

Service Date: October 27, 2015

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

IN THE MATTER OF the Petition of) REGULATORY DIVISION
Greycliff Wind Prime, LLC To Set Contract)
Terms and Conditions for a Qualifying) DOCKET NO. D2015.8.64
Small Power Production Facility) ORDER NO. 7436a
)

PROTECTIVE ORDER

PROCEDURAL HISTORY

1. On August 17, 2015, Greycliff Wind Prime, LLC (Greycliff) filed a *Petition to Have Commission Set Contract Terms and Conditions Pursuant to MCA 69-3-603* with the Montana Public Service Commission (Commission). The Commission issued a *Notice of Petition and Intervention Deadline* on August 20, 2015, and granted intervention to NorthWestern Energy (NorthWestern) and the Montana Consumer Counsel (MCC) on September 9, 2015.
2. Data requests issued by NorthWestern on October 2, 2015 asked Greycliff to provide hourly production estimates for a minimum of one calendar year for the Greycliff project. Greycliff submitted responses to NorthWestern's data requests on October 16, 2015, and indicated that Greycliff would be seeking a protective order for the hourly production estimates.
3. On October 20, 2015, Greycliff filed a *Motion for Protective Order and Brief in Support* (Motion) to protect financial information which it would be required to be produced in response to data requests. Greycliff also filed the supporting affidavit of Patrick Pelstring.
4. 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 7436 ¶ 12 (Sept. 10, 2015).

FINDINGS OF FACT

5. Greycliff seeks to protect “non-public financial information” which includes “information, whether written, oral or other tangible or intangible forms, which may include, but is not limited to, ideas, concepts, know-how, models, diagrams, flow charts, data, computer programs, marketing plans, business plans, customer information, and other technical, financial or business information...” Mot. pp. 2-3 (Oct. 20, 2015).

6. More specifically, Greycliff seeks to protect “information such as wind data derived from meteorological towers, the analysis of such data (including but not limited to power curve analyses), and ultimately potential capacity factors associated with the site, the meteorological data, and power curve analysis.” Aff. Patrick Pelstring ¶ 7 (Oct. 20, 2015).

7. “Greycliff 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.” Mot. at 5.

8. Greycliff takes steps to prevent public disclosure of the information it seeks to protect, including the following:

Greycliff maintains strict security at all times at its offices over the Confidential Information, including the following measures: Only members of Greycliff and their respective employees are allowed access to this information, and all such information provided to outside consultants, experts, attorneys or any other non-employees is produced pursuant to confidentiality agreements with penalties for violations of confidentiality if such information is disclosed without the express, advance, written permission of Greycliff. All present and past Confidential information is strictly maintained in separate file cabinets which are clearly marked as “Confidential.”

Aff. Pelstring ¶ 12.

9. According to Greycliff, “[t]he wind development business is highly competitive.” *Id.* ¶ 7. Greycliff states that its “wind data, potential analyses of such data by competitors, the ability to derive power curves and capacity factors, must be protected against disclosure.” *Id.* ¶ 8. Greycliff asserts that if a competitor accesses the information, “it can successfully replicate the method, manner, and outcomes generated by Greycliff’s proprietary approach to this data, and potentially replicate the results and obtain commercial information.” *Id.*

CONCLUSIONS OF LAW

10. 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.

11. 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).

12. 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).

13. 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 6 describes the information that Greycliff seeks to protect.

14. 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).

15. With respect to the information described in paragraph 6 of this Protective Order, to the extent that it is not readily ascertainable by proper means, Greycliff has demonstrated that the information 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* ¶¶ 6-9; *see* Dkt. D2015.3.27. As a result, Greycliff has made a *prima*

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facie showing that the information described in paragraph 6 consists of trade secrets entitled to protection under constitutional due process requirements.

16. To the extent paragraph 6 of this Protective Order does not describe all of the information Greycliff seeks to protect, Greycliff has not adequately described the information it seeks to protect, and has not demonstrated how it derives competitive advantage from the secrecy of other information. *Supra* ¶ 5.

ORDER

IT IS HEREBY ORDERED THAT:

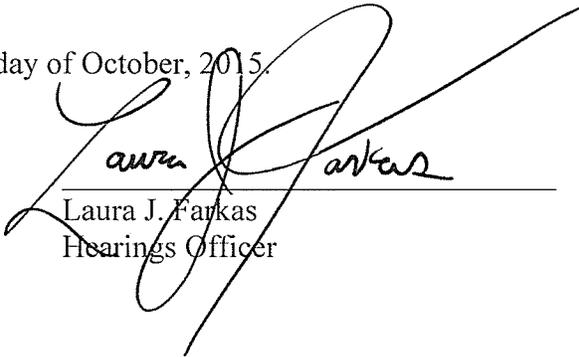
17. To the extent the information described in paragraph 6 of this Protective Order encompasses the information Greycliff seeks to protect, the *Motion* is granted;

18. To the extent the information described in paragraph 6 of this Protective Order does not fully encompass the information Greycliff seeks to protect, the *Motion* is denied in part;

19. Greycliff must provide the information consistent with this Protective Order by November 2, 2015, and;

20. 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 27th day of October, 2015.



Laura J. Farkas
Hearings Officer

Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

(7-26-00)

ARM 38.2.5012

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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