

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of Consumers)
Energy Company for approval of an Integrated)
Resource Plan under MCL 460.6t, certain)
accounting approvals, and for other relief.)
_____)

Case No. U-21090

**RULING ON MOTION TO REVOKE PROTECTED STATUS OF CERTAIN
DOCUMENTS**

A. Background

This case involves an application by Consumers Energy Company (Consumers) requesting approval of an Integrated Resource Plan (IRP) under MCL 460.6t. Among other things, Consumers' IRP includes the proposed purchase of the Dearborn Industrial Generation, LLC (DIG) plant in 2025. A prehearing conference in this matter was held on July 22, 2021, and a protective order was entered on July 23, 2021. The evidentiary hearing was completed on December 8, 2021.

On December 2, 2021, Michigan Environmental Council, Natural Resources Defense Council, and Sierra Club (collectively, MNS) filed a motion to revoke the protected status of all or portions of testimony by MNS witnesses Douglas Jester, Tyler Comings, George Evans, and Chris Neme and rebuttal testimony of company witness

Heather A. Prentice.¹ On December 9, 2021, per the agreement of Consumers and MNS, DIG was granted limited intervention to address the motion² and any appeals of this ruling.³

On December 15, 2021, Consumers and DIG filed responses opposing MNS's motion, all or in part,. Oral argument on the motion was held on December 16, 2021. Due to the nature of the information to be discussed, the motion hearing was conducted on a confidential record, subject to portions of the transcript being made public in the future.

B. Motion and Responses

1. MNS's Motion

MNS divided its motion into three parts: (1) a request to revoke the protected status of testimony by Mr. Jester concerning a National Pollution Discharge Elimination System (NPDES) permit issue related to the DIG plant, limited references to Mr. Jester's testimony in Mr. Comings' testimony, along with rebuttal testimony by Ms. Prentice on the same subject; (2) testimony by Mr. Comings concerning circumstances regarding the capacity available at the DIG plant from the purchase date of 2025;⁴ and (3) testimony by Mr. Evans and Mr. Neme, containing references to certain Aurora modeling files and portions of testimony by Mr. Comings to which the company responded in public rebuttal testimony.

¹ The motion and responses thereto were filed in the public docket, in redacted form, and under seal in the confidential docket.

² Docket entry 515.

³ 9 Tr 4071-4072.

⁴ See generally, 5 Tr 1210-1211, which includes a table indicating available capacity at DIG beginning in 2025.

Citing numerous orders, MNS asserts that the Commission has consistently found that utility regulation should be public and that claims of confidentiality should be made rarely and only in the clearest situation. MNS argues that the Commission carefully scrutinizes confidentiality claims and that the Commission's standards require that a party requesting that information be designated confidential show: (1) that the information is a trade secret or otherwise confidential; and (2) that disclosure of the information would result in a serious and clearly described harm.⁵ Under these standards, MNS argues that the protections for the information at issue here should be revoked, noting that it is not requesting that any exhibits containing confidential information be made public.

MNS contends that issues surrounding environmental permitting at DIG are a matter of public record, pointing to responses⁶ from the Department of Environment, Great Lakes, and Energy (EGLE) to Freedom of Information Act (FOIA) requests about DIG's NPDES permit. Further, MNS applies the Commission's standards for confidentiality to this issue, again noting that details of the NPDES permit are publicly available, that issues of cost and risk to ratepayers from the acquisition of the DIG plant are central to the resolution of the IRP approval, and that Consumers has not demonstrated that any competitive harm will result from the disclosure of the materials. Finally, although MNS acknowledges that there is a non-disclosure agreement (NDA)⁷ between Consumers and DIG, it nevertheless maintains that the NDA does not control the outcome here because the agreement recognizes that confidential material may be

⁵ MNS motion, p. 7, quoting July 18, 1990 order in Case Nos. U-9322 and 9611, p. 7.

⁶ See Attachments 1, 5, and 6 to MNS motion.

⁷ See Attachment 2 to MNS motion.

disclosed to the Commission, and other parties to this proceeding, in order to obtain approval of the purchase of the DIG plant.

Next, MNS discusses the circumstances of a capacity commitment related to the DIG plant that MNS maintains is important to the ultimate resolution of the case. According to MNS, “its existence, date, number of [zonal resource credits] ZRCs, and directional relationship to 50% of [cost of new entry] CONE are important pieces of information that should be public under the [Commission’s] standards[.]”⁸

Lastly, MNS argues that direct and rebuttal testimony by Mr. Evans and Mr. Neme, and additional portions of testimony by Mr. Comings, should be unredacted. According to MNS: (1) Mr. Evans’ direct and rebuttal testimony and Mr. Neme’s direct testimony were protected “out of an abundance of caution” when they were filed because the testimony contained references to Aurora modeling files;⁹ and (2) some protected portions of Mr. Comings’ direct and rebuttal testimony also refer to Aurora modeling, and other redacted portions of his testimony were responded to in public rebuttal testimony by Mr. Lee. MNS argues that all of Mr. Evans’ and Mr. Neme’s testimonies should be unprotected because the redacted portions do not contain proprietary or confidential information that pertains to Consumers or the owner of the Aurora program.

In summary, MNS requests that all of the protected information in Mr. Jester’s and Ms. Prentice’s testimony be made public, protection of portions of Mr. Comings

⁸ MNS motion, p. 9.

⁹ MNS motion, p. 10.

testimony should be revoked, and all of Mr. Evans' and Mr. Neme's testimony should be included as part of the public record.

2. Consumers' Response

As an initial matter, Consumers points out that MNS and the other parties to the proceeding have full access to the confidential material, subject to the protective order, and that the harm to Consumers and DIG would far outweigh the benefit to MNS if the motion were granted. Consumers asserts that most of the disputes over protected material in previous Commission cases involved access to confidential material in discovery, a circumstance that is not present in this proceeding. Consumers reiterates that making confidential, proprietary, or commercially sensitive information public as part of this proceeding would cause substantial harm to the company and DIG while providing no real benefit to MNS.

Consumers argues that requiring the company to disclose commercially sensitive information concerning DIG's NPDES permit could harm DIG, Consumers, and Consumers' customers. Consumers maintains that requiring disclosure of confidential information that it received from DIG could affect the company's relationships with other third parties in the future, positing that potential bidders may be less inclined to respond to the company's capacity solicitations if there are concerns about the disclosure of commercially sensitive information. Alternatively, bidders may increase their prices to account for the risk that confidential business information may become public.

Consumers argues that although some of the information MNS seeks to disclose regarding the DIG NPDES permit is public, and therefore protection can be revoked, certain other information on the permit issue should remain confidential.¹⁰

With respect to DIG's capacity commitment, Consumers again argues that this information is commercially sensitive, emphasizing that the confidential testimony at issue concerns DIG, a merchant plant that is not regulated by the MPSC. Consumers adds:

This is made even more significant by the fact that MNS opposes the sale of the DIG Plant to Consumers Energy. And, if MNS were to make this information public and the sale of the DIG Plant was not approved by the Commission, then commercial information of a business not regulated by the MPSC would be made public in a Commission proceeding. The utilization of the Protective Order allows MNS to make all of the arguments necessary for it [sic] position, while keeping the third parties' confidential, commercial information appropriately protected.¹¹

Accordingly, Consumers maintains that the information in Mr. Comings' testimony concerning capacity commitments at DIG should remain protected.

Finally, Consumers states that it "does not oppose MNS's request with respect to the direct and rebuttal testimony of Mr. Evans or the direct testimony of Mr. Neme."¹² Consumers also avers that it does not oppose making public the portions of Mr. Comings' testimony related to the analysis of the company's 2021 request for proposals or carbon price modeling.¹³

¹⁰ The portions of Mr. Jester and Ms. Prentice's testimony that Consumers maintains should remain protected are listed on page 8 of the company's response.

¹¹ Consumers' response, p. 9.

¹² Consumers' response, p. 10.

¹³ The portions of Mr. Comings' testimony that Consumers does not oppose making public are listed on page 10 of the company's response.

Noting that MNS did not specifically address some of Mr. Comings' testimony it proposes to make public, Consumers opposes revoking protections for testimony addressing other merchant plants. According to Consumers, making this information public could harm the competitive interests of these plants.¹⁴

3. DIG Response

DIG points out that the information at issue concerning the DIG plant was provided to Consumers as part of due diligence efforts undertaken in evaluating the potential purchase of the DIG facility. The information was made available to Consumers pursuant to an NDA that also allowed confidential information to be provided to the Commission and others for purposes of obtaining approval of the sale. Like Consumers, DIG contends that MNS has full access to all the confidential information at issue and is therefore not harmed if the information is not made public. DIG emphasizes that, unlike Consumers, it is not an entity that is regulated by the Commission and that DIG operates in a highly competitive business environment.

DIG contends that MNS makes several misrepresentations regarding the NPDES permit and other materials attached to MNS's motion, adding that the motion appears to be based on an outdated permit draft from 2018, which in turn is being used to support revoking the confidentiality protection from Mr. Jester's and Ms. Prentice's testimony. DIG further notes that the information that MNS seeks to make public goes beyond the information contained in the NPDES permit.

¹⁴ The portions of Mr. Comings direct and rebuttal testimony that Consumers contends should remain confidential are listed on pages 11-12 of the company's response.

Similarly, DIG asserts that the information in Mr. Comings testimony that pertains to DIG should remain protected. DIG again points out that it operates in a highly competitive and dynamic environment and certain information contained in Mr. Comings testimony could be used by competitors resulting in significant harm to DIG.¹⁵ DIG adds:

Though there is an allowance in the CA [i.e.,NDA] for Consumers Energy to release DIG's Confidential Information as part of this proceeding, the language of the CA continues to treat such information as Confidential Information despite its disclosure in a regulatory case and does not recognize any diminution of the confidential nature of the information, see CA at ¶3 ("obligations under Section 2 shall not apply to Confidential Information..."). Therefore, maintaining the confidential nature of DIG's information through the Protective Order is consistent with the parties' agreement under the CA. It is also consistent with the Protective Order.¹⁶

In summary, DIG requests that the motion be denied with respect to all testimony concerning the DIG plant.

C. Discussion

As discussed in MNS's motion, and DIG's and Consumers' responses, the Commission has authority to issue protective orders under Rule 403 of the Commission's procedural rules, Mich Admin Code, R 792.10403, as well as under the court rules, MCR 2.302(C)(8). Nevertheless, Commission precedent is clear that "assertions of confidentiality should be made infrequently and only in the clearest situations[.]"¹⁷ especially when "(1) the information for which protection is sought is central to the proceeding's ultimate resolution and (2) public access to the information is

¹⁵ See ¶¶ 11-15 of the Affidavit of Mr. Todd Mortimer, attached as Attachment A to DIG's response.

¹⁶ DIG's response, pp. 14-15.

¹⁷ July 29, 2008 order in Case No. U-14716-R, p. 9.

highly desirable and should be required whenever reasonably possible.”¹⁸ The Commission has held that “the regulation of utilities is a public affair which is to be conducted in an open and public manner so that all persons affected by the proceedings can participate if they choose to.” Consistent with its policy favoring disclosure, the Commission has used the following standard in determining whether information should be protected:

[T]he party moving for a protective order must satisfy a stringent burden by making a particularized showing (1) that the information at issue is a trade secret or otherwise confidential, and (2) that disclosure would work a clearly defined and serious injury.¹⁹

It should be further noted that with respect to the second part of this principle, the Commission has determined that “vague and unsupported contentions that public disclosure would harm a party’s competitive position are inadequate.”²⁰ That said, the Commission has recognized concerns regarding commercially sensitive information provided by third parties, finding that price terms, especially, should not be publicly disclosed.²¹

Consumers and DIG contend that although the NDA permits the disclosure of confidential information to the Commission, Staff, and intervenors to this proceeding, the parties to that agreement did not intend that the confidential information provided under the NDA would eventually become public. Consumers further argues that the Commission should weigh the significant commercial harm to DIG that could arise if the confidential information at issue becomes public, compared to the limited benefit to

¹⁸ July 19, 1994 order in Case Nos. U-10491 and U-10492, p. 6.

¹⁹ See June 30, 1994 order in Case No. U-10282, page 8.

²⁰ Id.

²¹ See April 20, 2009 order in Case No. U-15806, pp 10-11; October 31, 2012 order in Case No. U-16582, p. 6; and November 19, 2015 order in Case No. U-15805, p. 5.

MNS and the public if the information were released. DIG echoes Consumers' claims, reiterating that it is an unregulated merchant plant operating in a highly competitive environment. As such, the disclosure of confidential information could result in commercial harm.

MNS counters that there is no Commission precedent that requires a "balancing of harms" evaluation in determining whether information should be designated confidential, adding that the significance of the issues to which the confidential information relates will severely limit the Commission's ability to make an open and public decision.²² MNS further argues that when DIG provided confidential information to Consumers, DIG was fully aware that the information would be scrutinized by the Commission and others under the normal regulatory process and that certain information could become public. MNS points out that the NDA could have addressed this eventuality, but it did not do so.

The ALJ agrees with MNS. As the Commission has found, utility regulation should be conducted publicly, to the extent possible, and the Commission has never endorsed weighing the benefits of disclosure with the potential harm from disclosure. In addition, the ALJ agrees that although DIG and Consumers may have intended that the confidential information provided remain confidential, the plain language of Paragraph 3 of the NDA does not support this claim.²³

Turning to the Protective Order, Paragraph I.A. provides:

"Protected Material" consists of trade secrets or confidential, proprietary, or commercially sensitive information provided in Disclosing Party's

²² 9 Tr 4058-4059.

²³ See MNS motion, Attachment 2, p. 2.

discovery or audit responses, any witness' related exhibit and testimony, and any arguments of counsel describing or relying upon the Protected Material. Subject to challenge under Paragraph IV.A, Protected Material shall consist of non-public confidential information and materials including, but not limited to, the following information disclosed during the course of this case if it is marked as required by this Protective Order:

1. Trade secrets or confidential, proprietary, or commercially sensitive information provided in response to discovery, in response to an order issued by the presiding hearing officer or the Michigan Public Service Commission ("MPSC" or the "Commission"), in testimony or exhibits filed later in this case, or in arguments of counsel[.]

However, Paragraph I.B clarifies that:

The information subject to this Protective Order does not include:

1. Information that is or has become available to the public through no fault of the Receiving Party or Reviewing Representative and no breach of this Protective Order, or information that is otherwise lawfully known by the Receiving Party without any obligation to hold it in confidence[.]

And Section IV, Paragraphs A and B provide:

A. A Receiving Party reserves the right to challenge whether a document or information is Protected Material and whether this information can be withheld under this Protective Order. In response to a motion, the Commission or the presiding hearing officer in this case may revoke a document's protected status after notice and hearing. If the presiding hearing officer revokes a document's protected status, then the document loses its protected status after 14 days unless a Party files an application for leave to appeal the ruling to the Commission within that time period. Any Party opposing the application for leave to appeal shall file an answer with the Commission no more than 14 days after the filing and service of the appeal. If an application is filed, then the information will continue to be protected from disclosure until either the time for appeal of the Commission's final order resolving the issue has expired under MCL 462.26 or, if the order is appealed, until judicial review is completed and the time to take further appeals has expired.

B. If a document's protected status is challenged under Paragraph IV.A, the Receiving Party challenging the protected status of the document shall explicitly state its reason for challenging the confidential designation. The

Disclosing Party bears the burden of proving that the document should continue to be protected from disclosure.

The ALJ finds that Mr. Jester's testimony and Ms. Prentice's rebuttal testimony concerning the NPDES permit should be disclosed consistent with Paragraph I.B.1. of the Protective Order. As MNS points out, the information concerning DIG's NPDES permit is the subject of an ongoing dialogue with EGLE, the details of which were made available in response to a FOIA request. Thus, although DIG provided the information to Consumers under an NDA, DIG's claim that disclosure of the information would cause competitive harm cannot be sustained in light of the fact that the information is already public. Finally, the issue of Consumers' proposed purchase of the DIG plant is highly contested in this proceeding and the capital and operational risks associated with this purchase, as alleged by MNS, should be made public under the Commission's standards.

However, based on the arguments and representations of the parties, some of the information in Mr. Comings's testimony that MNS proposes to make public appears to fall within the ambit of commercially sensitive information and thus should remain protected.²⁴ Consistent with this finding, the following direct and rebuttal testimony of Mr. Comings should be unprotected:

Direct Testimony of Tyler Comings

Page 5, lines 13-14;

Page 6, lines 6 through 11, and lines 19 through 21;"

Page 7, line 23 through page 8, line 1;

²⁴ See DIG response Attachment A, p. 4, ¶¶ 16-17.
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Page 15, line 12 through page 16, line 2;

Page 16, footnote 33;

Page 17, lines 4 through 5;

Page 18, lines 1 through 4, lines 15 through 17, and footnote 42;

Page 21, lines 13 through 14;

Page 25, lines 10 through 14;

Page 29, lines 14 through 15;

Page 35, lines 9 through 11;

Page 35, line 18 through page 36, line 12 and footnote 89;

Page 41, lines 9 through 15, ending with the word “and;”

Page 42, lines 3-13;

Page 43, lines 3-11;

Page 44, lines 4 through page 45 line 8;

Page 45, lines 12 through 13; and

Page 46, footnote 112.

Rebuttal Testimony of Mr. Comings:

Page 21, lines 6 through 7.

Finally, the ALJ agrees with MNS and Consumers²⁵ that the information contained in Mr. Evans’ and Mr. Neme’s testimony regarding the Aurora modeling is not proprietary and should be disclosed.

²⁵ DIG did not take a position on this recommendation but reserved its right to appeal if DIG’s interests are implicated. 6 Tr 4049-4050.

Although the Protective Order provides for a 14-day stay of this ruling, given the pendency of the year-end holidays and briefing schedule for this proceeding, the parties agreed that the ruling should be stayed for some additional time. Thus, if no party appeals this ruling, it will become effective in 21 days. If MNS, Consumers, or DIG appeals the ruling, it will be stayed until the Commission reaches a decision.

MICHIGAN OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES
For the Michigan Public Service Commission

Administrative Law Judge

Issued and Served:
DATE