

RECEIVED

JUL 02 2020

WATER RESOURCES
WESTERN REGION

Laurence ("Laird") J. Lucas (ISB # 4733)
Bryan Hurlbutt (ISB # 8501)
Advocates for the West
P.O. Box 1612
Boise, ID 83701
(208) 342-7024 (phone)
(208) 342-8286 (fax)
llucas@advocateswest.org
bhurlbutt@advocateswest.org

Chas. McDevitt (ISB # 835)
PO Box 1543
Boise ID 83701
chas@mcdevitt.org

Attorneys for Protestant Idaho Foundation for Parks and Lands

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)	IFPL'S MOTION TO
FOR PERMIT NO. 63-34614,)	ESTABLISH PROCEDURES
IN THE NAME OF MICRON)	FOR CONFIDENTIAL
TECHNOLOGY INC.)	INFORMATION
_____)	

Protestant IDAHO FOUNDATION FOR PARKS AND LANDS (IFPL) hereby moves for the Hearing Officer to establish procedures for treating confidential information at live prehearing proceedings and at the hearing in this matter, pursuant to the May 11, 2020 "Confidentiality Stipulation and Protective Order."

The Confidentiality Stipulation and Protective Order provides that "all confidential materials that are designed to be 'Confidential,' and any summaries, compilations or other work product which contains or reflects such confidential materials, shall be kept and treated as confidential and shall be used only for purposes of the prosecution and/or defense of this matter." See May 11, 2020 Confidentiality Stipulation and Protective Order, ¶ 2 (underscore added). It defines the "prosecution and/or defense

of this matter” as meaning “preparation for hearing in this matter, including specifically, but not exclusively, pre-trial discovery. . . , the hearing in this matter, any alternative dispute resolution in this matter. . . , and . . . any appeal, rehearing or other judicial proceeding which relates to the subject matter of this motion.” *Id.* ¶ 1(a)(iv).

While the Confidentiality Stipulation and Protective Order has provisions for submitting written pleadings and “other papers filed with IDWR” under confidentiality markings and procedures, *see id.* ¶ 7, it does not address how confidential information may be addressed by the parties and their counsel at live proceedings, including prehearing or status conferences, or at the hearing itself. To the contrary, it specifically states that: “The treatment of CONFIDENTIAL INFORMATION to be introduced in the hearing of this matter shall be subject to a later order.” *Id.* ¶ 17 (underscore added). It also allows any party to seek modification of the Protective Order. *Id.* ¶ 18.

Micron has produced some information in discovery to IFPL that it has designated as confidential under the Confidentiality Stipulation and Protective Order, which IFPL believes will be directly relevant to the issues at hearing in this matter. Micron has already proven that it will take a hyper-vigilant, and indeed unreasonable, approach to enforcing the Confidentiality Stipulation and Protective Order—as demonstrated by the “Motion to Impose Sanctions Against IFPL for Breach of Confidentiality Agreement and Protective Order” that Micron filed on June 26, 2020, relating to IFPL’s Motion to Continue Hearing and Prehearing Deadlines and the status conference conducted on June 24, 2020 addressing it. IFPL has responded demonstrating that Micron’s motion for sanctions lacks merit; and in fact, IFPL sought to conform with the Confidentiality Stipulation and Protective Order in addressing the lack of prejudice to Micron from the

requested six-month continuance. *See* IFPL’s Response to Micron’s Motion for Sanctions and Declaration of Laurence J. Lucas, filed June 29, 2020.

But the point is clear: All parties and the Hearing Officer need explicit guidelines on how to treat “confidential information” at live prehearing conferences and the hearing in this matter. IFPL is not willing to be subjected to another similar attack by Micron when there is a lack of clarity on how confidential information may be addressed at live proceedings in this matter.

Micron drafted the Confidentiality Stipulation and Protective Order, which was agreed to by IFPL and approved by IDWR without any amendments. Either deliberately or inadvertently, Micron did not specify how confidential information should be treated at live proceedings, including prehearing conferences and the hearing. That gap in the Confidentiality Stipulation and Protective Order must be filled now.

IFPL thus moves the Hearing Officer to address this gap by ordering that: (a) Micron, as the originator of the Confidentiality Stipulation and Protective Order, propose guidelines for how confidential information may introduced, discussed, and otherwise used at live proceedings in this matter, including the hearing; (b) that all other parties be given an adequate opportunity to comment on Micron’s proposals, and make their own suggestions as necessary; (c) that the Hearing Officer conduct a status conference to iron out any differences of opinion; and (d) the Hearing Officer then adopt a supplement or modification to the Confidentiality Stipulation and Protective Order addressing such procedures.

In addition, IFPL requests that such procedures include clear guidelines for how a party may summarize or generally reference information that may have been designated as confidential in detailed form, but only needs to be referenced in general terms.

This is what happened in connection with IFPL's Motion to Continue Hearing, which generally referenced information that Micron designated under the Confidentiality Stipulation and Protective Order, but did not disclose any of the detailed information Micron provided. Indeed, as IFPL will demonstrate in its forthcoming reply on its Corrected Motion to Continue Hearing, IFPL's disputed statement in the Motion to Continue Hearing reflected information already publicly available or generally known—yet Micron seized on IFPL's general statement to claim a breach of the Protective Order in its Motion for Sanctions, without ever providing notice to IFPL before bringing the motion or attempting to work out the issue informally.

Again, IFPL is unwilling to risk similar attacks in the future, but will have to relate information relating to Micron's future plans and projections in putting on its case and showing that the requested water right should be denied under the relevant provisions of the Idaho Code. IFPL must have clear guidelines to be able to present its case fully, and publicly, without breaching the Confidentiality Stipulation and Protective Order.

WHEREFORE, Protestant IFPL respectfully moves the Hearing Officer to grant this motion; direct Micron to propose procedures for treatment of confidential information at live prehearing proceedings and the hearing in this matter; allow other parties to comment and make their own suggestions; hold a hearing to resolve any disputes; and issue a Supplemental or Modified Protective Order addressing such procedures.

Dated this 30th day of June, 2020.

Respectfully Submitted,



Laurence ("Laird") J. Lucas

Attorney for Protestant IFPL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June, 2020, I caused the foregoing IFPL's MOTION TO ESTABLISH PROCEDURES FOR CONFIDENTIAL INFORMATION to be served via the method of service show below, upon the following persons:

Original Hard Copy and Email

Copy To:

Nick Miller, P.E.
Idaho Dep't of Water Resources
Western Region
2735 W. Airport Way
Boise, ID 83705-5082

Michael Orr
Deputy Attorney General
PO Box 83720
Boise ID 83720
michael.orr@ag.idaho.gov

Email Copies To:

Kevin Beaton
Stoel Rives LLP
101 S. Capitol Blvd.
Suite 1900
Boise ID 83702
kevin.beaton@stoel.com

Christopher Meyer
Michael P. Lawrence
Givens Pursley LLP
PO Box 2720
Boise, ID 83701-2720
chrismeyer@givenspursley.com
michaellawrence@givenspursley.com

Scott Gatzemeier
Ann Dickey
Micron Technology Inc.
PO Box 6
Boise ID 83707
adickey@micron.com

Daniel Steenson
Bryce Farris
Andrew Waldera
Sawtooth Law Office
1101 W. River St, Suite 110
PO Box 7985
Boise ID 83707
dan@sawtoothlaw.com
bryce@sawtoothlaw.com
andy@sawtoothlaw.com

SPF Water Engineering
Attn: Terry Scanlan
300 E. Mallard Dr, Ste 350
Boise ID 83706
TScanlan@spfwater.com

Albert Barker
Barker Rosholt & Simpson

PO Box 2139
Boise ID 83701-2139
apb@idahowaters.com



Laurence ("Laird") J. Lucas