

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)
UPPER PENINSULA POWER COMPANY)
for authority to increase retail electric rates.)
_____)

Case No. U-16417

MOTION OF UPPER PENINSULA POWER COMPANY
FOR ENTRY OF A PROTECTIVE ORDER

Upper Peninsula Power Company (“UPPCO”), by its attorneys, pursuant to Rule 335 of the Rules of Practice and Procedure Before the Michigan Public Service Commission (“MPSC” or “Commission”), R 460.17335, and MCR 2.302(C)(8), respectfully requests entry of a Protective Order to govern the release, use, and disclosure of confidential and Critical Energy Infrastructure Information, in any manner or form, in this proceeding. In support of its Motion, UPPCO states as follows:

1. UPPCO is a Michigan corporation with its principal offices located at 500 N. Washington Street, Ishpeming, Michigan 49849, and is engaged as a public utility in the generation, purchase, distribution and sale of electric energy in the Upper Peninsula of Michigan.

2. UPPCO serves certain cities, villages and townships located in the counties of Alger, Baraga, Delta, Houghton, Iron, Keweenaw, Marquette, Menominee, Ontonagon and Schoolcraft, in the Upper Peninsula of Michigan.

3. UPPCO requests the Protective Order to protect confidential and Critical Energy Infrastructure Information included in Exhibit A-2 (SSD-2), Schedules B7, B8, B9, and B10, and Exhibit A-9 (CWS-1), which discuss energy infrastructure project information and dam safety and inspection documents for the McClure Development of the Dead River Hydroelectric

Project; the Bond Falls Hydroelectric Project; the Prickett Hydroelectric Project; the Victoria Dam; and the Cataract Hydroelectric Project.

4. Although the Commission's Rules do not expressly address the issuance of Protective Orders, Rule 103(1) of the Rules of Practice and Procedures Before the Commission, R460.17103(1), states that "[t]hese rules govern practice and procedure in all proceedings before the commission, except as otherwise provided by statute or these rules. In areas not addressed by these rules, the presiding officer may rely on appropriate provisions of the currently effective Michigan Court Rules." MCR 2.302(C)(8) states:

"On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

....
(8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."

Also, Section 80 of the Michigan Administrative Procedures Act specifically provides that a presiding officer may "[r]egulate the course of the hearings..." MCL 24.280.

5. The appropriateness of the issuance of protective orders in Commission proceedings for documents which are confidential, proprietary, or involve trade secrets is well established. For example, protective orders have been issued in Case Nos. U-9322 and U-9611 (July 18, 1990), U-10335 (Nov. 29, 1993), U-10491 and U-10492 (July 19, 1992), U-13221 (March 20, 2002), U-14040 (May 11, 2004), U-15988 (August 3, 2009), and U-16166 (July 23, 2010). In its Opinion and Order dated June 30, 1994, Case No. U-10282, the Commission discussed the standard that it applies when considering whether to issue a protective order. The Commission stated that before it will enter a protective order, the moving party must show "(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."

6. The documentation which are designated as Exhibit A-2 (SSD-2), Schedules B7, B8, B9, and B10, and Exhibit A-9 (CWS-1) contain confidential and Critical Energy Infrastructure Information.

7. The documentation which are designated as Exhibit A-2 (SSD-2), Schedules B7, B8, B9, and B10, and Exhibit A-9 (CWS-1) contain information which is defined by the Federal Energy Regulatory Commission (“FERC”) as “Critical Energy Infrastructure Information,” pursuant to FERC Order Nos. 702, 630, 630-A, 643, 649 and 683. Critical Energy Infrastructure Information is defined as, “specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that, (1) relates details about the production, generation, transmission, or distribution of energy; (2) could be useful to a person planning an attack on critical infrastructure; (3) is exempt from mandatory disclosure under the Freedom of Information Act; and (4) gives strategic information beyond the location of the critical infrastructure.” FERC Order No. 630, 18 CFR 375, 388 (Issued Feb. 21, 2003) and clarified by FERC Order No. 683, 18 CFR 388 (Issued September 21, 2006).

8. FERC has also issued a guidance document titled, “Federal Energy Regulatory Commission, Office of Energy Projects, Division of Dam Safety and Inspections Documents – Which Ones Are CEII and Which Are Not?” Issued January 12, 2005. In the document, FERC provides additional guidance for using the claim that documents are qualified as Critical Energy Infrastructure Information, as that claim may apply to dam safety and inspection documents. FERC explains that, “[o]nly documents that contain information that can be useful to someone planning an attack on a project are [Critical Energy Infrastructure Information].”

9. Public disclosure of the documentation labeled as Exhibit A-2 (SSD-2), Schedules B7, B8, B9, and B10, and Exhibit A-9 (CWS-1) would cause a clearly defined and serious injury because it would disclose engineering, vulnerability, or detailed design and construction information about UPPCO’s hydroelectric facilities and dams. Public release of such information may allow someone planning an attack to gain knowledge regarding the

vulnerabilities of a project and the consequences of infrastructure failure. Therefore, public release of the information would unreasonably compromise public safety and threaten homeland security because it could be useful to a person planning an attack.

10. UPPCO represents that the documentation which comprise Exhibit A-2 (SSD-2), Schedules B7, B8, B9, and B10, and Exhibit A-9 (CWS-1) are not in the public domain and are treated as confidential by FERC.

11. The proposed Protective Order is modeled after the order issued in Case No. U-16166 which protected information identical to the information which is sought to be protected herein. The proposed Protective Order identifies the documentation labeled as Exhibit A-2 (SSD-2), Schedules B7, B8, B9, and B10, Exhibit A-9 (CWS-1), and the information therein as "Protected Material" and provides that any document filed with the Commission that contains Protected Material shall be placed in a sealed envelope with a copy of the Protective Order attached and maintained in the Commission's files. The proposed Order also provides that materials which UPPCO contends are confidential will be marked as "Protected Material." The proposed Order prohibits distribution or dissemination of the protected documentation by MPSC Staff ("Staff") or any properly admitted intervenors except according to the terms of the Protective Order. Further, the proposed Order dictates the use of the documentation in the discovery and litigation phases of this case, and requires that UPPCO be given notice of any Freedom of Information Act request filed with the Commission seeking access to the documents. Such notice must be given at least five business days prior to the MPSC or Staff, responding to the request so as to provide UPPCO with an opportunity to take whatever legal actions it deems appropriate to protect the documents from disclosure.

12. The proposed Protective Order will not hinder Staff's or any properly admitted party's review of the Application for Authority to Increase Retail Electric Rates, MPSC Case No. U-16417, because Staff will continue to have full access to the confidential information.

WHEREFORE, for the reasons stated herein, Exhibit A-2 (SSD-2), Schedules B7, B8, B9, and B10, and Exhibit A-9 (CWS-1) constitute confidential and Critical Energy Infrastructure Information and their disclosure would work a clearly defined and serious injury to UPPCO and its customers and the public's safety; therefore, UPPCO respectfully requests the Commission to grant this Motion and enter the proposed Protective Order, attached as Exhibit A.

Respectfully submitted,

UPPER PENINSULA POWER COMPANY

Dated: June 30, 2011

By: _____
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LALIB:180409.1\130062-00025