



Memorandum

To: Mayor Stebbins
City Commissioners

From: Gregory T. Doyon – City Manager

Date: June 11, 2008

Re: SME Response to Right to Know Requests

I have received a written response from Southern Montana Electric Inc., regarding a letter I sent to Tim Gregori dated May 5, 2008.

As the Commission is well aware, I am struggling with the matter of balancing the Commission's/public's right to know and SME's need for confidentiality. It is absolutely critical to me that this be resolved in order to effectively advise the Commission/public on matters related to Electric City Power, SME, and the HGS project.

The City receives multiple right to know requests including everything from staff notes taken at SME Board meetings, to the specific details surrounding the financing of the HGS project. Based on SME's response, offered by Attorney Ken Reich, the level of information that can be shared publicly is very restrictive. This poses a significant problem for me and the City, in that, the City Commission has some decisions to make in the coming months regarding its level of participation in HGS.

Based on the attached letter, I am very limited as to what I can say publicly about continued participation in Highwood. Specifically, participation in SME Board meetings provides staff with a wider and more detailed perspective on overall development strategy and financial matters relating to the project and SME as a corporate entity. Much of what is discussed at these meetings, I believe, is in fact, proprietary and confidential in nature. I do understand the need for SME to exercise its rights as a corporate entity to protect trade secrets and other information from its competitors, but I also respect and appreciate the public's right to know about the City's involvement in the project.

My fundamental concern in all of this is to provide information to the Commission/public so the community can debate and make informed decisions. Tim Gregori has offered to visit with the Commission as much as is necessary to update them on SME matters and the HGS project. I believe that Mr. Gregori will also be limited by what he can say publicly by the attached

guidelines. While I appreciate the offer and will probably take him up on it, I think it will fall short of public expectations.

Even with Tim appearing before the Commission, the Commission will still be lacking the level of detail that I feel needs to be given. Based on what I have observed during my short time here, the public wants city officials to provide information and thoughts on the project and its status. My desire is to have the Commission more informed on the various nuances that I have observed, offer a different perspective, and better evaluate options.

Two staff members alone cannot effectively spearhead this project without more intense involvement from the Commission. While I appreciate the expression of trust extended to me to do that, this project is bigger than Coleen and me. We need to have the Commission and ECP involved at a much more intimate level and there needs to be a greater emphasis on establishing a level of public trust that facilitates a balanced discussion about Highwood. I am afraid that without the ability to delve into more detail with proponents or opponents of the project, the level of transparency needed cannot be achieved.

I look forward to having further discussions and getting specific guidance from the Commission on how it wishes to proceed.

Gtd

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CONFIDENTIAL

June 10, 2008

VIA E-MAIL and
VIA FIRST CLASS MAIL

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City Manager
City of Great Falls
#2 Park Drive South
P.O. Box 5021
Great Falls, MT 59403

Re: Issue of City of Great Falls' Disclosure of Confidential Documents and Information Related to SME

Dear Gregory:

At the request of Tim Gregori, General Manager of Southern Montana Electric G & T ("SME"), I am writing in response to your letter to SME dated May 5, 2008, which included *inter alia*, a request for guidance on what documents and information SME considered confidential and not subject to disclosure. My letter reflects SME's position on the types of documents in the possession of the City related to the business of SME for which it claims confidentiality protection. It also reflects SME's position on the disclosure of other confidential information related to the business of SME. I understand that you intend to share this letter with the City Commissioners.

Introduction

SME, a private cooperative corporation of which the City is a member, is entitled to protection of its confidential, proprietary and trade secret information under applicable provisions of the U.S. and Montana constitutions and Montana statutory and case law discussed herein. We understand that the City has legal obligations as a public entity to allow access to its

BOS:50800.1/SOU108-230233

public records, *see, e.g.*, Montana Constitution Art. II, § 9; Mont. Code Ann. §§ 7-1-4144, 2-6-104. This letter reflects SME's position on the appropriate balance between these interests within the dictates of Montana law.

Law Discussion

Recognizing that the public's right to review documents and observe its public bodies and agencies is of paramount importance to its citizens, the Montana State Constitution provides:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Art. II, Sec. 9, Mont. Const. This right to examine documents is balanced by a right to privacy both in that Constitutional provision, as well as in Article II, Section 10 of the Constitution which provides:

The right to individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Although the Constitutional protection of the right to privacy is limited to individuals, case law and statutory law demonstrate that as a matter of public policy the Montana courts and legislature place a high regard on the protection of confidential records, including proprietary and other confidential information belonging to non-human entities, such as corporate and other business entities. *See Great Falls Tribune v. Montana Public Service Comm'n*, 319 Mont. 38, 2003 MT 359, 82 P.3d 876 (2003) (discussing trade secrets protections for corporations in the context of record requests); *Dunlap v. Graves*, 2004 Mont. Dist. 3240 (2004) (discussing confidential business information in context of discovery); Trade Secrets Act, Mont. Code Ann. § 30-14.401. et. seq. The federal government through the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and other states through similar laws protect trade secrets and other confidential information from disclosure while still maintaining the public's general right to review documents in the possession of the governmental entities. *See, e.g.*, N.D. Code § 44-04-18.4.; Wyo. Stat. Ann. 16-4-203(d).

In *Great Falls Tribune*, the Montana Supreme Court stated:

While non-human entities do not enjoy privacy rights under the right of privacy provision of the Montana Constitution, nothing in Article II, Section 9 requires disclosure of trade secrets and other confidential proprietary information where the data is protected from disclosure

elsewhere in the federal or state constitutions or by statute. For example, a non-human corporate entity may enjoy confidentiality of its property interests under Montana statutory law, such as the Uniform Trade Secrets Act, Title 30, Chapter 14, Part 4, or protection against the "taking" of private property for public use without just compensation under the federal and state constitutions. Such cases implicate the due process and equal protection clauses of the state and federal constitutions and form the legal grounds through which non-human entities can seek protection of confidential information. 319 Mont. 38, 50; 82 P. 3d 876, 883.

The Uniform Trade Secrets Act defines a "trade secret" as "information of computer software, including a formula, pattern, compilation, program, device, method, or process, that: (1) derives 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." Mont. Code Ann. § 30-14-402(4).

In general, SME seeks to maintain as confidential documents that derive economic value from not being disclosed and are the subjects of efforts to maintain their secrecy, confidential proprietary information related to the business of SME and information protected by separate confidentially agreements with third parties. As discussed below, the categories of documents and information listed are entitled to special protection from disclosure under Mont. Code § 7-1-4144, the Montana and U.S. constitutions and case law.

Facts

SME has monthly meetings and an annual meeting of the Members. Under SME's bylaws, the City is a member as are the distribution cooperatives Beartooth Electric, Fergus Electric, Yellowstone Valley Electric, Mid-Yellowstone Valley Electric and Tongue River Electric. The members are represented by trustee representatives who sit on SME's board of directors. In the past John Lawton, former City Manager, was the trustee representative and Colleen Balzarini attended in her capacity as Executive Director of Electric City Power. Currently we understand that you and Ms. Balzarini share an interim role as trustee representatives until the City selects a permanent trustee.

As a member of the Board, the City is provided with a variety of information - written and oral. Typically the members are provided with a board packet at each monthly meeting consisting of minutes of the prior meeting. At the meeting of the members (which are the six members represented by their elected SME trustees) a similar Board Packet is distributed to the trustees. Those board packets contain financial information concerning the operations of SME; the costs of electricity and member rates; requests for proposals and responses for power supply, equipment and construction which often contain confidential information governed by confidential agreements; financial projections regarding pricing, costs, and power consumption;

business strategies, including those regarding the HGS; information regarding contract negotiations with respect to the construction and financing of the HGS; information regarding legal matters; evaluations by consultants; and information and projections concerning current and future prices of electricity, coal and transportation, much of which is available only through subscription and which is copyrighted. In addition, trustees are provided with written or oral information on the status and strategy of pending litigation; confidential attorney advice; confidential information regarding potential financing options (protected by separate confidentiality agreements with the potential financing entities); confidential information regarding third party power supply contracts (protected by confidentiality agreements); copies of attorney correspondence; and similar information related to proprietary or trade secret protected information of SME.

Much of this information, if disclosed to the general public, would violate third party confidentiality agreements, injure SME's ability to supply power at a competitive rate, and generally interfere with SME's carrying out of its business.

Discussion

Based on the above facts and law, the following categories of written information related to SME and provided to the City as a member of SME, shall not be routinely subject to disclosure to the public under applicable law.

1. Minutes of SME meetings - these minutes summarize in detail the confidential discussions and information in the board packets and presented at the meetings and contain trade secrets, proprietary information or other protected confidential information related to SME.
2. Details of pricing for power supplied by third party suppliers which are protected by confidentiality agreements intended to protect the trade secrets of the suppliers (other than the pricing of power supplied by the Bonneville Power Administration and Western Power Administration which is public information).
3. Details of bids for power to be supplied by third party suppliers which are protected by confidentiality agreements intended to protect the trade secrets of the suppliers.
4. Details of pricing for the boiler, turbine, chimney and other major equipment - these are protected by confidentiality agreements intended to protect trade secrets of the manufacturers.
5. Names and details of potential financing entities and their proposals - these are protected by confidentiality agreements intended to protect trade secrets of the financial entities.
6. Details of strategic discussions about all of the above-protected for the same reasons cited above and also protected as confidential proprietary information.

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7. Details of litigation strategies - protected by SME's attorney client privilege.
8. Confidential attorney advice - protected by SME's attorney client privilege.
9. Information requested by SME's financial counsel - protected by SME's attorney client privilege.
10. Resolutions passed at board meetings - see discussion regarding minutes above.
11. Information regarding the current price of power in the Pacific Northwest and other copyright protected subscription information - protected by confidentiality agreements between SME and the proprietary providers of the information. However much of this information can be found on the Internet.
12. Internal communications between cooperative members or their representatives directly related to confidential board business.
13. Information provided by SME's consultants concerning project planning and analysis and the status of various aspects of the HGS project, to the extent it contains proprietary or trade secret information.
14. Project information from SME's engineering consultants for the HGS containing business and financial analysis, evaluation, and strategy; contract information; and contractor invoicing information.
15. Notes referring to any of the same.

In addition to asserting a confidentiality protection for documents, SME asserts the same protections for verbal information that comes within the categories set out above. As you know, Mr. Gregori has offered to brief the City Commission and members of the public on any aspects of the Highwood Generation project on which there are questions in order to be sure that the Commission and the public are fully informed on this project, subject to the right not to disclose confidential information.

Please feel free to call me or Mr. Gregori if you have any questions regarding this letter.

Sincerely,



Kenneth A. Reich
For WolfBlock LLP

cc: Tim Gregori, General Manager, SME
David Gliko, Esq.