

Service Date: February 20, 1997

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

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IN THE MATTER of the MONTANA POWER)	UTILITY DIVISION
COMPANY's Request for Approval of the)	DOCKET NO. D96.6.106
Advanced Silicon Materials, Inc., Tariff.)	ORDER NO. 5924b

FINAL ORDER

Appearances

FOR THE MONTANA POWER COMPANY:

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FOR THE LARGE CUSTOMER GROUP:

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FOR THE PUBLIC SERVICE COMMISSION:

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FOR THE COMMISSION:

NANCY MCCAFFREE, Chair
DAVE FISHER, Vice Chair
BOB ANDERSON, Commissioner
DANNY OBERG, Commissioner
BOB ROWE, Commissioner

BACKGROUND

1. On June 18, 1996 Montana Power Company (MPC or Company), in anticipation of MPC's proposed filing of tariffs, filed a Motion for Protective Order for Advanced Silicon Materials, Inc., Tariff Filing (ASIMI) to protect "market sensitive" information related to pricing and rates for electric service to ASIMI. MPC maintained that the information it would submit in support of its tariff filing would be proprietary and confidential. MPC requested the protection of ASIMI's contractual pricing terms to safeguard MPC's pricing policies in negotiating strategies in the newly developing competitive environment for electrical sales.

2. On August 9, 1996 the Montana Public Service Commission (Commission) received a transmittal letter, rate filing and Rate Schedule - ASIMI-1 from MPC, proposing service to ASIMI on a contract negotiated to provide electrical service to this new customer load. In its initial application, MPC stated that it will be serving ASIMI with a combination of system energy surpluses and capacity purchased from the market, with net revenues treated as revenue credits and flowed through in future revenue requirement proceedings.

3. On August 23, 1996 the Commission issued Protective Order No. 5924, as requested by MPC in its Motion for a Protective Order, and Procedural Order No 5924a, setting forth an expedited discovery schedule and scheduling a hearing for October 31, 1996. The Commission issued its Notice of Request and Intervention Deadline on the same day.

4. The Commission conducted a public hearing on October 31, 1996 at the Commission's offices, in the Gordon Bollinger Hearing Room, 1701 Prospect Avenue, Helena, Montana. MPC presented the testimony of its witnesses *en banc*, to respond to examination as a panel. The Company's witnesses were Perry J. Cole, Vice-President of Business Development and Regulatory Affairs; Jim Falvey, Director of Allocated Costs, Regulatory Affairs Department; Patrick R. Corcoran, Director of Rates, Regulatory Affairs Department; Terry Wisner, Energy Marketer, Energy Supply Division; and Ted Williams, Manager of Transmission Marketing, Transmission Services Department. Also on the panel testifying was Michael Kerschen, Vice-President of Manufacturing for ASIMI and General Manager of the Butte facility. Neither Montana Consumer Counsel nor Large Customer Group presented witnesses. Counsel for both

were allowed to cross-examine witnesses, an option exercised by counsel for Large Customer Group only.

5. At the conclusion of the hearing, the Commission requested briefs on the issue of the propriety of keeping the negotiated terms on pricing confidential, such that the filed tariffs and terms would be confidential and subject to an ongoing protective order. MPC and MCC filed briefs; LCG elected not to brief the issue.

FINDINGS OF FACT AND DISCUSSION

6. The ASIMI plant will process silica for use by companies that make silicon wafers. ASIMI selected Butte in part because of the area's reliable electrical transmission and because MPC agreed to provide a confidential competitive electric rate. When fully operational, the ASIMI plant in Butte will have a load of 100 MWs, operating at an 88.5 percent load factor.¹ Since the plant's employees in Montana will exceed 250 people, MPC expects the ASIMI plant to result in other economic benefits, in addition to net revenue generation, for Montana's economy.

7. The basis of MPC's contract with ASIMI is a bundled market-based price.² The costs normally bundled into a price can be separated by function. In ASIMI's case, there are line extension, transmission and generation cost functions. MPC proposes to price generation, not the other cost functions, on a market basis. MPC attributes the move to market-based pricing to national policies opening transmission systems to common carriage, technologic change that lowered costs, power surpluses, and regional policies and trends.

¹ ASIMI's gas load is about 700,000 Mmbtu (about .7 of a BCF) of per year (p.15).

² After the initial period other pricing policies apply.

8. MPC recommends two criteria for efficient market-based pricing on the ASIMI tariff: providing revenues that cover MPC's opportunity costs and maximizing net revenues. In turn, MPC intends to flow through net revenues as a credit to revenue requirements.

9. To MPC market-based pricing means that regional power values serve as a guide to the prices the company can charge. MPC expects market-based pricing to become the norm as competitive power markets evolve. With market-based pricing MPC sells its surplus energy to ASIMI instead of selling this surplus into off-system markets. So long as ASIMI generates revenues that exceed both the opportunity cost and transmission cost for the alternative market, MPC maintains that other retail customers are not adversely affected and stranded costs may be mitigated. According to MPC the market-based prices for ASIMI were checked against the following Least Cost Planning rule guidelines: opportunity cost pricing, risk allocation to MPC and ASIMI, no long-term obligation to serve and involvement of stakeholders .

10. MPC maintains that the ASIMI contract recovers costs of line extension, transmission and generation, thereby benefiting other customers.³ First, the line extension costs for ASIMI are covered through tax increment financing. Second, the contract price for ASIMI covers transmission costs associated with the FERC tariff, and therefore other customers' transmission rates should decrease, according to MPC. Third, the absence of any obligation to include ASIMI as a firm generation resource requirement in its load and resource plans underscores the rate as a market-based pricing choice. MPC will sell its surplus energy to ASIMI

³ MPC describes this benefit several different ways: (1) stranded costs are mitigated; (2) the ASIMI contract contributes to the fixed costs of the embedded system, and (3) other customers' rates should not increase because of ASIMI.

at market-based rates. After the surplus dissipates, MPC may arrange for ASIMI's power requirements from the market. MPC maintains that it has no long-term obligation to serve ASIMI's energy needs.⁴ Market-based prices, in addition to covering transmission costs and the best alternative off-system sales price, must also cover the cost of purchased capacity.

11. MPC suggests that the ASIMI contract may serve as a guide to future electric restructuring. In addition to its Real Time Price filing and in an attempt to smooth the transition, MPC may file a generic "access rate" in advance of its restructuring filing (MPC application, pp. 13, 14). MPC expects that restructuring efforts will lead to deregulation of generation and allow customers to choose their energy suppliers.

12. MPC also discusses "penalties" which can be imposed by the Commission. In a competitive market regulators must establish symmetric risk standards with reasonable performance standards. As part of the "new compact" MPC describes, if a better use of the power sold to ASIMI would emerge after the fact, MPC maintains that it should not be penalized. MPC asserts that because ASIMI selected MPC through a competitive solicitation, MPC's surplus power attains its highest valued use at the time of selection (MPC application p. 12, second full paragraph). Thus, according to MPC, there is no place for an ongoing penalty in the form of a rate/revenue imputation such as this Commission used with the economic development tariff for Rhone Poulenc Chemical Company.

Commission Decision

13. MPC's request for approval of this confidential tariffed rate was not opposed. The testimony and evidence supporting the request was solely that of MPC, including testimony from the witness from ASIMI. Determining that the ASIMI rate would at least cover costs and

⁴ MPC, however, has a short term (5 year) obligation to serve ASIMI's energy needs and an apparent obligation to serve ASIMI's capacity and transmission needs (MPC Data Responses to PSC-4(a), (e) and 9(b)).

because no party appeared in opposition, the Commission approves the ASIMI application, subject to certain conditions. MPC's net-revenue maximization criterion is valid if MPC lacks market power. The following conditions attempt to limit the risk of negative net revenues and to monitor the actual net revenues generated by ASIMI.

14. Because the market prices that MPC and ASIMI could arrange after the initial term are unknown, the Commission approves only the prices and price indices of the ASIMI contract for the initial term. Although MPC could still contract with ASIMI at the end of the initial term based on the pricing in the proprietary agreement, the Commission cannot pre-approve unknown prices and pricing indices. The contract allows only one roll-over of the initial term in the contract. Therefore, MPC must file any new contract proposal at least one year before the initial five year contract terminates on December 31, 2002, to allow the Commission to investigate and consider the proposed market prices and indices.

15. For data reporting requirements, MPC must provide historical market data each year after the plant comes on line and for the duration of the initial term. Data must include the prices and sales quantities for each category of service quality (confidentiality prevents a more detailed description) at which MPC sells power to ASIMI. MPC must also report its actual annual revenues, prices and quantities from opportunity sales. All such data can be filed as proprietary.

16. It is premature for the ASIMI contract to serve as a precedent for generic or customer-specific tariffs. A thorough explanation of the various markets, market prices and the role of auctions and niche-market values must precede any expansion of generic or designer rates. Therefore, the Commission conditions the approval of subsequent filings on a demonstration of the relationship between various markets and market prices. To this end, MPC may use reverse RFP (request for proposal) auctions as one means to establish the value of power.

17. The Commission expressed concern at the hearing about MPC's request to file parts of the tariff as confidential, in particular the contract terms on price (the actual tariffed rate) negotiated between ASIMI and MPC. The actual tariff schedule would not be on file with the

Commission and "open to public inspection, showing all rates, tolls, and charges which [the utility] has established and which are in force at the time for any service . . ." as provided in § 69-3-301(1), Montana Code Annotated (MCA). In their briefs on the issue, both MCC and MPC supported the filing of tariffs pursuant to a protective order.

18. MCC's brief on confidential tariffs. MCC states that under the specific circumstances of this case, the Commission can approve the confidential portions of ASIMI. The Commission issued the Protective Order based on MPC's Motion to protect information consisting of "trade secrets" to be filed in the case, in particular the pricing information from the negotiations and contractual terms between ASIMI and MPC. No party contested the confidential nature of the information. At the hearing MPC and ASIMI explained further why the information was a valuable trade secret, without being refuted. MCC relies on the analysis in Mountain States Telephone and Telegraph Co. v. Department of Public Service Regulation, 194 Mont. 277, 634 P.2d 181, 38 St.Rptr. 1479 (1981) to resolve the conflict between the desires of the parties to keep the rate information confidential and the Commission's obligation to maintain open tariffs. In the rate case, the balance between the public's right to know in the Montana Constitution is balanced against the utility's desire to protect trade secret information, resulting in a protective order allowing parties in the rate case to have access to the information. MCC applies the same balancing analysis after the rate case to the tariff publication provisions of § 69-3-301, MCA, and concludes that the Commission may approve filing the confidential pricing terms of the tariff under a protective order.

19. MPC's brief on the ASIMI tariff confidentiality. MPC maintains that due process and equal protection provisions of the Constitution require the confidentiality of the price information. To find "the right balance" with the public's right to know, MPC begins with § 69-3-301, MCA, which facially provides that rates shall be open to public inspection at the Commission. MPC argues that with competitive markets, the "market has now outpaced the law," necessitating a sophisticated analysis of the statute. As did MCC, MPC also relies on the analysis of Mountain States to assess the value of the private property right (the pricing information) as opposed to the public's right to inspect the tariffs.

20. MPC proposes signing of "Exhibit A's" to a protective order to balance the public's right to know with MPC's right to protect confidential business information. If released to a competitor, this information would show how the prices were derived, harming MPC in its future negotiations in a competitive market. MPC also asserts ASIMI's right to protection from its competitors. ASIMI's witness testified that its competitors would have an advantage in knowing what it pays for electric service. MPC would make available a general tariff for public review, omitting the proprietary information, which would be filed pursuant to a protective order. MPC proposes to allow individuals access to the tariff pricing information (the rate to ASIMI) after signing an Exhibit A to the protective order, provided that neither MPC or ASIMI object.

21. When the actual transition period to a competitive market arrives, the Commission will more generally address issues of confidentiality, market-pricing of utility service and appropriate tariff filings. However, the ASIMI-1 filing is a unique precursor of competition in the industry. In this case, MPC was not competing with other utilities to provide service to an existing customer. Rather, MPC, in concert with other Montana businesses and the city/county government of Butte-Silver, was competing with localities in other states to entice a large industrial plant with its new load to Montana. The local government and businesses provided incentives to ASIMI, in particular subsidizing the line extension for the plant, making it possible for MPC to offer more attractive terms without affecting other ratepayers. Other incentives attracted ASIMI to locate in Butte, including a promised substantial water supply and government cooperation on taxing and building requirements. This unique case does not provide precedent for future competition and filing of distribution and transmission tariffs. Under this limited scenario, the Commission finds that filing a general tariff for the public, with the specific contractual pricing terms filed under protection, would satisfy the requirements of § 69-3-301, MCA.

22. The Commission grants MPC's request to file the contract terms of the tariff as confidential and subject to a Protective Order, as proposed by MPC with some modification. As MPC proposes, the tariff filed with the Commission for public review would not contain the trade secret information. Any individual wishing to review the confidential information

(contracted terms of rates and service) would first sign an Exhibit A. The Commission would have twenty (20) business days to review the Exhibit A to ensure that "the person signing the Exhibit A is not MPC's or ASIMI's competitor." At the same time the Commission would serve copies of the Exhibit A with ASIMI and MPC. According to MPC, if the Commission, ASIMI or MPC do not object, the information will be released to the individual, who will be bound by the terms of the Exhibit A and the protective order.

23. The Commission modifies MPC's proposal as follows. MPC shall file the tariff showing as much information as is necessary for the use of the general public, to be kept on file for public inspection. At the same time MPC shall file a proposed protective order for the Commission's approval, covering only the confidential portions of the tariff. On approval of the protective order, the tariff is deemed filed. The Commission will allow MPC, and MPC alone, to file an objection twenty (20) days (not 20 business days) from the date an individual requests to see the confidential portions of the tariff and signs an Exhibit A. Twenty business days, potentially amounting to more than one month, would require too long a turn-around for a determination under the protective order.

24. MPC is the regulated entity filing the tariff and subject to the Commission's jurisdiction, and hence protection under the protective order. The Commission has no authority over or concern about an unregulated, non-utility customer's need for confidentiality of the terms of power purchase, in protecting it from its industry competitors. On notice of a request to view the tariff, MPC may contact ASIMI and determine whether it can make a good faith argument to invoke the protective order, if ASIMI desires. However, only MPC can invoke or receive the protection from the Commission, in this case, protection of confidential information involving its negotiating and pricing strategies from its potential competitors in the coming era of competition. The Commission cannot respond to entities not under our jurisdiction requesting protection of information held by the Commission.

CONCLUSIONS OF LAW

1. Montana Power Company (MPC) in providing electric service is a public utility under the regulatory jurisdiction of the Montana Public Service Commission (Commission).

Section 69-3-101, MCA.

2. The Commission properly exercises jurisdiction over MPC's rates and operations. Sections 69-3-102 and 69-3-301, *et seq.*, MCA.

3. The Commission has provided adequate public notice of all proceedings and an opportunity to be heard to all interested parties in this Docket. Sections 69-3-303 and 69-3-104, MCA and Title 2, Chapter 4, MCA.

4. The rate level approved in this order for the ASIMI-1 tariff is just, reasonable, and not unjustly discriminatory as a unique market-based rate, negotiated between MPC and ASIMI. Sections 69-3-330 and 69-3-201, MCA.

5. The requirements of § 69-3-301, MCA, are satisfied by filing of a general tariff open to public inspection with the confidential price terms filed under a protective order as provided in this order, limited to the particular facts of this application and not precedential to future filings.

ORDER

THE MONTANA PUBLIC SERVICE COMMISSION HEREBY ORDERS THE FOLLOWING:

1. Montana Power Company (MPC) is authorized to provide electrical service in Butte, Montana to Advanced Silicon Materials, Inc. (ASIMI), pursuant to the negotiated pricing terms of the contract between the parties. The service shall be provided with a combination of system energy surpluses and capacity purchased from the market, with net revenues treated as revenue credits to existing ratepayers in future revenue requirement proceedings.

2. MPC shall file a proposed Protective Order, governing the confidential pricing terms, and a general tariff subject to open inspection by the public. On approval of the Protective Order, the tariff is deemed filed.

3. To provide this service, MPC shall comply with the requirements incorporated in this Order in the Commission Decision.

Done and Dated this 19th day of February, 1997 by a vote of 5 -0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.