) and the PPA initially executed with Thunder Spirit Wind, as well as the terms of the Asset Purchase Agreement executed with ACE. Mot. p. 5 (Oct. 9, 2015).

5. MDU has considered that the Commission is a public agency and that there is a constitutional presumption of public access to documents and information in the Commission's possession." *Id.* at 4.

6. MDU asserts that the information is secret. *Id.* at 7. MDU takes steps to prevent public disclosure of the information it seeks to protect, including the following:

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.

Aff. Darcy J. Neigum ¶ 11 (Oct. 9, 2015).

7. According to MDU, it, ACE, and the third-party entities that responded to MDU's RFP obtain economic value and a competitive advantage from keeping the Confidential Information secret. Mot. at 9. MDU asserts that:

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 in response to future RFPs; 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 other third party wind projects by providing their competitors with an advantage they would not otherwise have...

Aff. Neigum ¶ 16.

CONCLUSIONS OF LAW

8. The Montana Constitution imposes "an 'affirmative' duty on government officials to make all of their records and proceedings available to public scrutiny." *Great Falls Tribune v. Mont. Pub. Serv. Commn.*, 2003 MT 359, ¶ 54, 319 Mont. 38. However, "a trade secret is one form of information in which there is a statutorily defined property right." *Id.* ¶ 59.

9. The Commission "may issue a protective order when necessary to preserve trade

secrets . . . as required to carry out its regulatory functions.” Mont. Code Ann. § 69-3-105(2) (2015).

10. An entity seeking a protective order “must support its claim of confidentiality by filing a supporting affidavit making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements.” *Great Falls Tribune*, ¶ 56. “The claimant’s showing must be more than conclusory” and “must make clear . . . the basis for the request.” *Id.*; Mont. Admin. R. 38.5.5007(3) (2015).

11. A request for protective order must include “a complete and specific nonconfidential identification, description, and explanation of the information, item by item or by category of items which are alike, of all information for which protection is requested.” Mont. Admin. R. 38.2.5007(3)(b). For purposes of this Protective Order, paragraph 4 describes the information that MDU seeks to protect.

12. In order to claim a trade secret as the basis for a protective order, a movant must demonstrate that: (1) It has considered the Commission is a public agency and that there is a Constitutional presumption of access to documents and information in the Commission’s possession; (2) the claimed trade secret material is information; (3) the information is secret; (4) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy; (5) the secret information is not readily ascertainable by proper means; and (6) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy. *Id.* at 38.2.5007(4)(b).

13. MDU has demonstrated that the information in paragraph 4 is secret, is subject to efforts reasonable under the circumstances to maintain its secrecy, is not readily ascertainable by proper means, and derives independent economic value from its secrecy. *Supra* ¶¶ 6-7. As a result, MDU has made a *prima facie* showing that the information described in paragraph 4 consists of trade secrets entitled to protection under constitutional due process requirements.

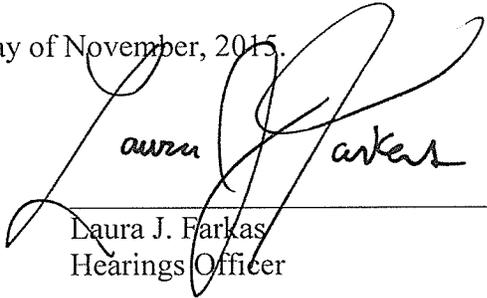
ORDER

IT IS HEREBY ORDERED THAT:

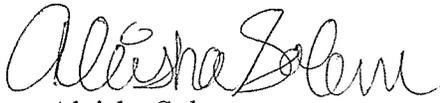
14. MDU’s *Motion* is GRANTED;
15. MDU must provide the information consistent with this Protective Order within 5 calendar days of the service date of this Protective Order;

16. Information submitted in accordance with this Protective Order shall be treated as confidential pursuant to Title 38, Subchapter 50 of the Administrative Rules of Montana.

DONE AND DATED this 5th day of November, 2015.


Laura J. Farkas
Hearings Officer

ATTEST:


Aleisha Solem
Commission Secretary
(SEAL)

Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

(7-26-00)

ARM 38.2.5012

Docket No. D2015.6.61, Order No. 7433a

Order Action Date: November 5, 2015

I understand that in my capacity as counsel or expert witness for a party to this proceeding before the commission, or as a person otherwise lawfully so entitled, I may be called upon to access, review, and analyze information which is protected as confidential information. I have reviewed ARM 38.2.5001 through 38.2.5030 (commission rules applicable to protection of confidential information) and protective orders governing the protected information that I am entitled to receive. I fully understand, and agree to comply with and be bound by, the terms and conditions thereof. I will neither use nor disclose confidential information except for lawful purposes in accordance with the governing protective order and ARM 38.2.5001 through 38.2.5030 so long as such information remains protected.

I understand that this nondisclosure agreement may be copied and distributed to any person having an interest in it and that it may be retained at the offices of the provider, commission, consumer counsel, any party and may be further and freely distributed.

Typed or Printed Name

Signature

Date of Signature

Business Address:

Employer

Party Represented