

Minnesota Public Utilities Commission

Staff Briefing Papers

Meeting Date: September 10, 2015 Agenda Item # **5A

Company: Great River Energy

Docket No. **ET2/RP-14-813**

In the Matter of Great River Energy's 2014 Resource Plan

Issue: What action should the Commission take on the Environmental Intervenors' Motion to Compel?

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Relevant Documents

GRE, *Initial Filing* October 31, 2014
Environmental Intervenors, *Comments* March 2, 2015
Environmental Intervenors, *Information Requests 36-38* March 6, 2015
GRE, *Response to EI Information Requests 36-38* March 16, 2015
Environmental Intervenors, *Reply Comments* May 1, 2015
Great River Energy, *Supplemental Comments* June 29, 2015
Environmental Intervenors, *Motion to Compel* July 10, 2015
Great River Energy, *Opposition to Motion to Compel* July 22, 2015

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WHAT ACTION SHOULD THE COMMISSION TAKE ON THE ENVIRONMENTAL INTERVENORS' MOTION TO COMPEL?

On July 10th, The Environmental Intervenor's (EI) filed a motion requesting that the Commission: 1) compel GRE to disclose Spiritwood's revenue pursuant to Minn. R. 7843.0300 subpart 8; and 2) re-designate operation and maintenance costs as public information.

GRE filed its Opposition to EI's Motion on July 22, 2015.

EI's Motion to Compel GRE to Disclose Spiritwood's Revenue Pursuant to Minn. R. 7843.0300

In its Motion to Compel, EI requested that the Commission compel GRE to disclose the revenue generated by Spiritwood under Minnesota Rule 7843.0300 subpart 8 and pursuant to the terms of the Protective Agreement in place between the parties. According to EI, despite the Protective Agreement in place between EI and GRE, GRE has refused to supply information on the revenue generated from its Spiritwood plant reasonably requested by EI.

Minn. Rule 7343.0300, Subt 8 states the following:

Subp. 8. **Information requests.** The parties shall comply with reasonable requests for information by the commission, other parties, and other interested persons. A copy of an information request must be provided to the commission and to known parties. Parties shall reply to information requests within ten days of receipt, unless this would place an extreme hardship upon the replying party. At least one copy of information provided to a party or other interested person must be filed with the commission. The replying party must also provide a copy of the information to any other party or interested person upon request. Disputes regarding information requests may be taken to the commission or, if a contested case proceeding has been ordered, to the assigned administrative law judge.

The Protective Agreement states the following in regard to Trade secret information and the use and disclosure of such information.

a) Trade Secret Information and/or Nonpublic Data. The terms Trade Secret Information and Nonpublic Data, for purposes of this Agreement, means data designated as Trade Secret or Nonpublic by GRE. All Trade Secret Information or Nonpublic Data shall be furnished pursuant to the terms of this Protective Agreement, and shall be treated by all persons accorded access thereto pursuant to this Agreement as constituting Trade Secret Information or Nonpublic Data and shall be used solely for the purpose of this proceeding and solely in accordance with this Agreement, and shall not be used or disclosed for any other purpose or in any other manner. For purposes hereof, notes made pertaining to or prepared as the result of a review of Trade Secret Information or Nonpublic Data that reference the Trade Secret Information or Nonpublic Data shall be subject to the

terms of this Agreement. Any Trade Secret Information or Nonpublic Data received in photographic, digital or electronic formats shall be identified as protected by GRE by means appropriate to the medium and shall be handled by the recipient in a manner suitable to protect its trade secret designation.

(b) Use and Disclosure of Trade Secret Information and/or Nonpublic Data. All Trade Secret Information or Nonpublic Data made available pursuant to this Agreement shall be given solely to representatives of the party that has signed this Agreement. Trade Secret Information or Nonpublic Data shall not be used by any such representative except for purposes of this proceeding. The Trade Secret Information or Nonpublic Data may not be used or referenced in other proceedings in Minnesota or in other jurisdictions. Unless otherwise provided in this Agreement, all Trade Secret Information or Nonpublic Data will be safeguarded and handled in Commission proceedings with at least the degree of care set forth in the Commission's September 1, 1999, Revised Procedures for Handling Trade and Privileged Data ("Commission Procedures").

On March 6, 2015, EI served Information Requests ("IRs") 36-38 on GRE. EI IR 36 stated: "Refer to the responses to [EI] Information Requests Nos. 24 and 31. Provide the annual estimated revenues from the sale of electricity and steam to the Dakota Spirit AgEnergy."

On March 16, 2015, GRE responded to IR 36 with the following:

The information requested is confidential under the terms of agreements between GRE and Dakota Spirit AgEnergy ("DSA"). GRE treats the agreements with DSA as Trade Secret because the information contained in such agreements derives independent economic value from not being generally known to, and not being readily ascertainable by, persons who could obtain economic value from its disclosure or use. Accordingly, GRE cannot disclose the requested information concerning the estimated revenues from the sale of electricity and steam to DSA.

IR 37 stated: "Refer to the response to [EI] Information Request No. 24. Provide the annual estimated revenues from the sale of electricity (if applicable) and steam to the Cargill malt plant." GRE's March 16th Response to IR 37 was as follows:

GRE does not sell electricity to the Cargill malt plant ("Cargill"). The information requested on steam sales is confidential under the terms of an agreement between GRE and Cargill. GRE treats the agreement with Cargill as Trade Secret because the information contained in the agreement derives independent economic value from not being generally known to, and not being readily ascertainable by, persons who could obtain economic value from its disclosure or use. Accordingly, GRE cannot disclose the requested information concerning the estimated revenues from the sale of steam to Cargill.

According to EI, the information sought would not be disclosed to or used by persons who can obtain economic value from it, pursuant to the terms of the Protective Agreement. EI is required to keep this information confidential; as it stated it has done with all of the nonpublic and trade secret information it receives in this and other Commission dockets.

EI stated that it had contacted GRE on Friday, March 20, 2015 to clarify how disclosing this information to EI, pursuant to the Protective Agreement in place, would compromise the independent economic value GRE derives from the information such that it must be treated differently from other information in this docket. According to EI, GRE did not provide an adequate explanation.

EI stated it had sought this information to bolster the argument it had made in its Initial Comments, that GRE's excess capacity position and increasing costs are significant risk factors. Specifically, EI stated the following in its Initial Comments:

Spiritwood, coupled with low levels of load growth, has likely contributed to some risky courses of action that GRE has adopted in order to cover its increasing operating costs. For example, GRE has invested millions of dollars to build one of two ethanol plants that will use steam from Spiritwood and its lack of interest in retiring Stanton Station is likely due in part to the contribution the plant currently makes to off-system sales revenue.

According to EI, Spiritwood's revenue from sales of electricity and steam to Dakota Spirit AgEnergy and Cargill is directly relevant to how GRE is covering its operating costs and whether the Commission should or should not endorse a particular course of action in this IRP proceeding for GRE to cover its operating costs going forward. EI stated that its primary argument in this proceeding is that scheduling retirement of Stanton Station should be a priority given GRE's excess capacity and risky actions such as operating Spiritwood at a loss, among other things.

In its June 29, 2015 "Supplemental" Reply Comments, GRE alleged that EI did not raise the issue of Spiritwood's profitability in its Initial Comments and criticized EI's "understanding of the MISO market and flawed assumptions." EI stated in its Motion that because it did not have the requested information regarding Spiritwood's revenue, and to avoid bringing a discovery dispute to the Commission, it had approximated the revenue generated from Spiritwood using MISO values and publicly available information in its Reply Comments to flesh out the argument raised in its Initial Comments.

EI asserted in its Motion that GRE's "Supplemental" Reply Comments are unwarranted given that this issue was clearly raised in its Initial Comments, but, regardless, because GRE has chosen to attack the validity of its argument, EI stated it was forced to bring the discovery dispute to the Commission.

GRE's Opposition to EI's Motion to Compel Disclosure of Spiritwood's Revenue

In its July 22, 2015 Opposition to EI's Motion, GRE requested the Commission deny EI's Motion to Compel production of estimated revenue from sales of electricity and steam generated by the Spiritwood plant to Dakota Spirit AgEnergy and Cargill, because it is untimely and because the requested revenue information is not relevant to the Commission's consideration of GRE's integrated resource plan (IRP).

GRE stated that EI's motion comes more than two months after the close of the reply comment schedule set by the Commission and EI's failure to exercise diligence in obtaining or seeking discovery supports denial of the motion, since EI provided no compelling justification for allowing discovery after the close of the comment period or for delaying the IRP proceeding.

GRE stated further that the requested information is not relevant to the Commission's evaluation of GRE's IRP and requiring GRE to produce the requested information would impose an unreasonable risk of possible disclosure or misuse of highly confidential contract terms.

According to GRE, EI has not demonstrated the information they seek contributes to the Commission's evaluation of GRE's resource plan. Although EI asserted Spiritwood electricity and steam sales revenue is "relevant to how GRE is covering its operating costs and whether the Commission should or should not endorse a particular course of action in this IRP proceeding for GRE to cover its operating costs going forward," GRE stated that cost recovery is a rate design issue that goes beyond the scope of this IRP proceeding.

In addition, GRE contended that Spiritwood's operations are completely irrelevant to whether or not Stanton Station should be retired. GRE stated it has provided EI and other parties with forecasts of all costs related to all existing and potential generation resources used in its IRP model, including all fixed and variable maintenance costs, tax forecasts, insurance, depreciation, book value, and potential decommissioning costs of all generation. Accordingly, GRE contended that EI already has received significant information relevant to its claim that the decommissioning of Stanton Station should be included in GRE's IRP, and their motion failed to demonstrate how receipt of highly sensitive sales revenue information concerning Spiritwood Station would advance their arguments regarding Stanton Station.

Finally, GRE stated that the annual estimated revenue from the sale of electricity and steam to Dakota Spirit AgEnergy and Cargill that EI is seeking are based on a complex, confidential pricing formula found in the agreements with those counterparties and these agreements contain highly sensitive, confidential business information belonging to each of the counterparties.

Staff Comment

Minn. R. 7843.0500, subp. 3 states that when evaluating a proposed resource plan the Commission should consider the plans ability to keep customers' bills and the utility's rates as low as practicable, given regulatory and other constraints. Although staff agrees with GRE that

cost recovery is a rate design issue that may go beyond the scope of an IRP proceeding, the information EI seeks on the estimated revenues from the sales of steam and electricity to Dakota Spirit and Cargill may be relevant and useful to the Commission's analysis of the proposed plan's ability to keep customer bills and GRE's rates as low as practicable.

If the Commission approves EI's Motion to Compel disclosure of Spiritwood's revenue, the Commission will likely need to delay the decision on GRE's 2014 Resource Plan until after parties have had a chance to review and comment on the information. Under this scenario, Staff proposes the following schedule.

GRE Answer to IR 36 & 37	10 days after Order Approving EI's Motion to Compel
Party's Comments on Answer	15 days after GRE Answer
GRE Response to Party's Comments	10 days after Party's Comments

EI's Request for the Commission to Re-Designate Operation and Maintenance Costs as Public Information

EI stated that GRE's designations of information as trade secret pursuant to the Protective Agreement are overbroad. According to EI, there is a significant amount of information designated as non-public by GRE that EI asserted should have been public. EI described GRE's Non-Public Designations as out of line with IRP standard practice.

EI provided the following comparison of GRE's designations in this docket with designations made by Xcel Energy in its most recent IRP docket, as an example, to demonstrate that GRE is out of step with standard practice in these dockets.

- Operation and Maintenance expenses are public data for Investor Owned Utilities ("IOUs"), but not for co-ops. IOUs must provide these data to the Federal Energy Regulatory Commission ("FERC"), which is not required of co-ops. There is no basis to assert that GRE has a greater need for confidentiality—the fact that the FERC does not have jurisdiction to require GRE to report the same data does not make these data trade secret.
- Peak and non-peak market price forecast data that GRE maintains is trade secret is public and available at page 15 of Appendix J of Xcel's IRP.
- The Energy Information Administration typically publishes net generation, fuel consumption and capacity factor information, but for reasons that are not clear, EIA did not publish that information for relevant years for Stanton Station. Because this information should be public, there is no basis for GRE's designation of the information as trade secret.
- Page 1 of GRE's Appendix B contains the existing sales and purchases contracts GRE has and lists that data including the name of the counterparty as trade secret. Appendix J of Xcel's IRP shows its Power Purchase Agreement data as public at pages 22 and 23.

- GRE's coal price forecast is a non-public worksheet attached to its response to EI IR 2. Xcel gives a public generic price forecast at page 16 of Appendix J. Although Xcel's forecast is not plant specific, there are generally only small differences in fuel cost between coal plants in the same utility portfolio.
- The heat rates for GRE's plants are trade secret at Table B-5 of Appendix B. Xcel lists that data as public at page 43 of Appendix J. Heat rates for power plants in general is public information disclosed on Energy Information Administration Form 923.
- The only place the installed capacity ("ICAP") values of GRE's plants are listed is in the non-public output data in MCEA IR 2. Xcel's ICAP values are publicly available on page 20 of Appendix J.

EI only requested that the operation and maintenance costs be re-designated as public so that it can effectively advocate for EI's position at the upcoming agenda meeting. According to EI the Commission may resolve this dispute pursuant to the terms of the Protective Agreement. The Protective Agreement states the following in regard to challenges to the designation of trade secret information:

(d) Challenge to Trade Secret Information or Nonpublic Data Designation and Other Special Requests. This Agreement shall not be construed as an agreement or ruling on the discoverability, confidentiality or privileged designation of any such information or document. Any person at any time upon ten (10) days prior notice may seek by appropriate pleading to have documents or other matters that have been designated as Trade Secret Information or Nonpublic Data removed from the protective requirements of this Agreement or to have them handled in a manner differently than described in this Agreement (either for greater or lesser trade secret or nonpublic protections). If the Trade Secret nature of this information is challenged, resolution of the issue shall be in accordance with the regulations and procedures of the Commission, and in a manner that preserves the Trade Secret or Nonpublic nature of the information unless and until a decision is made by the Commission that the information is not entitled to treatment as Trade Secret Information or Nonpublic Data, and GRE has not appealed that decision within the time provided by statute or Commission rule or order.

GRE's Opposition to EI's Request to Re-Designate O&M Costs

In its July 22nd Opposition to EI's Motion, GRE stated that EI's request to re-designate O&M Costs as public information should also be denied in its entirety, because it is untimely – coming more than two months after the close of the reply comment period.

Additionally, GRE stated that the O&M cost information has already been produced, has been properly designated as non-public data, and appropriate justification for such designation has been provided. GRE stated its O&M costs meet the definition of trade secret information, because GRE buys and sells energy on MISO in a competitive market. Accordingly, GRE stated

it treats all counter-party information and operational data as non-public because public knowledge of this information could hinder its negotiations, causing it to obtain less valuable transactions.

In addition, GRE stated that neither FERC nor any other regulator requires GRE to make its generation O&M costs public. GRE asserted that the O&M cost information is not otherwise generally known or ascertainable, and therefore GRE can derive economic value from ensuring such information continues to be not generally known or ascertainable.

Staff Comment

In the event that the Commission approves EI’s request to re-designate O&M costs as public information, staff does not believe this decision alone would necessitate a delay in the decision on GRE’s 2014 Resource Plan.

DECISION OPTIONS

- 1. EI’s Motion to Compel disclosure of Spiritwood’s revenue pursuant to Minn. Rule 7843.0300
 - a. Approve EI’s Motion to Compel GRE to disclose Spiritwood’s revenue. Adopt the following schedule:

GRE Answer to IR 36 & 37	10 days after Order Approving EI’s Motion to Compel
Parties’ Comments on Answer	15 days after GRE Answer
GRE Response to Parties’ Comments	10 days after Party’s Comments

- b. Deny EI’s Motion to Compel GRE to disclose Spiritwood’s revenue.
- 2. EI’s request for the Commission to re-designate GRE’s operation and maintenance costs as public information.
 - a. Approve EI’s request to re-designate O&M costs as public information; or
 - b. Deny EI’s request to re-designate O&M costs as public information.