

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>MIDWEST RENEWABLE ENERGY PROJECTS LLC,</p> <p style="padding-left: 40px;">Petitioner,</p> <p style="text-align:center">v.</p> <p>INTERSTATE POWER AND LIGHT COMPANY,</p> <p style="padding-left: 40px;">Respondent.</p>	<p>DOCKET NOS. AEP-05-2 AEP-05-3 AEP-05-4</p>
--	---

ORDER GRANTING MOTION TO COMPEL

(Issued April 29, 2008)

On April 11, 2008, Midwest Renewable Energy Projects II, LLC (MREP) filed a "Motion to Compel Discovery," in which it asked the Utilities Board (Board) to order Interstate Power and Light Company (IPL) to produce documents MREP requested in Data Request Nos. 35, 36, 37, 39, 41, 42, 43, 45, 50, and 51. On April 22, 2008, IPL filed a "Response to Motion to Compel Discovery." IPL's objections are the same for each data request. On April 28, 2008, MREP filed a "Reply to Response to Motion to Compel."

MREP states that IPL recently acquired the Buffalo Creek and Whispering Willow Wind Farms, and that Data Request Nos. 35 and 41 asked for the proposed site plans for the wind farms. MREP states that Data Request Nos. 36 and 42 asked

for all raw wind data and any wind speed reports for the wind farms, Data Request Nos. 37 and 43 asked for all raw wind turbine purchase quotes for the wind farms, and Data Request Nos. 39 and 45 asked for detailed transmission upgrade costs for the wind farms. MREP states that Data Request Nos. 50 and 51 asked for detailed specifications regarding the turbines (including model and measurements) and detailed tower specifications (including model and height) that IPL plans to use at the Buffalo Creek Wind Farm and the Whispering Willow Wind Farm, respectively.

MREP argues that the answers to these data requests are essential to MREP's position, and without the information and documents sought, MREP's ability to present its case is significantly damaged. MREP argues that none of the grounds for IPL's refusal to produce the documents and information requested are valid.

IPL argues that MREP seeks competitive information from a competitor and the current protective agreement between IPL and MREP offers insufficient protection to IPL. It argues that this request seeks sensitive, commercial information that is unique to IPL's activities as a direct owner and developer of wind sites, rather than confidential information that IPL has obtained from third parties in IPL's role as a purchaser of energy generated from wind resources. As such, argues IPL, this request is not directed to IPL's legal obligation, if any, to purchase alternative energy, but is directed to IPL as a direct competitor to MREP and is therefore outside the scope of the protective agreement.

MREP argues that the protective agreement in place was clearly intended to address such concerns, was freely and voluntarily executed by IPL, and was

specifically amended on November 10, 2005, to apply to these dockets. MREP argues that paragraph six of the protective agreement explicitly prohibits the parties from using the information disclosed for competitive purposes. Therefore, argues MREP, the protective agreement must be deemed adequately protective of IPL's competitive information as a developer of wind sites. MREP argues that IPL's objections based on its concerns with competitive information are unfounded, given the adequacy of the protective agreement, and given that IPL previously asserted these same objections in a losing effort on a previous motion to compel. MREP argues that IPL voluntarily entered the wind farm development and ownership market and thereby lends itself to disclosing the requested information to determine the avoided cost rate for a purchase power agreement. MREP further argues that the protective agreement expressly covers proprietary, trade secret, and confidential information unless one of the following exceptions applies. The exceptions are: (1) confidential information disclosed to IPL subject to a certain confidentiality agreement attached to IPL's 2005 request for proposals for renewable wind resources; (2) renewable energy power purchase agreements; and (3) fuel purchase or fuel transportation agreements with unaffiliated third parties. MREP argues that none of these exceptions apply to the information and documents sought by this motion to compel.

IPL contests MREP's argument that discovery of the confidential information is directly relevant because MREP expects to use the information to demonstrate that the costs associated with IPL's construction and operation of the Buffalo Creek and

Whispering Willow Wind Farms can be used to determine an avoided cost for the 190 MW at issue in this case. IPL also contests MREP's argument that IPL's interests as a competitor are adequately protected by the protective agreement. IPL argues that most of the information sought by MREP is subject to confidentiality agreements between IPL and third parties related to negotiations of various construction and operation components. IPL argues that MREP should not be allowed access to such commercially sensitive, competitor information when it is not a party to the requisite confidentiality agreements.

IPL objects to MREP's reliance on the existing protective agreement. IPL states the protective agreement was executed on March 5, 2005, in Docket No. AEP-05-01, and was adopted for these consolidated dockets on November 10, 2005. IPL argues the protective agreement was drawn in consideration of extremely limited issues and did not contemplate the protracted nature of the litigation and did not consider the existence of today's conditions. IPL argues that if the protective agreement were drafted today, it would be very different. IPL argues the protective agreement is outdated and all-but-obsolete. IPL argues the protective agreement anticipated only that IPL would be in the market for wind power purchases and did not anticipate that IPL would be a wind-build competitor of MREP.

IPL argues that Iowa Code § 22.7 specifically protects trade secrets and reports to government agencies, which, if released, would give advantages to competitors and serve no public purpose. It argues the protective agreement provides certain protections for information and may arguably be useful in regulating

MREP's competition with other potential providers of wind power. However, argues IPL, the protective agreement inadequately protects IPL's interests as a direct competitor of MREP in the wind-build market. IPL argues that releasing the requested information to MREP will give significant information to MREP regarding IPL's procurement and operations related to its wind farm construction. IPL further argues that IPL will construct its wind power in accordance with Midwest Independent Transmission System Operator (MISO) requirements, potentially putting a portion of the power through MISO and into the marketplace. IPL argues that MREP will therefore have information potentially damaging to IPL's ability to construct and operate its proposed wind sites at a reasonable cost, as well as information potentially damaging to its participation in the marketplace through MISO. IPL argues the protective agreement does not provide adequate protections for this sensitive information because it never anticipated a direct competitive relationship between IPL and MREP. IPL argues that it cannot be assured by the existing protective agreement that MREP's position in the marketplace, either as a purchaser, wind turbine vendor, or wind power provider, will not be clouded by the release of this specific competitive information.

MREP argues that discovery procedures applicable to civil actions are available to parties in contested cases and parties are entitled to obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Iowa R. Civ. P. 1.503(1). MREP argues that the subject matter of these dockets is the determination of rates to be paid by IPL for mandatory

purchases of energy and capacity from MREP's three qualifying facilities known as Barton-I, Barton-II, and Winnebago-II pursuant to 199 IAC 15.4 and 15.5. MREP argues that the requested information is relevant to the subject matter of this case.

MREP argues that IPL's press releases announcing the acquisition of the Buffalo Creek and Whispering Willow Wind Farms state that IPL expects each of the wind farms to generate as much as 200 MW of electricity. MREP argues the 200 MW capacities of IPL's wind farms are very close to the 190 MW capacity of the three MREP wind farms at issue in these dockets. MREP argues the requested documents and information are relevant for the same reasons that the documents in Docket No. RPU-07-5 were found to be relevant and discoverable in the prior order issued by the undersigned administrative law judge on January 24, 2008. MREP argues that it expects to be able to demonstrate that the costs associated with IPL's construction and operation of the Buffalo Ridge and Whispering Willow Wind Farms can be used to determine a more accurate and current actual avoided cost purchase rate for MREP's wind farms at issue in these dockets.

MREP argues it is not seeking disclosure to use the requested information for a competitive purpose, but rather, to determine the avoided cost IPL must pay to MREP. MREP argues that typical confidentiality provisions included in wind industry contracts provide that disclosure pursuant to an order compelling such disclosure is not a breach of the agreement. MREP argues the information already provided by IPL is an estimate of its costs and is not actual cost information from a comparable wind facility. MREP argues it seeks actual, current cost information, which it could

then use to derive IPL's actual, current avoided cost. MREP argues that the incremental costs of the utility itself is one of the factors to consider in determining the price IPL must pay under 199 IAC 15.5(6). MREP argues it expects to be able to demonstrate that the costs of IPL's owned wind generation projects can be used to determine the actual, current avoided cost purchase price for the 190 MW of wind capacity at issue in these dockets.

MREP argues it has made a good faith attempt to resolve this issue with IPL, but without success. Therefore, MREP requests the Board to issue an order compelling IPL to produce the requested documents and information.

IPL notes MREP's argument that it needs the requested information to aid in the determination of an avoided cost in this case. IPL argues that MREP already has information that fulfills this request in its possession. In particular, IPL argues, MREP has the confidential information provided with IPL's filing in Docket No. RPU-07-5, which contains IPL's 2009 projected levelized price for energy from its Buffalo Creek Wind Farm. IPL argues this information contains the best estimates, at the time of filing, of the associated construction and operating costs leading to the ultimate levelized price. IPL continues to assert that its competitive position has been harmed by the release of the information from Docket No. RPU-07-5. However, IPL argues, it considers the provision of these estimates to be less damaging to its competitive interests than information with the specificity now requested by MREP.

Therefore, IPL requests the Board to deny MREP's motion to compel.

As stated before in the previous orders issued in these consolidated dockets on January 24 and 30, 2008,¹ discovery procedures applicable to civil actions are available to parties in contested cases. Iowa Code § 17A.13; 199 IAC 7.15(1).

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Iowa R. Civ. P. 1.503(1).

The considerations with respect to whether MREP's motion to compel regarding these data requests are the same as those considered and decided with respect to the previous data requests. The arguments and analysis from the two previous orders are incorporated by reference into this order. The requested information is relevant to the subject matter of this case. Contrary to IPL's argument, the requested information has not previously been provided to MREP. None of the arguments made by IPL for the refusal to provide the requested information provides a valid basis to deny discovery of the information, particularly when the parties have an executed protective agreement in place. Although the protective agreement was executed prior to the existence of IPL's ownership and operation of the two wind farms that are the subject of this discovery dispute, this does not mean they are not sufficiently protective of IPL. By the terms of the protective agreement, the discovered materials may not be used for business, commercial, or competitive purposes, or for any purpose other than the preparation for and conduct of this case. (Protective Agreement, paragraph 6.) IPL's argument that the existing protective

¹ "Order Regarding Motions and Setting Procedural Schedule and Hearing Date," (Issued January 24, 2008); "Order Granting Motion to Compel and Delaying Implementation," (issued January 30, 2008).

agreement is not sufficient because it would be different if the parties negotiated it today is not persuasive. The protective agreement sufficiently protects IPL's interests with respect to the requested information.

For these reasons, MREP's motion to compel should be granted.

IT IS THEREFORE ORDERED:

The "Motion to Compel Discovery" filed by Midwest Renewable Energy Projects II, LLC, on April 11, 2008, is hereby granted, and Interstate Power and Light Company is ordered to provide the requested information as soon as possible.

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 29th day of April, 2008.