

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Montana-Dakota Utilities Co.
Natural Gas Rate Increase
Application**

Case No. PU-04-97

ORDER DENYING TRADE SECRET PROTECTION

August 18, 2004

On July 14, 2004, Montana-Dakota Utilities Co., a division of MDU Resources Group ("MDU) filed an application for a protective order limiting the disclosure of certain trade secret information provided by MDU in response to Discovery Requests by the Public Service Commission's Advocacy Staff (Advocacy Staff) that is included within the direct testimony and exhibits of Charles W. King to be filed on behalf of the Advocacy Staff. MDU provides the following general description of the nature of the information sought to be protected:

- A. Confidential information on pages 15-17 of the Direct Testimony of Charles W. King stating the amounts paid by MDU under its incentive compensation plans to its various employee groups and describing factors and characteristics of those plans.
- B. Confidential information on pages 25-28 of the Direct Testimony of Charles W. King stating the percentage increases in annual compensation to officers and other employees since 1999.
- C. Confidential information on page 4 of Exhibit CWK-1 to the Direct Testimony of Charles W. King stating the amounts paid by MDU under its incentive compensation plans to its various employee groups and describing the factors and characteristics of those plans.
- D. Confidential information on page 8 of Exhibit CWK-1 to the Direct Testimony of Charles W. King stating the number of employees within MDU's various employee groups and the average compensation and average annual percentage compensation increase for each group since 1999.

MDU states that the confidential information contained in the testimony and exhibits describes the average annual amounts, annual percentage increases, and the factors and characteristics of MDU's incentive plans for its various employee groups,

and that it also describes the number of employees within MDU's employee groups and the average compensation and average annual percentage compensation increases for each group since 1999.

MDU states that the information is confidential and proprietary to MDU and is not publicly disclosed, that the information is sensitive, and that its public disclosure would place MDU at a competitive disadvantage in attracting and retaining employees. MDU states that if the information is disclosed publicly, it would disadvantage MDU because the information reflects specifics regarding MDU's compensation programs, particularly compensation programs for MDU's executives and officers.

MDU states that the information is proprietary to MDU, and is available only to those employees and representatives of MDU who have a need to know the information to perform their duties and responsibilities. MDU states that it does not disclose the information outside the company except pursuant to the terms of agreements and orders to maintain the confidentiality of the information.

MDU states that competitors or potential competitors of MDU for qualified and experienced employees in the fields of electric and natural gas distribution would obtain economic value from the disclosure or use of the information.

MDU states that competitors and potential competitors of MDU for electric and natural gas employees include all investor owned utilities and rural electric cooperatives in North Dakota and any other state in the United States.

N.D.C.C. § 47-25.1-01 defines the term "trade secret" as:

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- a. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

N.D. Admin. Code § 69-02-09-04 requires that the "commission staff examine the information and application and make a prima facie recommendation of whether the information is relevant and a trade secret under the definition of trade secret in North Dakota Century Code section 47-25.1-01."

On July 15, 2004, Advocacy Staff filed its response to MDU's request for trade secret protection. Advocacy Staff indicated that the information is relevant to the application, but asserted that it is not trade secret. Advocacy Staff contends that the manner in which MDU compensates its employees is an important part of a rate case and it is information that MDU's ratepayers are entitled to see.

Advocacy Staff asserts that the information is not trade secret because competition, as used in the context of the Commission's rule, is generally understood to mean competition between parties in the sale of goods or services and not in the trading or acquisition of employees. Advocacy Staff further asserts that release of the information cannot place MDU at a competitive disadvantage in attracting and retaining employees because the information is not specific to any individual employee.

Advocacy Staff contends that employees and potential employees of MDU are not likely required to sign confidentiality agreements concerning compensation. Therefore, MDU has no way to maintain confidentiality.

Advocacy Staff does not recall a single instance in at least the past fifteen years where a public utility has claimed trade secret protection for information relating to compensation for officers and employees of the company. Advocacy Staff asserts that the information may be sensitive from MDU's perspective because of public reaction to the amounts being paid, but that is not justification for trade secret protection.

On July 23, 2004, MDU filed its Reply in Support of Trade Secret Application. MDU contends in its reply that the information sought to be protected meets the definition of "trade secret" because it derives economic value from not being generally known or readily ascertainable by proper means and is subject to reasonable efforts to maintain its secrecy. MDU retains consultants to assure market competitiveness of employee compensation packages and the information sought to be protected results from information purchased from these consultants. This information provides economic value to MDU and its competitors because of the cost, time and effort required to duplicate it. MDU should not be required to disclose this information, or the results of this information as reflected in its compensation packages, for the benefit of its competitors who have not expended the resources to develop this information.

MDU disagrees with the Advocacy Staff's assertion that the information sought to be protected is not trade secret because it involves employees rather than products and services.

MDU agrees that the information sought to be protected is not employee specific, but contends that the information is sufficiently disaggregated to the point that it provides detail of employee compensation information that has economic value to MDU and its competitors.

MDU states that it does not prohibit employees from disclosing their compensation details, but does not disclose that information except to persons within the organization that have a need to know the information to perform their duties.

The Commission finds the information MDU seeks to protect is relevant to this proceeding.

MDU has not shown that the information it seeks to protect derives independent economic value from not being generally known. Therefore, the Commission concludes the information is not trade secret under N.D.C.C. § 47-25.1-01.

Order

The Commission Orders that MDU's application for trade secret protection filed July 14, 2004, is DENIED.

PUBLIC SERVICE COMMISSION

**Susan E. Wefald
Commissioner**

**Tony Clark
President**

**Kevin Cramer
Commissioner**