

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35393

PROVIDENCE AND WORCESTER RAILROAD COMPANY—PETITION FOR
DECLARATORY ORDER—GARDNER BRANCH

Decided: May 25, 2011

Providence and Worcester Railroad Company (P&W) on July 20, 2010, filed a petition for a declaratory order with respect to its Gardner Branch, a 26.1-mile line extending between Worcester and Gardner, Mass. P&W seeks to construct a second track on the Gardner Branch right-of-way but claims that it cannot do so while New England Power Company d/b/a National Grid occupies a portion of the right-of-way for an electric transmission line. P&W requests that the Board remove any uncertainty regarding its exclusive jurisdiction over P&W's use of the Gardner Branch right-of-way and find that P&W has the right to the exclusive use of the right-of-way and that regulation of its use of the right-of-way under Massachusetts General Law, c. 164, § 73 by the Massachusetts Department of Public Utilities is preempted under 49 U.S.C. § 10501(b).

On August 30, 2010, National Grid filed a reply and a separate motion seeking a protective order under 49 C.F.R. § 1104.14 to protect the production and possible use of information that P&W regards as commercially sensitive and confidential or highly confidential and to protect commercially sensitive and confidential information that National Grid may submit in this proceeding. National Grid claims that a protective order is necessary to protect such information from public disclosure.

In a filing on September 7, 2010, P&W argues that there is no need for discovery or a procedural schedule and therefore no need for a protective order. P&W contends there are no material facts at issue, just a single narrow legal issue, whether M.G.L., c. 164, § 73 is preempted under 49 U.S.C. § 10501(b). In P&W's view National Grid is trying to complicate and expand the scope of this proceeding in an effort to further delay, frustrate, or jeopardize P&W's plan to expand rail operations over its own right-of-way.¹

In a decision being served simultaneously with this one, the Board is instituting a declaratory order proceeding and directing P&W and National Grid to participate in a meeting to explore any and all options that may help to resolve this dispute. Granting the motion for

¹ On September 9, 2010, National Grid filed a motion to strike portions of P&W's reply, arguing that it impermissibly addresses the merits of the dispute. P&W filed a reply to the motion on September 10, 2010. The Board will address the motion in a subsequent decision.

protective order will permit the fullest possible discussion of the issues at the meeting and will facilitate the sharing of information in this proceeding.

Accordingly, good cause exists to grant National Grid's motion for protective order. Unrestricted disclosure of confidential, proprietary, or commercially sensitive information and data could cause serious competitive injury to the parties. The motion conforms to the Board's rules at 49 C.F.R. § 1104.14 governing protective orders. Issuance of the protective order will ensure that confidential information will be used solely for this proceeding and not for other purposes. National Grid's proposed Protective Order and Undertakings, as modified in the Appendix to this decision, will be adopted.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion for a protective order is granted, and the Protective Order and Undertakings in the Appendix to this decision are adopted.
2. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

APPENDIX

PROTECTIVE ORDER

1. Any party producing information, data, documents, or other material (hereinafter collectively referred to as “material”) in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information or “critical energy infrastructure information” as that term is defined in Federal Energy Regulatory Commission regulations (“CEII”), may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:

(a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.

(b) May be disclosed only to employees, counsel, or agents of the party requesting such material, who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising therefrom, only when such employees, counsel, or agents have been given and have read a copy of this Protective Order, agreed to be bound by its terms, and have executed the attached Undertaking for Confidential Material prior to receiving access to such materials.

(c) Must be destroyed by the requesting party, its employees, counsel, and agents at the completion of this proceeding and any judicial review proceeding arising therefrom. However, counsel for a party is permitted to retain file copies of all pleadings filed with the Board which they were authorized to review under this Protective Order, including paragraph 10 of this Protective Order.

(d) If contained in any pleading filed with the Board shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” See 49 C.F.R. § 1104.14.

2. Any party producing material in discovery to another party to this proceeding or submitting material in pleadings may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” If any party wishes to challenge such designation, the party may bring such material to the attention of the Board. Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising therefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agreed to be bound by its terms, and executed the attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as

“HIGHLY CONFIDENTIAL” and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1 of this Protective Order.

3. In the event a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to designate the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the receiving party in writing within 5 days of discovery of the producing party’s inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will either return or destroy the non-designated portion (including any and all copies), as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.

4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party within a reasonable time after it discovers the inadvertent disclosure may make a written request that the receiving party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.

5. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material at hearings in this proceeding, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material to the Board, or the court, as appropriate, with a written request that the Board or the court: (a) restrict attendance at the hearings during discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

6. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

7. To the extent that material reflecting shipper-specific traffic data or other proprietary information is produced by a party in this or any related proceedings and is held and used by the

receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904.

8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the “CONFIDENTIAL” material, “HIGHLY CONFIDENTIAL” material, or copies or notes are to be released, or within 3 working days prior to such release, whichever is soonest, to give the producing party the opportunity to contest the release. The provisions of this paragraph notwithstanding, the parties agree to use their best efforts to prevent disclosure of CEII to a government or judicial body (other than the Board) without a protective order from such government or judicial body preventing disclosure of CEII to the public.

9. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding.

10. Each party has a right to view its own data, information, and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information, and documentation has been designated “HIGHLY CONFIDENTIAL” by a producing party, without securing prior permission from the producing party. If a party (the “filing party”) files and serves upon another party (the “reviewing party”) a pleading or evidence containing the filing party’s “HIGHLY CONFIDENTIAL” material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a “CONFIDENTIAL” version of the pleading or evidence from which the filing party’s “HIGHLY CONFIDENTIAL” material has been redacted. The “CONFIDENTIAL” version may be provided in hardcopy or electronic format at the option of the filing party, and may be disclosed to those personnel employed by the reviewing party who have read a copy of this Protective Order and executed the attached Undertaking for Confidential Material (“In-house Personnel”). In lieu of preparing a “CONFIDENTIAL” version, the filing party may (simultaneously with the party’s submission to the Board of its “HIGHLY CONFIDENTIAL” version) make available to outside counsel for any other party a list of all “HIGHLY CONFIDENTIAL” information that must be redacted from its “HIGHLY CONFIDENTIAL” version prior to review by In-house Personnel, and outside counsel for any other party must then redact that material from the “HIGHLY CONFIDENTIAL” version before permitting any clients to review the submission.

11. Any party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on May 26, 2011, governing the production of confidential documents in FD 35393, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in FD 35393 or any judicial review proceeding arising therefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel may retain file copies of pleadings filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: _____

Print: _____

Affiliation: _____

Dated: _____

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on May 26, 2011, governing the production of confidential documents in FD 35393, understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information, or material designated “HIGHLY CONFIDENTIAL” to any person or entity who: (i) is not eligible for access to “HIGHLY CONFIDENTIAL” material under the terms of the Protective Order, or (ii) has not executed a “HIGHLY CONFIDENTIAL” undertaking in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated “HIGHLY CONFIDENTIAL,” that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising therefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated “HIGHLY CONFIDENTIAL” by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT]

Print: _____

Affiliation: _____

Dated: _____