

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. 7433e

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.

1. On September 8, 2015, the Commission issued *Procedural Order No. 7433*. On January 13, 2016, the Commission issued a *Notice of Public Hearing*. On February 8, 2016, the parties filed a *Stipulation and Settlement Agreement*. On February 9, the Commission commenced a hearing in Glendive, Montana.

2. 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

3. MDU seeks to protect “information from its preliminary cost modeling to comply with the Clean Power Plan.” Mot. 1 (Mar. 4, 2016).

4. 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 3.

5. MDU asserts that the information is secret. *Id.* at 5. 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] 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 is kept in password-protected computers and in locked physical facilities that are not available to the public at any time.

Aff. Darcy J. Neigum ¶ 10 (Mar. 4, 2016).

6. According to MDU, it obtains economic value and a competitive advantage from keeping the information secret. Mot. at 6. MDU asserts that:

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.

Aff. Neigum ¶ 12.

CONCLUSIONS OF LAW

7. 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.

8. 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).

9. 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) (2016).

10. 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.

11. 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).

12. 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

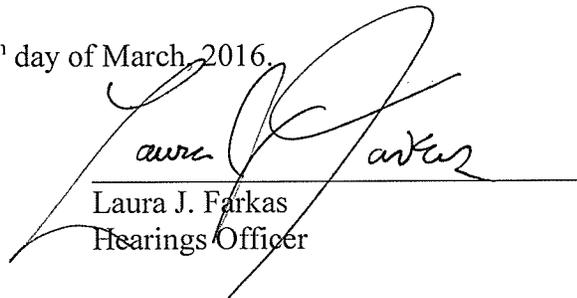
IT IS HEREBY ORDERED THAT:

13. MDU's *Motion* is GRANTED;

14. MDU must provide the information consistent with this Protective Order within 1 calendar day of the service date of this Protective Order;

15. 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 10th day of March, 2016.



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. 7433e

Order Action Date: March 10, 2016

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