



**Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Request for an Adjudicatory
Hearing Regarding: Decision to Grant Confidential
Status to Information Submitted to the Department
of Natural Resources by Enbridge Energy, Limited
Partnership – Superior Terminal

Case No. DNR-15-060

DECISION

Pursuant to due notice, a hearing was held at Madison, Wisconsin, on Wednesday, March 23, 2016, Eric D. Défort, Administrative Law Judge presiding. The parties were asked to submit written post-hearing briefs and the last was received on May 20, 2016.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are:

Mr. Peter Bormuth, self-represented,

Mr. Peter Bormuth
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Enbridge Energy, by

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Wisconsin Safe Energy Alliance, by

Mr. Peter Anderson
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FINDINGS OF FACT

1. In August 2015, the Department of Natural Resources (DNR) informed Enbridge Energy (Enbridge) that an air pollution control construction permit application for its Superior Terminal at 2800 East 21st Street, Superior, Wisconsin, was incomplete and additional information was needed.
2. Enbridge responded to the DNR's request but asked that certain supplemental information submitted to the DNR on October 14, 2015, be treated as confidential.
3. Enbridge requested confidential status for the following information:
 - a. Sandpiper Receiving Station Piping Configuration and Equipment Replacement Pipeline Receiving Station;
 - b. Piping Configuration and Equipment System;
 - c. Example of Surge Relief System Drawing;
 - d. Superior Terminal Process Flow Program;
 - e. Sandpiper Pipeline Venting Location and Systems Configuration; and
 - f. Line 3 Replacement Pipeline Venting Location and System Configuration.
4. In its request to the DNR, Enbridge asserted that the information qualifies as critical infrastructure within the meaning of Section 1016(e) of the USA Patriot Act, 42 U.S.C. 5195(e), and that disclosure of the information could allow persons the potential to incapacitate the equipment in a manner that would have a debilitating impact on the national economy or public health and safety or a combination of both. Additionally, Enbridge asserted that the information qualifies as trade secrets within the meaning of Wis. Stat. § 134.90(1)(c) and qualifies for protection from disclosure under Wis. Admin. Code § NR 2.19 and Wis. Stat. § 285.70.
5. On October 27, 2015, the DNR issued a notice of its preliminary decision to grant the request for confidential status (Decision).

6. On November 3, 2015, Mr. Peter Bormuth requested an adjudicatory hearing, which the DNR granted on November 16, 2015.
7. On December 30, 2015, the Division of Hearings and Appeals scheduled the hearing for March 23, 2016.
8. On March 23, 2016, a Class 1 contested case hearing was held.
9. Enbridge Energy is in the business of transporting crude oil from Canada down to Enbridge's Superior terminal, in Superior, Wisconsin. (Testimony of David Lichtenberg).
10. The Superior terminal is a facility with tankage, booster pumps, main-line pump stations, and receiving stations for receiving product, breaking it out to tankage, and putting it back onto the main line system for distribution across the country. (Lichtenberg).
11. There are multiple products that are moved down the pipeline. (Lichtenberg).
12. The information subject to the confidentiality request (noted above in § 3 a-f) is comprised of facility diagrams and equipment specifications, such as horsepower and unit size, which can be used for calculations. (Lichtenberg).
13. The system diagrams and equipment specifications include considerations on the spacing of equipment and the timing for switching valves to maintain product integrity. (Lichtenberg).
14. The system diagrams and equipment specifications include the location and size of vents used in equipment pressure relief. (Lichtenberg).
15. Enbridge's facility equipment is custom designed. (Lichtenberg).
16. The value of the diagrams of the facility and equipment specifications are estimated to have a value into the hundreds of thousands of dollars, based on the engineering that has gone into their development. (Lichtenberg).
17. An identical version of the diagrams of the facility and equipment specifications could not be duplicated by an engineer employed by some other entity without access to Enbridge Energy's diagrams and equipment specifications. (Lichtenberg).
18. A competitor could use Enbridge Energy's system diagrams and equipment specifications to duplicate Enbridge Energy's system of product delivery or to make improvements to a competitor's existing system. (Lichtenberg).
19. In terms of speed of product delivery, a competitor could use Enbridge Energy's system diagrams and equipment specifications to identify redundancy in Enbridge's system and capitalize on that knowledge. (Lichtenberg).

20. In terms of product integrity, a competitor could use Enbridge Energy's system diagrams and equipment specifications to ascertain the switching procedure or timing and spacing based on placement of valves relative to the process. (Lichtenberg).
21. The information is not publicly available. (Lichtenberg).
22. Amongst the 11,000 to 12,000 employees of Enbridge, only 200 of them have access to the information and those employees are subject to a confidentiality policy, which they sign on an annual basis. (Lichtenberg).
23. Third party contractors can only access the information if they apply to the US pipeline critical drawing group and, if approved, they must enter into a signed confidentiality contract with Enbridge. (Lichtenberg).
24. The criteria for approval include that the access must relate to a current, active project with approved team members. (Lichtenberg).
25. The information is stored on a secured digital drive, within secured, locked facilities. (Lichtenberg).
26. The information for which Enbridge seeks confidential status involves a method or process.
27. The information for which Enbridge seeks confidential status 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.
28. The information for which Enbridge seeks confidential status is the subject of reasonable efforts undertaken by Enbridge to maintain the secrecy of this information.

DISCUSSION

Trade Secret

Wisconsin Administrative Code § NR 2.19(5)(b)1 provides that confidential status may be assigned pursuant to Wis. Stat. § 285.70, which provides that information obtained by the DNR, in the air pollution control context, shall be kept confidential if the information would divulge a method or process that is entitled to protection as a trade secret, as defined in Wis. Stat. § 134.90(1)(c). Additionally, Wisconsin Administrative Code § NR 2.19(5)(b)7 provides that confidential status may be assigned pursuant to, “[o]ther specific statutory or common law right to confidential treatment of information.” Wisconsin’s Uniform Trade Secret Act (Wis. Stat. § 134.90) provides a statutory mechanism to obtain confidential treatment of information by way of injunctive relief and an action for damages. *See* Wis. Stat. § 134.90. That statute defines a trade secret as follows:

“‘Trade secret’ means information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply:

1. The information 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.
2. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.”

Wis. Stat. § 134.90(1)(c).

Some factors that are helpful to consider in determining whether given information is one's trade secret are: 1) the extent to which the information is known outside of his or her business; 2) the extent to which it is known by employees and others involved in his or her business; 3) the extent of measures taken by him or her to guard the secrecy of the information; 4) the value of the information to him or her and to his competitors; 5) the amount of effort or money expended by him or her in developing the information; 6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Minuteman, Inc. v. Alexander*, 147 Wis. 2d 842, 851-853 (Wis. 1989).

A party asserting a trade secret need not spell out the details that would destroy what the party seeks to protect, but the party must include with some specificity the nature of the trade secret that is more than a generalized allegation that there is a trade secret. *ECT International, Inc. v. Zwerlein*, 228 Wis. 2d 343, 349-352 (Wis. Ct. App. 1999).

Enbridge described the alleged trade secret information as follows:

- a. Sandpiper Receiving Station Piping Configuration and Equipment Replacement Pipeline Receiving Station;
- b. Piping Configuration and Equipment System;
- c. Example of Surge Relief System Drawing;
- d. Superior Terminal Process Flow Program;
- e. Sandpiper Pipeline Venting Location and Systems Configuration; and
- f. Line 3 Replacement Pipeline Venting Location and System Configuration.

Furthermore, Enbridge provided more details in its explanation about the function and purpose of the above items in a correspondence letter addressed to the DNR. *See* Exh. 1. Additionally, Enbridge offered testimony from the manager of facilities, Mr. David Lichtenberg, and he testified extensively, on direct examination and cross-examination.

Lichtenberg's testimony established that the information is not known outside of Enbridge, apart from third party contractors who are subject to confidentiality agreements. Lichtenberg's testimony established that the information is only known to 200 of the 11,000 to 12,000 employees at Enbridge and that each of the 200 employees is under a confidentiality agreement as to the information. Lichtenberg's testimony established that Enbridge has undertaken

reasonable measures to guard the secrecy of the information: it is stored on secured digital media, kept in a secured and locked facility, it is accessible only after submitting an application to the U.S. pipeline critical drawing group at Enbridge by someone who is involved in a current and active project with approved team members, and confidentiality agreements are executed with anyone who gains access to the material through the approval process. Lichtenberg's testimony established that the information is valuable to competitors because competitors could improve their market position by improving the speed of product delivery and the integrity of the product that is delivered. Lichtenberg's testimony established that Enbridge has spent hundreds of thousands of dollars to develop the information. Lichtenberg's testimony established that it would be impossible to duplicate or acquire the information. Moreover, Mr. Bormuth's cross-examination of Lichtenberg only assisted Enbridge in demonstrating that Enbridge's systems, methods, or process are not publicly known, at least within in any of the literature presented by Mr. Bormuth.

Based on the evidence, Enbridge has carried its burden of proof in demonstrating that: (a) the information involves a method, or process; (b) that 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 (c) that Enbridge has undertaken reasonable efforts to maintain the secrecy of this information. Therefore, Enbridge has proven that the information is a trade secret within the meaning of the Uniform Trade Secret Act. Wis. Stat. § 134.90(1)(c).

Mr. Bormuth argues that there is insufficient information upon which one can find that there is a trade secret. However, he is incorrect. Based on the evidence that was presented, Enbridge provided sufficient information about the nature of the trade secret, with sufficient specificity, in a manner that was more than a generalized allegation that there is a trade secret.

Secondly, Mr. Bormuth argues that the location of certain equipment (vents) does not qualify as a trade secret because, he argues, such information amounts only to a refinement of pre-existing generally known engineering knowledge. However, Mr. Bormuth has not established that the specific placement of the vents, within Enbridge's system configuration, are merely refinements of pre-existing generally known engineering knowledge.

Enbridge has carried its burden of proof of establishing that the information constitutes trade secrets and, therefore, the information is entitled to confidential treatment under Wis. Admin. Code § NR 2.19(5)(b)1 and 7.

Pipeline Safety and Security

As discussed earlier in this decision, Wis. Admin. Code § NR 2.19(5)(b)7 provides that confidential status may be assigned pursuant to, "[o]ther specific statutory or common law right to confidential treatment of information." Enbridge cites to 49 CFR § 1520.5, which relates to information that is "*obtained or developed in the conduct of security activities, including research and development,*" which the Transportation Security Administration (TSA) has determined, if disclosed, would: "(1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file); (2) Reveal

trade secrets or privileged or confidential information obtained from any person; or (3) Be detrimental to the security of transportation.” 49 CFR § 1520.5(a). The remainder of the Regulation discusses what information constitutes sensitive security information and when such designation may be lost. *See* 49 CFR § 1520.5(b) and (c). Additionally, 49 CFR § 1520.5(a) refers back to 49 U.S.C. 114(s), which relates to “Transportation Strategic Planning.”

Enbridge presented an article that discusses instances of pipeline tampering by protesters. Exh. 2. Additionally, Enbridge introduced a Pipeline and Hazardous Materials Safety Administration Facility Response Plan (Policy Number PHMSA 2050.1A). Exh. 3. The document prescribes the policy on the types of information to be protected “in oil spill response plans (‘Facility Response Plan’).” Exh. 3 at 1. Importantly, the policy appears to be limited to oil spill response plans. Enbridge argues that the policy helps one to determine what constitutes sensitive security information. However, the policy itself suggests that there is a distinction to be made between sensitive security information as discussed in 49 CFR § 1520.5 and “security-sensitive information” as discussed in 49 U.S.C. 60138(a)(2)(B) of the Pipeline Safety Act and that the latter is “broader” than what is envisioned in 49 CFR § 1520.5. Exh. 3 at 3. The policy construes security-sensitive information as “information in a Facility Response Plan that, if disclosed, would be of significant operational utility to a person(s) seeking to harm the pipeline infrastructure of the U.S., therefore adversely affecting transportation security.” *Id.* Again, the policy appears to limit itself to information found in a Facility Response Plan.

In the current matter, there was insufficient reliable evidence presented to establish that the information was “obtained or developed in the conduct of security activities,” pursuant to 49 CFR § 1520.5(a). Further, there was insufficient evidence to establish that the information is part of a Facility Response Plan under 49 U.S.C. 60138(a)(2)(B). Therefore, the information would not be entitled to confidential treatment based on the pipeline security arguments.

Discovery and Disclosure of Trade Secret Material

For good cause shown, the Administrative Law Judge may allow prehearing discovery and the preservation of evidence in any class 1 proceeding. Wis. Admin. Code § NR 2.11(2).

Additionally, the Administrative Law Judge shall exercise discretion to determine which individuals may have access to information alleged to be confidential and shall exercise the authority provided by law to impose protective measures and conditions for inspection necessary to safeguard confidentiality of the information during and after the hearing. Wis. Admin. Code § NR 2.19(6)(c).

On March 18, 2016, Mr. Bormuth requested that the contested case hearing be postponed and rescheduled for the purpose of engaging in discovery. On March 21, 2016, the request was denied because there had not been a showing of good cause to authorize discovery, as required by Wis. Admin. Code § NR 2.11(2). At the hearing, Mr. Anderson, also a litigant in the case, asked for a recess of the proceedings until such time that he would be provided with the alleged trade secret material under seal. The request was denied. In Mr. Anderson’s post-hearing submission, he argues that the Administrative Law Judge should have ordered Enbridge to provide the documents. However, as previously noted in the March 21, 2016, ruling, there must be a showing of good cause to authorize discovery. Wis. Admin. Code § NR 2.11(2). No such

showing has been made in this case. Moreover, Mr. Anderson has not articulated any legitimate basis to require the disclosure of the alleged trade secret material, especially where the law places no obligation on the holder of the material to disclose what they are seeking to protect. As noted by the Wisconsin Court of Appeals, a party asserting a trade secret need not spell out the details that would destroy what the party seeks to protect. *ECT International, Inc. v. Zwerlein*, 228 Wis. 2d at 349-352. Finally, an Administrative Law Judge may regulate the course of the hearing and may dispose of procedural requests or similar matters. Wis. Stat. § 227.46(1)(e), (g). In this regard, Mr. Anderson's frivolous request on the day of the hearing was untimely and, if granted, would have disrupted the conduct of the hearing. Therefore, under the circumstances of this case, Mr. Anderson has not articulated any reason to set aside the decision to deny the request to obtain the trade secret material. Wis. Admin. Code § NR 2.19(6)(c).

Mootness

A case is moot when a determination is sought upon some matter which, when rendered, cannot have any practical legal effect upon a then existing controversy. *Milwaukee Police Ass'n v. City of Milwaukee*, 92 Wis. 2d 175, 183-84, 285 N.W.2d 133, 137 (Wis. 1979) (citing *State ex rel. Clarke v. Carballo*, 83 Wis.2d 349, 356, 265 N.W.2d 285 [1978]; *Racine v. J-T Enterprises of America, Inc.*, 64 Wis.2d 691, 700, 221 N.W.2d 869 [1974]; *State ex rel. Hernandez v. McConahey*, 42 Wis.2d 468, 471, 167 N.W.2d 412 [1969]; *Fort Howard Paper Co. v. Fort Howard Corp.*, 273 Wis. 356, 360, 77 N.W.2d 733 [1956]; *Thoenig v. Adams*, 236 Wis. 319, 322, 294 N.W. 826 [1940].).

On June 9, 2016, Mr. Anderson requested a dismissal of the case on the ground that the case is moot because on June 8, 2016, Enbridge withdrew its permit application. However, there is no dispute that the records that are the subject of this litigation are still in the possession of the DNR and could be obtained through a public records request if the information were not designated as confidential material.

Therefore, it cannot be said that the matter before the Division of Hearings and Appeals is moot, since a decision granting, or denying, confidential status to the information would have a "practical legal effect" upon the dispute between the parties.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has the authority to hear contested cases and enter necessary orders relating to confidential status determinations pursuant to Wis. Stat. § 227.43(1)(b) and Wis. Admin Code § NR 2.19(6).
2. Wisconsin Administrative Code § NR 2.19(5)(b) provides that a decision to assign confidential status shall be made pursuant to one of the following (1.) Wis. Stat. § 285.70, (2.) Wis. Stat. § 289.09, (3.) Wis. Stat. § 291.15, (4.) Wis. Stat. § 293.47, (5.) Wis. Stat. § 283.55, (6.) Upon a finding consistent with the ruling in *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, that confidential treatment of the information is in the public interest, and (7.) Other specific statutory or common law right to confidential treatment of information.

3. Enbridge has the burden of proof as provided in Wis. Admin. Code § NR 2.19(6)(b): "The burden of establishing the confidential status shall be with the applicant who sought confidential status for the information which is the subject of the hearing."
4. The burden of proof, also known as the quantum of evidence, for the hearing decision shall be by the preponderance of the evidence. Wis. Admin. Code § HA 1.17(2).
5. If a hearing is held, the decision of the Administrative Law Judge shall be the final decision of the department. Wis. Admin. Code § HA 2.19(7).
6. Enbridge has carried its burden of proof of demonstrating that: (a) the information involves a method or process; (b) 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 (c) that Enbridge has undertaken reasonable efforts to maintain the secrecy of this information.
7. Enbridge has proven that the information is a trade secret, within the meaning of Wis. Stat. § 134.90(1)(c), and, therefore, said information is entitled to confidential treatment, pursuant to Wis. Admin. Code § NR 2.19(5)(b)1 and 7.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the request for confidential status is hereby GRANTED.

Dated at Milwaukee, Wisconsin on June ___, 2016.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____

Eric D. Défort
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.