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May 29, 2009

Ms. Kate Whitney
Montana Public Service Commission
1701 Prospect Ave.
P. O. Box 202601
Helena, MT 59620-2601

RE: Motion for Protective Order for Docket D2009.5.63

Dear Ms. Whitney:

Enclosed please find one copy of NorthWestern Energy's Motion for Protective Order relating to the gas tracker docket to be filed May 29, 2009. The Motion has also been mailed and e-filed.

Sincerely,

A handwritten signature in cursive script that reads "Connie Moran".

Connie Moran
Administrative Assistant
Regulatory Affairs

NC/nc
Enclosure

CC: Montana Consumer Counsel

Richard J. Garlish
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Attorney for NorthWestern Energy

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF NORTHWESTERN) UTILITY DIVISION
ENERGY, Annual Application for Approval)
of Monthly Gas Cost Tracker True-Up, Projected) DOCKET NO. D2009.5.63
Gas Costs, and Gas Transportation Balance)

**NORTHWESTERN ENERGY’S
MOTION FOR PROTECTIVE ORDER**

I. INTRODUCTION

NorthWestern Corporation doing business as NorthWestern Energy (“NorthWestern or NWE”), the provider, following a thorough legal and factual examination, has determined the specific items or categories of like items identified below are trade secret and/or confidential business information (collectively “confidential information”). The provider moves the Montana Public Service Commission (PSC) for a grant of a protective order pursuant to ARM 38.2.5001 through 38.2.5030 (PSC rules governing protective orders and protection of confidential information) to govern the use and disclosure of the specific items or categories of like items identified below.

The provider has considered that the PSC is a public agency and that there is a presumption of access to documents and information in the PSC’s possession. The provider understands it has

the burden of demonstrating that the identified items are confidential information and that it must, within this motion, establish a prima facie showing of confidentiality, factually and legally, and make clear the basis for the claim of confidentiality.

II. CONTACT PERSON

The contact person regarding this motion and regarding the items to be protected is:

Richard J. Garlish
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Fax: (406) 497-2451
Richard.Garlish@northwestern.com
Attorney for NorthWestern Energy

III. IDENTIFICATION OF CONFIDENTIAL INFORMATION

A complete and specific non-confidential identification, item by item or by category of like items for which protection is being sought is:

- Item A.** Detailed forecast monthly costs associated with purchases of natural gas;
- Item B.** Detailed forecast monthly volumes associated with purchases of natural gas;
- Item C** Parties from whom NWE expects to purchase natural gas in the future;
- Item D.** Details concerning forecast monthly activities related to Storage and Transportation Utilization;
- Item E** Identity of parties currently and prospectively in negotiation with NWE for provision of natural gas;
- Item F.** Costs associated with negotiation proposals;
- Item G** Volumes associated with negotiation proposals;
- Item H.** Location of delivery of the purchased gas associated with negotiation proposals;
and

Item I. NWE’s evaluation of the parties from whom NWE may purchases natural gas and the associated costs, volumes, and the location of delivery of the gas.

IV. FACTUAL AND LEGAL BASES FOR PROTECTION

For each of the above-referenced items or category of like items a complete and specific factual basis, including thorough identification and explanation of specific facts, and a complete and specific legal basis and application of the law to facts follows. An affidavit supporting the facts is attached. The affiant is a person qualified on the subject matter and the affidavit supports the claim of confidentiality of the identified information.

Item A. Detailed forecast monthly costs associated with purchases of natural gas.

1. The confidential material is information.

“Information” includes knowledge, observations, opinions, data, facts, and the like, whether recorded or communicated in writing, orally, electronically, or otherwise, and whether provided through pleadings, reports, exhibits, testimony, work papers, or similar items or attachments to such items, or in response to discovery, subpoena, order, audit, investigation, or other request. ARM 38.2.5001(3).

Knowledge and data concerning the detailed forecast monthly costs associated with purchases of natural gas are communicated in writing and in electronic format provided in the exhibits and workpapers in NWE’s filing. The details associated with forecast monthly costs has been requested during the discovery process in recent NWE filings, and is likely to be requested in this proceeding.

2. The confidential information is in fact secret.

a. Trade Secret

Section 69-3-05(2), MCA, provides “[t]he commission may issue a protective order when necessary to preserve trade secrets, as defined in 30-14-402, or other information that must be protected under law as required to carry out its regulatory functions.” (Emphasis added). Section 30-14-402(4), MCA, provides, in pertinent part:

“Trade secret” means information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, 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 is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Specific information regarding the detailed forecast monthly costs associated with purchases of natural gas over which NWE seeks a Protective Order is information that derives actual and potential independent economic value from not being generally known and represents legally protected property interests and trade secrets. This information is in fact secret. NWE enters into agreements with suppliers that contain confidentiality provisions that require that this information be kept secret. Suppliers expect confidentiality of transactions if they are to perform value-added economics or to provide various extrinsic values that distinguish their commodity supply from that of competitors. These beneficial supply attributes directly benefit customers. If NorthWestern is not able to provide confidentiality for contracts that contain forecast information or information about future transactions, suppliers will be unwilling to provide innovative products. Confidentiality of transactions is standard industry practice. An example of a master enabling agreement which includes confidentiality language is included as Attachment 1 and by this reference made a part of this Motion.

Specific information regarding the detailed forecast monthly costs associated with purchases of natural gas is included in John Smith’s Exhibit__(JMS-2) and associated work papers in the filing. Additionally, information supporting the detailed forecast

monthly costs has been requested in recent NEW filings, and it is expected that similar requests are likely to be made in this proceeding.

The Commission has granted protection of the detailed forecast monthly costs associated with purchases of natural gas in previous dockets. Concerning this information, in Docket No. D2008.5.44, Order 6930a, the Commission determined that “...NWE has made a prima facie showing that information involving future transactions and continuing negotiations constitutes property rights which are protected under constitutional due process requirements.” As set forth below, the release of this information would give unfair competitive advantage to certain market participants.

b. Confidential Business Information

The Montana Supreme Court’s decision in Great Falls Tribune v. Montana Public Service Commission (2003), 319 Mont. 38, 82 P.2d 876, affirmed that there are two distinct categories under which “documents” may be withheld from public inspection: trade secrets or confidential proprietary information. Id., 319 Mont. at 39. In this case, confidential proprietary information is also referred to as confidential business information.

Confidential business information has long been recognized as property. Concurring Opinion of Justice Nelson, Great Falls Tribune, Id., 319 Mont. at 81. See also Carpenter v. United States (1987), 484 U.S. 19, 26, 108 S. Ct. 316, 320, 98 L. Ed 2d 275. Justice Nelson also quoted Carpenter for the holding that “confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy”. Great Falls Tribune, supra, 319 Mont. at 81. The concurring opinion also reiterates that “valid contracts are ‘property’, which cannot be taken without just compensation, whether obligor be private individual, municipality, state, or United States”. Id., 319 Mont at 81. Justice Nelson points to the critical question that must be answered first – “What type of information is it?” Only then can we determine the type of protections to which it is entitled. Id., 319 Mont. at 81. In

the matter now pending before the Commission, the information over which NWE seeks protection is information generated either from its own business or by an energy supplier which is designed for the exclusive use of NWE. “Exclusivity is an important aspect of confidential business information.” Carpenter, *supra*, 484 U.S. at 27, 98 L. Ed. 2d at 284 (citations omitted).

Montana’s Supreme Court in Great Falls Tribune found that 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.” Great Falls Tribune, *supra*, 319 Mont. at 39.

There is no dispute that administrative agencies must follow the constitutional requirements of due process. Montana Power Co. v. Public Service Commission (1983), 671 P. 2d 604, 609. The Montana Constitution guarantees equal protection of the laws and due process to all persons. Mont. Const. Art. II, §§4 and 17. All persons found within the State of Montana are subject to the jurisdiction of the courts; and corporations are included in the definition of “person”. Rules 4A and 4(B)(1), Montana Rules of Civil Procedure. “A corporation is a ‘person’ within the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.” Montana Power Co, Id., at 607.

While the issues relative to “unfair competitive advantage” and release of competitively-sensitive confidential information are not new to the PSC, they have been fully refined by the Federal Energy Regulatory Commission (FERC). Although the decisions are not specific to Montana, this body of decisions should guide the MPSC. See Commonwealth Electric Co. v. Boston Edison Co., Docket No. EL88-5-000, Order

Ruling on Motion to Compel Responses, (Nov. 4, 1988). In the case of Wisconsin Electric Power Co.: Order on Request for Clarification and Amending Policy Statement Concerning Disclosure of Documents and Information obtained in Staff Audits; Policy Statement, 58 Fed. Reg. 38290 (July 12, 1993), the FERC reiterated its firm position that it would not “permit the release of commercially sensitive information”, even if obtained by its staff during audits, to “participants in highly competitive arenas.” See also, FERC Stats. & Regs. [Reg. Preambles 1991-96]¶ 30,972, pp. 30, 972, pp. 849-50(1993).

In the seminal case of Amoco Pipeline Company, Docket No. IS90-30-000, 55 FERC ¶ 61,323 (1991) (footnotes omitted), FERC set forth some instructive language on the issue of providing “confidential business information” to competitors. FERC provided:

A claim that information is confidential business information or unduly burdensome may be grounds for denying or limiting discovery under Rule 410 (c) of the Commission’s Rules of Practice and Procedure. **If the parties to the discovery dispute are competitors, the ALJ must exercise increased caution to avoid unnecessary disclosure.** If it is established that the requested material should be treated confidentially, the *ALJ* must then determine if reasonable protective measures are available to alleviate the harm that could result from disclosure.

61,959 (emphasis added).

FERC’s ruling resulted from the requests of competitors to see the information provided in RFPs by other competitors. The FERC’s holdings are instructive in this matter. The principles are the same. The Default Supply customers are to be protected.

As stated by NWE’s Director of Energy Supply Market Operations, Kevin J.

Markovich, as a default supplier, NWE is purchasing gas supply on behalf of customers in the competitive marketplace. *Affidavit of Kevin J. Markovich* at ¶1. Specific information regarding the detailed forecast monthly costs associated with such purchases and the supporting detail should not be made public. Release of this information could harm NWE's ability to ensure reliability through adequate gas supply, and/or to negotiate and receive the most competitive prices and beneficial supply arrangements on behalf of customers. As such, the information related to detailed monthly forecast information to be protected is a legally protected property interest. See Carpenter v. United States, 484 U.S. 19, 26, 108 S.Ct. 316, 320, 98 L.Ed.2d 275 (1987) (“Confidential business information has long been recognized as property.”)

3. The confidential information is subject to efforts reasonable under the circumstances to maintain its secrecy.

Acting under normal industry standard protocol, NWE and/or its suppliers protect confidential information (including contract offer and negotiation data and its analysis) by whatever means available to them. This action is necessary to keep utilities on an equal footing with other participants in the market. This also includes confidentiality provisions in negotiations. This information is kept at NWE in a specific secure location, and is accessible only by designated individuals. NWE also protects system optimization and reliability strategies related to Storage and Transportation Utilization, as well as forecast information by all available means, and this information is similarly kept in a specific secure location, accessible only by designated individuals.

After issuance of a protective order, NWE continues to maintain the secrecy of the information to be protected. For docket purposes, this information is then placed on yellow paper and maintained in a secure location with access limited to those NWE employees who have a “need to know” based on NWE's internal controls. The information to be protected is destroyed if it becomes dated or otherwise irrelevant. This information is currently held only by the supplier and NWE, *see Affidavit of Kevin J.*

Markovich at ¶ 7. As NWE also continues to maintain its secrecy, the information to be protected keeps its status as NWE trade secrets. See Section 30-4-402(4), MCA.

4. The confidential information is not readily ascertainable by proper means.

Since the information to be protected is not within the public domain, it is not readily ascertainable by any other entity. No public documents exist which could reveal the information to be protected by any means whatsoever. No one could reasonably ascertain this information through a public source, See *Affidavit of Kevin J. Markovich at ¶ 7*

5. The confidential information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy.

NWE and the supplier derive economic and operational value by virtue of this information not being generally available. If the information to be protected were to be disclosed, suppliers seeking to negotiate for contracts to serve default supply customers would gain an advantage in negotiations and proposals. Supply contracts are awarded through a negotiation process in order to ensure reliability, system flexibility and to obtain the lowest long-term cost for default supply customers. Disclosure of this information will provide suppliers access to the prices proposed to be charged by other suppliers, which may lead to an upward pressure on prices, thereby enabling new suppliers to adjust their offers to beat a competitor by making an offer that is not necessarily the lowest offer that could be submitted.

NWE, as the Default Supplier acting as a buyer in the marketplace on behalf of customers, also derives economic and operational value by virtue of this information not being generally available. These values include reliability through supply adequacy at strategic delivery points, as well as optimization of the system. If the information to be protected were to be disclosed, other buyers seeking to acquire natural gas supply contracts and other sellers seeking to maximize profits through attractive supply arrangements would gain an advantage

over the default supplier in future acquisitions. Disclosure of this information will give buyers access to the economic and qualitative attributes of the proposed supply arrangements, which will be entered into to ensure supply adequacy and system optimization benefit for default supply customers. Loss of even a few suppliers at key delivery points on the system could lead to reliability problems during the winter, and could have a negative economic impact on customers.

If prospective suppliers are aware that their confidential information can be made available to other supply competitors, it is very likely that fewer suppliers will participate in negotiations in the future. This result would harm ratepayers. All suppliers should compete on their own merits, rather than having the unfair advantage of proprietary information about their competitors.

If proprietary information were to be disclosed, the focus of the procurement process would shift, resulting in higher prices for consumers. If competitors know the strategies of other competitors, offers would likely be distorted. Energy suppliers compete to sell their products in various markets. The realization that their information in an NWE negotiation will not remain confidential will have a chilling effect on their willingness to do business with NWE.

The ability to ensure reliable and adequate supply where it is needed should not be jeopardized for the sole benefit of a few competing suppliers. Customers are benefited by NWE's ability to procure under standard industry practices of confidentiality.

As stated, disclosure of this information could result in both higher prices to be paid by default supply customers and the loss of a source of natural gas supply. As indicators of NWE procurement strategies, competitors' negotiation strategies and of pricing proposals, the information to be protected has actual and potential economic value to NWE and Default Supply Customers. See Affidavit of *Kevin J. Markovich* at ¶ 8. Therefore, the information to be protected has independent economic value aside from its secrecy.

Item B. Detailed forecast monthly volumes associated with purchases of natural gas and the supporting monthly invoices.

1. The confidential material is information.

Please refer to Item A, part 1, for definition of “Information.”

Data concerning the detailed forecast monthly volumes associated with purchases of natural gas are communicated in writing and in electronic format in the exhibits and workpapers in NWE’s filing. Additionally this type of information has been requested during the discovery process in recent NWE filings, and is likely to be requested in this proceeding.

2. The confidential information is in fact secret.

a. Trade Secret

Please refer to Item A, part (2)(a), for the basic applicable statutory language on “trade secret.”

Specific information regarding the detailed forecast monthly volumes associated with purchases of natural gas over which NWE seeks a Protective Order is information that derives actual and potential independent economic value from not being generally known and represents legally protected property interests and trade secrets. These issues are explained in more detail below.

This information is in fact secret. NWE enters into agreements with suppliers that contain confidentiality provisions that require that this information be kept secret. Suppliers expect

confidentiality of transactions if they are to perform value-added economics or to provide various extrinsic values that distinguish their commodity supply from that of competitors. These beneficial supply attributes directly benefit customers. If NorthWestern is not able to provide confidentiality, suppliers will be unwilling to provide innovative products. Confidentiality of transactions is standard industry practice. An example of a master enabling agreement which includes confidentiality language is included as Attachment 1 and by this reference made a part of this Motion. Moreover, the secrecy of this information is maintained and it is not disclosed in any public forum. Moreover, the secrecy of this information is maintained and it is not disclosed in any public forum.

Specific information regarding the detailed forecast monthly volumes associated with purchases of natural gas is included in John Smith's Exhibit (JMS-2) and associated workpapers in the filing. Additionally, this type of information has been requested during the discovery process in recent NWE filings, and is likely to be requested in this proceeding.

The Commission has granted protection of the detailed forecast monthly volumes associated with purchases of natural gas in previous dockets. Concerning this information, in Docket No. D2008.5.44, Order 6930a, the Commission determined that "...NWE has made a prima facie showing that information involving future transactions and continuing negotiations constitutes property rights which are protected under constitutional due process requirements." As set forth below, the release of this information would give unfair competitive advantage to certain market participants.

b. Confidential Business Information

Please refer to Item A(2)(b), for the basic applicable legal argument on "confidential business information."

As stated by NWE's Director of Energy Supply Marketing Operations, Kevin J. Markovich, as a default supplier, NWE is purchasing gas supply on behalf of customers in the competitive marketplace. Affidavit of *Kevin J. Markovich* at ¶ 1. Specific information

regarding the detailed forecast monthly volumes associated with such purchases and the supporting detail should not be made public. Release of this information could harm NWE's ability to ensure reliability through adequate gas supply, and/or to negotiate and receive the most competitive prices and beneficial supply structures on behalf of customers. As stated, the information to be protected consists of proposed specific, supply contract economic and delivery terms submitted to NWE with an expectation of confidentiality and/or non-disclosure. All quantitative and qualitative attributes are specific to each proposed transaction. Confidentiality of proposals is standard industry practice. *Affidavit of Kevin J. Markovich* at ¶ 6. As such, the information to be protected is a legally protected property interest of NWE's, as well as the supplying party.) See Carpenter v. United States, 484 U.S. 19, 26, 108 S.Ct. 316, 320, 98 L.Ed.2d 275 (1987) ("Confidential business information has long been recognized as property.")

3. The confidential information is subject to efforts reasonable under the circumstances to maintain its secrecy.

Please refer to Item A(3), for the basic applicable legal argument on "maintaining secrecy." The facts pertaining to Item A(3) "maintaining secrecy" are identical regarding this item.

4. The confidential information is not readily ascertainable by proper means.

Please refer to Item A(4), for the basic applicable legal argument on "not readily ascertainable." The facts pertaining to Item A(4) "not readily ascertainable" are identical regarding this item.

5. The confidential information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy.

NWE, as the Default Supplier and a buyer in the marketplace on behalf of customers,

derives quantitative (price) and qualitative (reliability) value by virtue of this information not being generally available. If the information to be protected were to be disclosed, other buyers seeking to acquire natural gas supply contracts as well as suppliers would gain unnecessary, detailed insight into the specific resources that NWE plans to rely upon to ensure reliability and supply adequacy. Furthermore, such other buyers and suppliers would maintain an advantage over the default supplier in future acquisitions.

Disclosure of this information will give buyers access to the specific periods when NWE expects to purchase specific volumes, providing information regarding NWE'S purchasing strategies by providing an indication of the system requirements. The limited number of suppliers, reliability and strategic optimization of the system demonstrate the importance of maintaining confidential information.

The supplier derives economic value by virtue of this information not being generally available. If the information to be protected were to be disclosed, other suppliers seeking to negotiate contracts to serve default supply customers would gain an advantage in negotiations and proposals. Supply contracts are awarded through a negotiation process in order to obtain the lowest long-term cost for default supply customers. Disclosure of this information will give competitors access to the monthly forecasted volumes, thereby enabling them to view the timing of volumetric purchases. This reveals the specific points in time when NWE expects to purchase specific volumes, providing information regarding NWE's purchasing strategies by providing indication of which periods during the year NWE needs gas from the market and those periods when competitors have gas available to sell. Because there are a limited number of suppliers able to provide natural gas to NWE's system, release of this information would be detrimental. This may allow suppliers to adjust their offers, and result in an offer that is not necessarily the lowest one that could be submitted.

If suppliers are aware that their confidential negotiation information can be made available to other supply competitors, it is very likely that fewer suppliers will participate in the

future. This result would harm ratepayers. All suppliers should compete on their own merits, rather than having, the unfair advantage of proprietary information about their competitors.

If competitors know what the strategy of other competitors is, the focus of the procurement process will shift, resulting in higher prices for consumers. Default supply customers would be harmed if this occurred. Energy suppliers compete to sell their products in various markets. The realization that their information will not remain confidential if they choose to enter negotiations with NWE will have a chilling effect on their willingness to do business with NWE. The ability to ensure reliable and adequate supply where it is needed should not be jeopardized for the benefit of a few competing suppliers. Customers are benefited by the NWE's ability to procure under standard industry practices of confidentiality.

As stated, disclosure of this information could result in higher prices to be paid by default supply customers and a detrimental impact on reliability and system flexibility. As indicators of NWE procurement strategies and competitors' negotiation strategies, the information to be protected has actual and potential economic value to NWE and Default Supply Customers. See *Affidavit of Kevin J. Markovich at ¶ 8*. Therefore, the information to be protected has independent economic value aside from its secrecy.

Item C. Parties from whom NWE expects to purchase natural gas in the future.

1. The confidential material is information.

Please refer to Item A, part 1, for definition of "Information."

Knowledge and data concerning the parties from whom NWE expects to purchase natural gas in the future are communicated in writing and in electronic format, but are not included in the filing. This type of information has been requested during the discovery process in recent NWE filings, and is likely to be requested in this proceeding.

2. The confidential information is in fact secret.

a. Trade Secret

Please refer to Item A, part (2)(a), for the basic applicable statutory language on “trade secret.”

Specific information regarding the parties from whom NWE expects to purchase natural gas in the future over which NWE seeks a Protective Order is information that derives actual and potential independent economic value from not being generally known and represents legally protected property interests and trade secrets. These issues are explained in more detail below.

This information is in fact secret. NWE enters into agreements with suppliers that contain confidentiality provisions that require that this information be kept secret. Suppliers expect confidentiality of transactions if they are to perform value-added economics or to provide various extrinsic values that distinguish their commodity supply from that of competitors. These beneficial supply attributes directly benefit customers. If NorthWestern is not able to provide confidentiality, suppliers will be unwilling to provide innovative products. Confidentiality of transactions is standard industry practice. An example of a master enabling agreement which includes confidentiality language is included as Attachment 1 and by this reference made a part of this Motion. Moreover, the secrecy of this information is maintained and it is not disclosed in any public forum.

Specific information regarding the parties from whom NWE expects to purchase natural gas, while not included in the filing, has been requested during the discovery process in recent NWE filings, and is likely to be requested in this proceeding.

The Commission has granted protection of the parties from whom NWE purchases natural gas in previous dockets. Concerning this information, in Docket No. D2008.5.44, Order 6930a, the Commission determined that “.NWE has made a prima facie showing that information involving future transactions and continuing negotiations constitutes property rights

which are protected under constitutional due process requirements.” As set forth below, the release of this information would give unfair competitive advantage to certain market participants.

b. Confidential Business Information

Please refer to Item A, part (2)(b), for the basic applicable legal argument on “confidential business information.”

As stated by NWE’s Director of Energy Supply Marketing Operations, Kevin J. Markovich, as a default supplier, NWE is purchasing gas supply on behalf of customers in the competitive marketplace. Affidavit of *Kevin J. Markovich* at ¶1. Specific information regarding the parties from whom NWE expects to purchase natural gas in the future should not be made public. Release of this information could harm NWE’s ability to ensure reliability through adequate gas supply, and/or to negotiate and receive the most competitive prices and beneficial supply structures on behalf of customers. As stated, the information to be protected consists of information submitted to NWE with an expectation of confidentiality and/or non-disclosure. All quantitative and qualitative contractual attributes are specific to the particular transaction. Confidentiality of transactions is standard industry practice. Affidavit of *Kevin J. Markovich* at ¶ 6. As such, the information to be protected is a legally protected property interest of both NWE and the supplying party. See Carpenter v. United States, 484 U.S. 19, 26, 108 S.Ct. 316, 320, 98 L.Ed.2d 275 (1987) (“Confidential business information has long been recognized as property.”)

3. The confidential information is subject to efforts reasonable under the circumstances to maintain its secrecy.

Please refer to Item A(3), for the basic applicable legal argument on “maintaining secrecy.” The facts pertaining to Item A(3) “maintaining secrecy” are identical regarding this item.

4. The confidential information is not readily ascertainable by proper means.

Please refer to Item A(4), for the basic applicable legal argument on “not readily ascertainable.” The facts pertaining to Item A(4) “not readily ascertainable” are identical regarding this item.

5. The confidential information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy.

NWE, as the Default Supplier and a buyer in the marketplace on behalf of customers derives significant economic value by virtue of this information not being generally available. If the information to be protected were to be disclosed, other buyers seeking to acquire natural gas supply contracts may gain an advantage over the default supplier in future acquisitions. Disclosure of this information will inform buyers of the parties from whom NWE expects to purchase natural gas in the future. NWE’s relationships with suppliers are critical in providing long-term supply adequacy and system reliability. If NWE’s access to its source of supply was diminished, this could prohibit NWE from efficiently procuring the natural gas resources necessary to serve its customers’ needs. Furthermore, supplier knowledge of the complete portfolio of resources may detrimentally affect economic terms of supply.

The supplier derives economic value by virtue of this information not being generally available. If the information to be protected were to be disclosed, other suppliers seeking to negotiate for contracts to serve default supply customers would gain an advantage in future negotiations and proposals. Supply contracts are awarded through a negotiation process in order to obtain the lowest long-term cost for default supply customers. Disclosure of this information will give competitors access to the parties from whom NWE expects to purchase natural gas in the future. Knowing the identity of prospective suppliers may allow other suppliers to utilize historical and other information and experience regarding these suppliers when preparing future offers. This may result in an offer that is not necessarily the lowest one

that could be submitted.

If suppliers are aware that their confidential negotiation information can be made available to other supply competitors, it is very likely that fewer suppliers will participate in the future. This result would harm ratepayers. All suppliers should compete on their own merits, rather than having the unfair advantage of proprietary information about their competitors.

The focus of the procurement process would then shift, resulting in higher prices for consumers, if competitors know what the strategy of other competitors is. Default supply customers would be harmed if this occurs. Energy suppliers compete to sell their products in various markets. The realization that their information will not remain confidential, if they choose to enter into negotiations with NWE, will have a chilling effect on their willingness to do business with NWE. The ability to ensure reliable and adequate supply where it is needed should not be jeopardized for the sole benefit of a few competing suppliers. Customers are benefited by the NWE's ability to procure under standard industry practices of confidentiality.

As stated, disclosure of this information could result in both higher prices to be paid by default supply customers and a detrimental impact on system reliability. As indicators of NWE procurement strategies and competitors' negotiation strategies, the information to be protected has actual and potential economic value to NWE and Default Supply Customers. See *Affidavit of Kevin J. Markovich* at ¶ 8. Therefore, the information to be protected has independent economic value aside from its secrecy.

Item D. Details Concerning Forecast Monthly Activities related to Storage and Transportation Utilization

1. The confidential material is information.

Please refer to Item A, part 1, for definition of "Information."

Knowledge and data concerning the utilization of storage and transportation to serve the

default supply customers' portfolio are communicated in writing and in electronic format provided in the exhibits and workpapers in NWE's filing.

2. The confidential information is in fact secret.

a. Trade Secret

Please refer to Item A, part (2)(a), for the basic applicable statutory language on "trade secret."

Specific information regarding the details concerning forecast monthly activities related to transportation and storage utilization directly associated with system reliability and optimization over which NWE seeks a Protective Order is information that derives actual and potential independent economic and reliability value from not being generally known and represents legally protected property interests and trade secrets. These issues are explained in more detail below.

This information is in fact secret. The integrity of the system relies on transportation and storage utilization which, when taken together constitute system optimization. If NWE is not able to keep details concerning forecast monthly activities related to the utilization of transportation and storage confidential, reliability may be severely impacted and the ultimate cost to default supply customers may be higher.

This information is included in John Smith's Exhibit (JMS-2) and associated workpapers in the filing. As set forth below, the release of this information would give unfair competitive advantage to certain market participants.

The Commission has granted protection of storage and transportation utilization information in previous dockets. Concerning this information, in Docket No. D2008.5.44, Order 6930a, the Commission determined that NWE has made a prima facie showing that information involving future transactions and continuing negotiations constitutes property rights which are protected under constitutional due process requirements." As set forth below, the release of this information would give unfair competitive advantage to certain market participants.

b. Confidential Business Information

Please refer to Item A(2)(b), for the basic applicable legal argument on “confidential business information.”

As stated by NWE’s Director of Energy Supply Marketing Operations, Kevin J. Markovich, as a default supplier, NWE is managing system resources to ensure reliability on behalf of customers. Affidavit of *Kevin J. Markovich* at ¶ 1. Specific information regarding the forecast detailed monthly activity of transportation and storage resources should not be made public. Release of this information could harm NWE’s ability to efficiently provide resource adequacy and system reliability. As stated, the information to be protected reveals specific detail in the forecast of utilization of storage and transportation, which are critical in system reliability. Affidavit of *Kevin J. Markovich* at ¶ 6. As such, the information to be protected is a legally protected property interest of NWE. See, *Carpenter v. United States*, 484 U.S. 19, 26, 108 S.Ct. 316, 320, 98 L.Ed.2d 275 (1987) (“Confidential business information has long been recognized as property.”)

3. The confidential information is subject to efforts reasonable under the circumstances to maintain its secrecy.

Please refer to Item A(3), for the basic applicable legal argument on “maintaining secrecy.” The facts pertaining to Item A(3) “maintaining secrecy” are identical regarding this item.

4. The confidential information is not readily ascertainable by proper means.

Please refer to Item A(4), for the basic applicable legal argument on “not readily ascertainable.” The facts pertaining to Item A(4) “not readily ascertainable” are identical regarding this item.

5. The confidential information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy.

NWE derives economic and operational value by virtue of this information not being generally available. If the information to be protected were to be disclosed, reliability or the cost of adequate resources may be impacted. Disclosure of this information will provide suppliers access to forecast resource optimization strategies focused on reliability. NWE, as the Default Supplier providing system integrity and rate stability on behalf of customers derives economic and qualitative value by virtue of this information not being generally available. This value includes reliability through supply adequacy and strategic delivery points, as well as optimization of the system. Disclosure of this information will give buyers access to the economic and qualitative attributes of various forecast resource strategies, which are secured for the reliability and system optimization benefit for default supply customers.

The ability to ensure reliable and adequate supply where it is needed should not be jeopardized for the sole benefit of a few competing suppliers. Customers are benefited by NWE's ability to procure under standard industry practices of confidentiality. Therefore, the information to be protected has independent economic value aside from its secrecy. See *Affidavit of Kevin J. Markovich* at ¶ 9.

Item E. The identity of the parties in negotiation with NWE for provision of natural gas.

1. The confidential material is information.

Please refer to Item A, part 1, for definition of "Information."

Knowledge and data concerning the identity of the parties in negotiation with NWE

for provision of natural gas may be communicated in writing and in electronic format, but are not included in the filing. However, this type of information has been requested during the discovery process in recent NWE filings, and is likely to be requested in this proceeding.

2. The confidential information is in fact secret.

a. Trade Secret

Please refer to Item A, part (2)(a), for the basic applicable statutory language on “trade secret.”

Specific information regarding the identity of the parties in negotiation with NWE for provision of natural gas over which NWE seeks a Protective Order is information that derives actual and potential independent economic value from not being generally known and represents legally protected property interests and trade secrets. These issues are explained in more detail below.

This information is in fact secret. In negotiating with NWE for provision of natural gas, suppliers have legitimate interests in ensuring that their proprietary information and pricing strategies are not disclosed to the public. Unless released by a supplier, this information is not disclosed in any public forum.

The release of a supplier’s identity, regardless of whether contracts are executed, may reduce the quantity of suppliers and parties willing to negotiate supply transactions. The identity of suppliers is not meaningful to the common stakeholder. Default supply customers are benefit from increased quantity of bidders.

Specific information regarding the identity of the parties in negotiation with NWE for provision of natural gas is not included in the filing; however similar information has been requested during the discovery process in recent NWE filings, and is likely to be requested in this proceeding.

The Commission has granted protection of the identity of the parties in negotiation with NWE for provision of natural gas in previous dockets. Concerning this information, in Docket No. D2007.5.44, Order 6832, the Commission determined that “...NWE has shown good and sufficient cause in fact and law that the information for which protection is requested is entitled to protection from uncontrolled public disclosure pursuant to § 69-3-105, MCA (PSC authority to issue protective orders), as trade secret.” As set forth below, the release of this information would give unfair competitive advantage to certain market participants.

b. Confidential Business Information

Please refer to Item A, part (2)(b), for the basic applicable legal argument on “confidential business information.”

Pending negotiation information is not discoverable and, if discovered, would diminish interest in participation in future negotiations, allowing competitors an unfair advantage and making future negotiations unmanageable.

As stated by NWE’s Director of Energy Supply Marketing Operations, Kevin J. Markovich, as a default supplier, NWE is purchasing gas supply on behalf of customers in the competitive marketplace. Affidavit of *Kevin J. Markovich* at ¶ 1. Specific information regarding the identity of the parties in negotiation with NWE for provision of natural gas should not be made public. Release of this information could harm NWE’s ability to negotiate and receive the most competitive prices on behalf of customers. Suppliers have legitimate interests in ensuring that their proprietary information and pricing strategies are not disclosed to the public. Affidavit of *Kevin J. Markovich* at ¶ 6. As such, the information to be protected is a legally protected property interest of NWE’s and also that of the supplying party. See *Carpenter v. United States*, 484 U.S. 19, 26, 108 S.Ct. 316, 320, 98 L.Ed.2d 275 (1987) (“Confidential business information has long been recognized as property.”)

3. The confidential information is subject to efforts reasonable under the circumstances to maintain its secrecy.

Please refer to Item A(3), for the basic applicable legal argument on “maintaining secrecy.” The facts pertaining to Item A(3) “maintaining secrecy” are identical regarding this item.

4. The confidential information is not readily ascertainable by proper means.

Please refer to Item A(4), for the basic applicable legal argument on “not readily ascertainable.” The facts pertaining to Item A(4) “not readily ascertainable” are identical regarding this item.

5. The confidential information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy.

NWE, as the Default Supplier as a buyer in the marketplace on behalf of customers, derives significant economic value by virtue of this information not being generally available. If the information to be protected were to be disclosed, other buyers seeking to acquire natural gas supply contracts may gain an advantage over the default supplier in future acquisitions. Disclosure of this information will inform buyers of the parties from whom NWE may purchase natural gas. NWE’s relationships with suppliers are critical in providing long-term supply adequacy and system reliability. If NWE’s access to its source of supply was diminished, this could prohibit NWE from efficiently procuring the natural gas resources necessary to serve its customers’ needs.

The supplier derives economic value by virtue of this information not being generally available. If the information to be protected were to be disclosed, other suppliers seeking to negotiate for contracts to serve default supply customers would gain an advantage in future and/or current negotiations. Supply contracts are awarded pursuant to a negotiation process in order to obtain the lowest long-term cost for default supply

customers. Disclosure of this information will give competitors access to the parties from whom NWE may purchase natural gas. Knowing the identity of potential suppliers may allow other suppliers to utilize historical and other information and experience regarding these suppliers when participating in future negotiations. This may result in an offer that is not necessarily the lowest offer that could be submitted.

If suppliers are aware that their confidential information can be made available to other supply competitors, it is very likely that fewer suppliers will participate in the future. This result would harm ratepayers. All suppliers should compete on their own merits, rather than having the unfair advantage of proprietary information about their competitors.

The focus of the procurement process would then shift, resulting in higher prices for consumers. Default supply customers would be harmed if this occurs. Energy suppliers compete to sell their products in various markets. The realization that their negotiation information will not remain confidential, whether or not they choose to enter a bilateral agreement with NWE, will have a chilling effect on their willingness to do business with NWE. The ability to ensure reliable and adequate supply where it is needed should not be jeopardized for the sole benefit of a few competing suppliers. Customers are benefited by the NWE's ability to procure under standard industry practices of confidentiality.

As stated, disclosure of this information could result in both higher prices to be paid by default supply customers and the detrimental impact on system reliability. As indicators of NWE procurement strategies and competitors' negotiation strategies, the information to be protected has actual and potential economic value to NWE and Default Supply Customers. See Affidavit of *Kevin J. Markovich* at ¶ 8. Therefore, the information to be protected has independent economic value aside from its secrecy.

Item F. Prices associated with negotiation proposals.

1. The confidential material is information.

Please refer to Item A, part 1, for definition of “Information.”

Knowledge and data concerning the prices associated with negotiation proposals may be communicated in writing and in electronic format, but are not included in the filing. However, this type of information has been requested during the discovery process in recent NWE filings, and is likely to be requested in this proceeding.

2. The confidential information is in fact secret.

a. Trade Secret

Please refer to Item A, part (2)(a), for the basic applicable statutory language on “trade secret.”

Specific information regarding the prices associated with negotiation proposals for provision of natural gas over which NWE seeks a Protective Order is information that derives actual and potential independent economic value from not being generally known and represents legally protected property interests and trade secrets. These issues are explained in more detail below.

This information is in fact secret. In negotiating with NWE for provision of natural gas, suppliers have legitimate interests in ensuring that their proprietary information and pricing strategies are not disclosed to the public. Unless released by a supplier, this information is not disclosed in any public forum.

Various price and non-price value-added elements are included in offers in order to distinguish one commodity offering from another. The default supply customers benefit from these innovative and value-added products. Release of such information, contained within offers, to competitors would most likely have a negative impact on future procurement activities.

Specific information regarding the prices associated with negotiation proposals for provision of natural gas is not included in the filing; however similar information has been requested during the discovery process in recent NWE filings, and is likely to be requested in this proceeding.

The Commission has granted protection of the costs associated with negotiation proposals in previous dockets. Concerning this information, in Docket No. D2008.5.44, Order 6930a, the Commission determined that “...NWE has made a prima facie showing that information involving future transactions and continuing negotiations constitutes property rights which are protected under constitutional due process requirements.”” As set forth below, the release of this information would give unfair competitive advantage to certain market participants.

b. Confidential Business Information

Please refer to Item A, part (2)(b), for the basic applicable legal argument on “confidential business information.”

Pending negotiation information is not discoverable, and, if discovered, would diminish interest in participation in future negotiations, allowing competitors an unfair advantage and making future negotiations unmanageable.

As stated by NWE’s Director of Energy Supply Marketing Operations, Kevin J. Markovich, as a default supplier, NWE is purchasing gas supply on behalf of customers in the competitive marketplace. Affidavit of *Kevin J. Markovich* at ¶ 1. Specific information regarding the prices associated with negotiation proposals for provision of natural gas should not be made public. Release of this information could harm NWE’s ability to negotiate and receive the most competitive prices on behalf of customers. Suppliers have legitimate interests in ensuring that their proprietary information and pricing strategies are not disclosed to the public. Affidavit of *Kevin J. Markovich* at ¶ 6. As such, the information to be protected is a legally protected property interest of NWE’s and also that of the

supplying party. See Carpenter v. United States, 484 U.S. 19, 26, 108 S.Ct. 316, 320, 98 L.Ed.2d 275 (1987) (“Confidential business information has long been recognized as property.”)

3. The confidential information is subject to efforts reasonable under the circumstances to maintain its secrecy.

Please refer to Item A(3), for the basic applicable legal argument on “maintaining secrecy.” The facts pertaining to Item A(3) “maintaining secrecy” are identical regarding this item.

4. The confidential information is not readily ascertainable by proper means.

Please refer to Item A(4), for the basic applicable legal argument on “not readily ascertainable.” The facts pertaining to Item A(4) “not readily ascertainable” are identical regarding this item.

5. The confidential information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy.

NWE, as the Default Supplier acting as a buyer in the marketplace on behalf of customers, also derives economic value by virtue of this information not being generally available. If the information to be protected were to be disclosed, other buyers seeking to acquire natural gas supply contracts would gain an advantage over the default supplier in future acquisitions. Disclosure of this information will give buyers access to the economic and qualitative attributes of various proposed supply arrangements, which will be entered into to ensure supply adequacy and system optimization benefit for default supply customers. Loss of even a few suppliers at key delivery points on the system could lead to reliability problems during the winter and may have a negative economic impact on customers.

The supplier also derives economic value by virtue of this information not being generally available. If the information to be protected were to be disclosed, competitors seeking to negotiate for default supply contracts would gain an advantage in future and/or current negotiations. Supply contracts are awarded pursuant to a negotiation process in order to obtain the lowest long-term cost for default supply customers. Disclosure of this information will provide suppliers access to the prices offered by other suppliers, which may have an upward pressure on prices, thereby enabling those suppliers to adjust their offers to beat the competitor, resulting in an offer that is not necessarily the lowest offer that could be submitted. Further, publication of negotiation information could lead to collusion and price fixing among competitors.

If suppliers are aware that their confidential information can be made available to other supply competitors, a very likely result will be that fewer suppliers will participate in the future. This result would harm ratepayers. All suppliers must compete on their own merits, not advantaged by proprietary information about their competitors.

The focus of the procurement process will shift and will result in higher prices for consumers, if competitors know what the strategy and proposed offers of other competitors are. Energy suppliers compete to sell their products in various markets. The realization that their negotiation information will not remain confidential, whether or not they choose to enter a bilateral agreement with NWE, will have a chilling effect on their willingness to do business with NWE.

The ability to ensure reliable and adequate supply where it is needed should not be jeopardized for the sole benefit of a few competing suppliers. Customers are benefited by the NWE's ability to procure under standard industry practices of confidentiality.

As stated, disclosure of this information could result in both higher prices to be paid by default supply customers and the loss of a source of natural gas supply. As indicators of

NWE procurement strategies and competitors' offers, the information to be protected has actual and potential economic value to NWE and Default Supply Customers. Publication of negotiation information could also lead to collusion and price fixing among competitors. See Affidavit of *Kevin J. Markovich* at ¶ 8. Therefore, the information to be protected has independent economic value aside from its secrecy.

Item G. Volumes associated with negotiation proposals.

1. The confidential material is information.

Please refer to Item A, part 1, for definition of "Information."

Knowledge and data concerning volumes associated with negotiation proposals may be communicated in writing and in electronic format, but are not included in the filing. However, this type of information has been requested during the discovery process in recent NWE filings, and is likely to be requested in this proceeding.

2. The confidential information is in fact secret.

a. Trade Secret

Please refer to Item A, part (2)(a), for the basic applicable statutory language on "trade secret."

Specific information regarding the volumes associated with negotiation proposals for provision of natural gas over which NWE seeks a Protective Order is information that derives actual and potential independent economic value from not being generally known and represents legally protected property interests and trade secrets. These issues are explained in more detail below.

This information is in fact secret. In negotiating with NWE for provision of natural gas, suppliers have legitimate interests in ensuring that their proprietary information and pricing strategies are not disclosed to the public. Unless released by a supplier, this

information is not disclosed in any public forum.

Specific information regarding the volumes associated with negotiation proposals for provision of natural gas is not included in the filing; however, this type of information has been requested during the discovery process in recent NWE filings and is likely to be requested in this proceeding.

The Commission has granted protection of the volumes associated with negotiation proposals in previous dockets. Concerning this information, in Docket No. D2007.5.44, Order 6832, the Commission determined that "...NWE has shown good and sufficient cause in fact and law that the information for which protection is requested is entitled to protection from uncontrolled public disclosure pursuant to § 69-3-105, MCA (PSC authority to issue protective orders), as trade secret." As set forth below, the release of this information would give unfair competitive advantage to certain market participants.

b. Confidential Business Information

Please refer to Item A, part (2)(b), for the basic applicable legal argument on "confidential business information."

Pending negotiation information is not discoverable and, if discovered, would diminish interest in participation in future negotiations, allowing competitors an unfair advantage and making future negotiations unmanageable.

As stated by NWE's Director of Energy Supply Marketing Operations, Kevin J. Markovich, as a default supplier, NWE is purchasing gas supply on behalf of customers in the competitive marketplace. *Affidavit of Kevin J. Markovich* at ¶ 1. Specific information regarding the volumes associated with negotiation proposals for provision of natural gas should not be made public. Release of this information could harm NWE's ability to negotiate and receive the most competitive prices on behalf of customers. Suppliers have legitimate interests in ensuring that their proprietary information and pricing strategies are

not disclosed to the public. *Affidavit of Kevin J. Markovich* at ¶ 6. As such, the information to be protected is a legally protected property interest of NWE's and also of the supplying party. See Carpenter v. United States, 484 U.S. 19, 26, 108 S.Ct. 316, 320, 98 L.Ed.2d 275 (1987) ("Confidential business information has long been recognized as property.")

3. The confidential information is subject to efforts reasonable under the circumstances to maintain its secrecy.

Please refer to Item A(3), for the basic applicable legal argument on "maintaining secrecy." The facts pertaining to Item A(3) "maintaining secrecy" are identical regarding this item.

4. The confidential information is not readily ascertainable by proper means.

Please refer to Item A(4), for the basic applicable legal argument on "not readily ascertainable." The facts pertaining to Item A(4) "not readily ascertainable" are identical regarding this item.

5. The confidential information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy.

The supplier derives economic value by virtue of this information not being generally available. If the information to be protected were to be disclosed, competitors seeking to negotiate for default supply contracts would gain an advantage in current and/or future negotiations. Supply contracts are awarded pursuant to a negotiation process in order to obtain the lowest long-term cost for default supply customers. Disclosure of this information will give competitors access to the monthly volumes proposed to be sold by other competitors, thereby enabling them to view the timing of volumetric purchases. This reveals the specific points in time when competitors have gas available to sell. Because there are a limited number of suppliers able to provide natural gas to NWE's system, release of this

information would facilitate the determination of which suppliers are negotiating to provide gas to NWE's default supply customers at various time periods throughout the year. This may allow other suppliers to adjust their offers, and result in an offer that is not necessarily the lowest offer that could be submitted.

NWE, as the Default Supplier and a buyer in the marketplace on behalf of customers, also derives economic value by virtue of negotiated quantity information not being generally available. If the information to be protected were to be disclosed, other buyers seeking to acquire natural gas supply contracts would gain an advantage over the default supplier in future acquisitions. Disclosure of this information will provide buyers with information regarding the quantity of negotiations and the depth of the total volume offered in the process. Because there are a limited number of suppliers able to provide natural gas to the system in Montana, release of this information would facilitate the determination of which suppliers are able to provide gas to NWE's default supply customers at various time periods throughout the year, allowing an alternative buyer to express an interest in and offer to purchase a particular supply. If NWE's access to its source of supply was diminished, it could prohibit NWE from purchasing all of the natural gas necessary to serve the default supply customers' needs.

If suppliers are aware that their confidential negotiation information can be made available to other supply competitors, it is very likely that fewer suppliers will participate in the future. This result would harm ratepayers. All suppliers should compete on their own merits, rather than having the unfair advantage of proprietary information about their competitors.

The focus of the procurement process will shift and will result in higher prices, if competitors know what the strategy and proposed offers of other competitors are. Default supply customers would be harmed if this event occurs. Energy suppliers compete to sell their products in various markets. The realization that their negotiation information will not remain confidential, whether or not they choose to enter a bilateral agreement with NWE, will have a chilling effect on their willingness to do business with NWE. The ability to

ensure reliable and adequate supply where it is needed should not be jeopardized for the sole benefit of a few competing suppliers. Customers are benefited by the NWE's ability to procure under standard industry practices of confidentiality.

As stated, disclosure of this information could result in both higher prices to be paid by default supply customers and the loss of a source of natural gas supply. As indicators of NWE procurement strategies and competitors' offers, the information to be protected has actual and potential economic value to NWE and Default Supply Customers. Publication of negotiation information could also lead to collusion and price fixing among competitors. See Affidavit of *Kevin J. Markoivich* at ¶ 8. Therefore, the information to be protected has independent economic value aside from its secrecy.

Item H. Location of delivery of the purchased gas associated with negotiation proposals.

1. The confidential material is information.

Please refer to Item A, part 1, for definition of "Information."

Knowledge and data concerning the location of delivery of the purchased gas associated with negotiation proposals may be communicated in writing and in electronic format, but are not included in the filing. However, this type of information has been requested during the discovery process in recent NWE filings, and is likely to be requested in this proceeding.

2. The confidential information is in fact secret.

a. Trade Secret

Please refer to Item A, part (2)(a), for the basic applicable statutory language on "trade secret."

Specific information regarding the location of delivery of the purchased gas associated with negotiation proposals over which NWE seeks a Protective Order is

information that derives actual and potential independent economic value from not being generally known and represents legally protected property interests and trade secrets. These issues are explained in more detail below.

This information is in fact secret. In negotiating with NWE for provision of natural gas, suppliers have legitimate interests in ensuring that their proprietary information and pricing strategies are not disclosed to the public. Unless released by a supplier, this information is not disclosed in any public forum.

Specific information regarding the point of delivery included in negotiation with NWE for provision of natural gas is not included in the filing; however, similar information has been requested during the discovery process in recent NWE filings, and is likely to be requested in this proceeding.

The Commission has granted protection of the location of delivery of the purchased gas associated with RFP responses or negotiation proposals in previous dockets. Concerning this information, in Docket No. D2007.5.44, Order 6832, the Commission determined that “...NWE has shown good and sufficient cause in fact and law that the information for which protection is requested is entitled to protection from uncontrolled public disclosure pursuant to § 69-3-105, MCA (PSC authority to issue protective orders), as trade secret.” As set forth below, the release of this information would give unfair competitive advantage to certain market participants.

b. Confidential Business Information

Please refer to Item A, part (2)(b), for the basic applicable legal argument on “confidential business information.”

Pending negotiation information is not discoverable and, if discovered, would diminish interest in participation in future negotiations, allowing competitors an unfair advantage and making future negotiations unmanageable.

As stated by NWE's Director of Energy Supply, Kevin J. Markovich, as a default supplier, NWE is purchasing gas supply on behalf of customers in the competitive marketplace. Affidavit of *Kevin J. Markovich* at ¶ 1. Specific information regarding the location of delivery of the purchased gas associated with negotiation proposals for provision of natural gas should not be made public. Release of information regarding the point of delivery could harm NWE's ability to negotiate and receive the most competitive prices on behalf of customers. Suppliers have legitimate interests in ensuring that their proprietary information and pricing strategies are not disclosed to the public. Affidavit of *Kevin J. Markovich* at ¶ 6. As such, the information to be protected is a legally protected property interest of NWE's and also that of the supplying party. See Carpenter v. United States, 484 U.S. 19, 26, 108 S.Ct. 316, 320, 98 L.Ed.2d 275 (1987) ("Confidential business information has long been recognized as property.")

3. The confidential information is subject to efforts reasonable under the circumstances to maintain its secrecy.

Please refer to Item A(3), for the basic applicable legal argument on "maintaining secrecy." The facts pertaining to Item A(3) "maintaining secrecy" are identical regarding this item.

4. The confidential information is not readily ascertainable by proper means.

Please refer to Item A(4), for the basic applicable legal argument on "not readily ascertainable." The facts pertaining to Item A(4) "not readily ascertainable" are identical regarding this item.

5. The confidential information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy.

NWE, as the Default Supplier and a buyer in the marketplace on behalf of customers, also derives economic value by virtue of this information not being generally available. If the information to be protected were to be disclosed, other buyers seeking to acquire natural gas supply contracts would gain an advantage over the default supplier in future acquisitions. Disclosure of this information will give buyers access to the specific locations where delivery to NWE is proposed to be made, providing information regarding bidders' selling strategies by providing indication of which delivery points are proposed to be used to supply gas to NWE customers. Because at many locations feeding into NWE's system there are a limited number of suppliers, release of this information would facilitate the determination of which suppliers are proposing to provide gas to NWE's default supply customers throughout the year, allowing an alternative buyer to express an interest in and offer to purchase a particular supply. If NWE's access to its source of supply was diminished, this could impact NWE's access and economic cost of resource procurement. Loss of even a few suppliers at key delivery points on the system could lead to reliability problems during the winter and may have a negative economic impact on customers.

The supplier derives economic value by virtue of this information not being generally available. If the information to be protected were to be disclosed, competitors seeking to negotiate for default supply contracts would gain an advantage in current and/or future negotiations. Supply contracts are awarded pursuant to a negotiation process in order to obtain the lowest long-term cost for default supply customers. Disclosure of this information will give competitors access to the location of delivery of specific offers made by other competitors, thereby enabling them to determine how a competitor utilizes the gas pipeline system. This reveals the specific proposed points for supply, providing information regarding other suppliers' strategies by providing indication of which delivery points are used when delivery is proposed to be made to NWE's customers. Any one delivery location may have a very limited number of suppliers. Thus, the release of this information would facilitate the determination of which suppliers are offering to provide gas to NWE's default supply customers throughout the year. This may allow other suppliers to adjust their offers to beat other competitors, and result in an offer that is not

necessarily the lowest offer that could be submitted.

If suppliers are aware that their confidential information can be made available to other supply competitors, it is very likely that fewer suppliers will participate in the future. This result would harm ratepayers. All suppliers should compete on their own merits, rather than having the unfair advantage of proprietary information about their competitors.

The focus of the procurement process will shift and will result in higher prices, if competitors know the strategy and offers of other competitors. Default supply customers would be harmed if this event occurs. Energy suppliers compete to sell their products in various markets. The realization that their negotiation information will not remain confidential, whether or not they choose to enter a bilateral agreement with NWE, will have a chilling effect on their willingness to do business with NWE. The ability to ensure reliable and adequate supply where it is needed should not be jeopardized for the sole benefit of a few competing suppliers. Customers are benefited by the NWE's ability to procure under standard industry practices of confidentiality.

As stated, disclosure of this information could result in both higher prices to be paid by default supply customers and the loss of a source of natural gas supply. As indicators of NWE procurement strategies and competitors' pricing proposals, the information to be protected has actual and potential economic value to NWE and Default Supply Customers. Publication of negotiation could also lead to collusion and price fixing among competitors. See *Affidavit of Kevin J. Markovich* at ¶ 8. Therefore, the information to be protected has independent economic value aside from its secrecy.

Item I. NWE's evaluation of the parties from whom NWE may purchase gas, the associated costs and volumes, and the location of delivery of the gas.

1. The confidential material is information. Please refer to Item A, part 1, for definition of "Information."

Knowledge and data concerning NWE's evaluation of: the parties from whom it may purchase gas, the associated costs and volumes, and the location of delivery of the gas may be communicated in writing and in electronic format, but are not included in the filing. However, this type of information has been requested during the discovery process in recent NWE filings, and is likely to be requested in this proceeding.

2. The confidential information is in fact secret.

a. Trade Secret

Please refer to Item A, part (2)(a), for the basic applicable statutory language on "trade secret."

Specific information regarding NWE's evaluation of: the parties from whom NWE may purchase gas, the associated costs and volumes, and the location of delivery of the gas over which NWE seeks a Protective Order is information that derives actual and potential independent economic value from not being generally known and represents legally protected property interests and trade secrets. These issues are explained in more detail below.

This information is in fact secret. In negotiating with NWE for provision of natural gas, suppliers have legitimate interests in ensuring that their proprietary information and pricing strategies are not disclosed to the public. Unless released by a supplier, this information is not disclosed in any public forum. The weighting and evaluation performed by NWE on various supplier offers must also be maintained as confidential in order to protect from gaming by suppliers.

Specific information regarding NWE's evaluation of: the parties from whom NWE may purchase gas, the associated costs and volumes, and the location of delivery of the gas is not included in the filing; however, similar information has been requested during the discovery process in recent NWE filings, and is likely to be requested in this proceeding.

The Commission has granted protection of the evaluation of information relating to NWE's acquisition of natural gas supplies, including identity of suppliers, costs associated with purchases, quantities purchased and delivery locations in previous dockets. Concerning this information, in Docket No. D2007.5.44, Order 6832, the Commission determined that "...NWE has shown good and sufficient cause in fact and law that the information for which protection is requested is entitled to protection from uncontrolled public disclosure pursuant to § 69-3-105, MCA (PSC authority to issue protective orders), as trade secret."

b. Confidential Business Information

Please refer to Item A, part (2)(b), for the basic applicable legal argument on "confidential business information."

Pending negotiation information is not discoverable and, if discovered, would diminish interest in participation in future negotiations, allowing competitors an unfair advantage and making future negotiations unmanageable.

As stated by NWE's Director of Energy Supply, Kevin J. Markovich, as a default supplier, NWE is purchasing gas supply on behalf of customers in the competitive marketplace. *Affidavit of Kevin J. Markovich* at ¶ 1. Specific information regarding NWE's evaluation of: the parties from whom NWE may purchase gas, the associated costs and volumes, and the location of delivery of the gas should not be made public. Release of this information could harm NWE's ability to negotiate and receive the most competitive prices on behalf of customers. Suppliers have legitimate interests in ensuring that their proprietary negotiation information and pricing strategies are not disclosed to the public. *Affidavit of Kevin J. Markovich* at ¶ 6. As such, the information to be protected is a legally protected property interest of NWE's and also that of the supplying party. See *Carpenter v. United States*, 484 U.S. 19, 26, 108 S.Ct. 316, 320, 98 L.Ed.2d 275 (1987) ("Confidential business information has long been recognized as property.")

3. The confidential information is subject to efforts reasonable under the circumstances to maintain its secrecy.

Please refer to Item A(3), for the basic applicable legal argument on “maintaining secrecy.” The facts pertaining to Item A(3) “maintaining secrecy” are identical regarding this item.

4. The confidential information is not readily ascertainable by proper means.

Please refer to Item A(4), for the basic applicable legal argument on “not readily ascertainable.” The facts pertaining to Item A(4) “not readily ascertainable” are identical regarding this item.

5. The confidential information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy.

NWE, as the Default Supplier and a buyer in the marketplace on behalf of customers, derives economic value by virtue of this information not being generally available. If the information regarding the specific rating criteria were to be disclosed, other sellers seeking to provide natural gas supply contracts would gain an advantage over the default supplier in future acquisitions.

The procurement process may then be characterized by gaming and could result in higher prices, if competitors know the strategy and pricing proposals of other competitors, as well as NWE’s evaluation and procurement strategies. Default supply customers would be harmed if this event occurs.

NWE procurement strategies and evaluations of pricing proposals have actual and potential economic value to NWE and Default Supply Customers. See Affidavit of *Kevin J.*

Markovich at ¶ 8. Therefore, the information to be protected has independent economic value aside from its secrecy.

V. SUMMARY AND REQUEST FOR RELIEF

Consistent, with the Montana Supreme Court's recent pronouncements in Great Falls Tribune, and the Commission's authority under Section 69-3-105(2), MCA, NWE therefore respectfully requests a protective order covering this material. In support of this Motion is the Affidavit of *Kevin J. Markovich*, included as Attachment 2.

Dated this 29th day of May, 2009.

Richard Garlish

By _____
Richard J. Garlish

CERTIFICATE OF SERVICE

I hereby certify that a copy of NorthWestern Energy's Motion for Protective Order has been served on the Montana Public Service Commission and The Montana Consumer Counsel by mailing a copy thereof by first class mail, postage prepaid.

Dated this 29th day of May, 2009

Connie Moran
Administrative Assistant
Regulatory Affairs

ATTACHMENT 1

TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

SECTION 14. MISCELLANEOUS

14.1. This Contract shall be binding upon and inure to the benefit of the successors, assigns, personal representatives, and heirs of the respective parties hereto, and the covenants, conditions, rights and obligations of this Contract shall run for the full term of this Contract. No assignment of this Contract, in whole or in part, will be made without the prior written consent of the non-assigning party (and shall not relieve the assigning party from liability hereunder), which consent will not be unreasonably withheld or delayed; provided, either party may (i) transfer, sell, pledge, encumber, or assign this Contract or the accounts, revenues, or proceeds hereof in connection with any financing or other financial arrangements, or (ii) transfer its interest to any parent or affiliate by assignment merger or otherwise without the prior approval of the other party. Upon any such assignment, transfer and assumption, the transferor shall remain principally liable for and shall not be relieved of or discharged from any obligations hereunder.

- 14.2. If any provision in this Contract is determined to be invalid, void or unenforceable by any court having jurisdiction, such determination shall not invalidate, void, or make unenforceable any other provision, agreement or covenant of this Contract.
- 14.3. No waiver of any breach of this Contract shall be held to be a waiver of any other or subsequent breach.
- 14.4. This Contract sets forth all understandings between the parties respecting each transaction subject hereto, and any prior contracts, understandings and representations, whether oral or written, relating to such transactions are merged into and superseded by this Contract and any effective transaction(s). This Contract may be amended only by a writing executed by both parties.
- 14.5. The interpretation and performance of this Contract shall be governed by the laws of the jurisdiction as indicated on the Base Contract, excluding, however, any conflict of laws rule which would apply the law of another jurisdiction.
- 14.6. This Contract and all provisions herein will be subject to all applicable and valid statutes, rules, orders and regulations of any governmental authority having jurisdiction over the parties, their facilities, or Gas supply, this Contract or transaction or any provisions thereof.
- 14.7. There is no third party beneficiary to this Contract.
- 14.8. Each party to this Contract represents and warrants that it has full and complete authority to enter into and perform this Contract. Each person who executes this Contract on behalf of either party represents and warrants that it has full and complete authority to do so and that such party will be bound thereby.

14.9. The headings and subheadings contained in this Contract are used solely for convenience and do not constitute a part of this Contract between the parties and shall not be used to construe or interpret the provisions of this Contract,

14.10. Unless the parties have elected on the Base Contract not to make this Section 14. 10 applicable to this Contract, neither party shall disclose directly or indirectly without the prior written consent of the other party the terms of any transaction to a third party (other than the employees, lenders, royalty owners, counsel, accountants and other agents of the party, or prospective purchasers of all or substantially all of a party's assets or of any rights under this Contract provided such persons shall have agreed to keep such terms confidential) except (i) in order to comply with any applicable law, order, regulation, or exchange rule, (ii) to the extent necessary for the enforcement of this Contract, (iii) to the extent necessary to implement any transaction, or (iv) to the extent such information is delivered to such third party for the sole purpose of calculating a published index. Each party shall notify the other party of any proceeding of which it is aware which may result in disclosure of the terms of any transaction (other than as permitted hereunder) and use reasonable efforts to prevent or limit the disclosure. The existence of this Contract is not subject to this confidentiality obligation. Subject to Section 13, the parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with this confidentiality obligation. The terms of any transaction hereunder shall be kept confidential by the parties hereto for one year from the expiration of the transaction.

In the event that disclosure is required by a governmental body or applicable law, the party subject to such requirement may disclose the material terms of this Contract to the extent so required, but shall promptly notify the other party, prior to disclosure, and shall cooperate (consistent with the disclosing party's legal

obligations) with the other party's efforts to obtain protective orders or similar restraints with respect to such disclosure at the expense of the other party.

14.11 The parties may agree to dispute resolution procedures in Special Provisions attached to the Base Contract or in a Transaction Confirmation executed in writing by both parties.

DISCLAIMER:- The purposes of this Contract are to facilitate trade, avoid misunderstandings and make more definite the terms of contracts of purchase and sale of natural gas. Further, NAESB does not mandate the use of this Contract by any party. **NAESB DISCLAIMS AND EXCLUDES, AND ANY USER OF THIS CONTRACT ACKNOWLEDGES AND AGREES TO NAESB'S DISCLAIMER OF, ANY AND ALL WARRANTIES, CONDITIONS OR REPRESENTATIONS, EXPRESS OR IMPLIED, ORAL OR WRITTEN, WITH RESPECT TO THIS CONTRACT OR ANY PART THEREOF, INCLUDING ANY AND ALL IMPLIED WARRANTIES OR CONDITIONS OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY, OR FITNESS OR SUITABILITY FOR ANY PARTICULAR PURPOSE (WHETHER OR NOT NAESB KNOWS, HAS REASON TO KNOW, HAS BEEN ADVISED, OR IS OTHERWISE IN FACT AWARE OF ANY SUCH PURPOSE), WHETHER ALLEGED TO ARISE BY LAW, BY REASON OF CUSTOM OR USAGE IN THE TRADE, OR BY COURSE OF DEALING. EACH USER OF THIS CONTRACT ALSO AGREES THAT UNDER NO CIRCUMSTANCES WILL NAESB BE LIABLE FOR ANY DIRECT, SPECIAL, INCIDENTAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES ARISING OUT OF ANY USE OF THIS CONTRACT.**

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE MONTANA PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF NORTHWESTERN) UTILITY DIVISION
ENERGY, Annual Application for Approval)
of Monthly Gas Cost Tracker True-Up, Projected) DOCKET NO. D2009.5.63
Gas Costs, and Gas Transportation Balance)

**AFFIDAVIT OF
KEVIN J. MARKOVICH**

STATE OF MONTANA)
) ss.
COUNTY OF SILVER BOW)

KEVIN J. MARKOVICH, being first duly sworn upon oath, deposes and states as follows:

1. I am Director of Energy Supply Market Operations for NorthWestern Energy (NWE). My responsibilities include the procurement, administration and oversight of the natural gas Default Supply function. The natural gas supply is procured and administered, pursuant to Montana statutes and administrative rules, on behalf of gas Default Supply consumers in Montana. Natural gas is procured in the marketplace. NWE manages system resources to ensure reliability on behalf of customers.

2. NWE files its annual gas tracker to recover its costs incurred in purchasing natural gas as the Default Supplier. On behalf of NWE, I maintain responsibility for all matters related to the gas tracker.

3. I have personal knowledge of the facts stated herein. Any opinions expressed herein are based upon my experience, as well as procurement and administration of the Default Supply generally.

4. As part of the natural gas tracker, NWE is required to provide information concerning the detailed monthly costs associated with purchases of natural gas, the detailed monthly volumes associated with these purchases and the location of delivery of specific purchases of natural gas, and storage and transportation utilization.

5. Additional information, while not included in the filing, has been requested during the discovery process in recent NWE filings and/or may be requested in the course of processing this filing. This information includes parties from whom NWE purchased natural gas in the 2007-2008 tracker period, from whom it expects to purchase natural gas in the future, monthly invoices which support these and certain categories of information described above, the parties in negotiation with NWE for provision of natural gas, the costs associated with negotiation proposals, the volumes associated with negotiation proposals, the location of delivery of the purchased gas associated with negotiation proposals, and NWE's evaluation of this information.

6. The above-described information reveals default supplier procurement strategies, suppliers' pricing and delivery terms and data (submitted to NWE with an expectation of confidentiality and/or non-disclosure), that is secret information and should not be made public. Confidentiality under these expectations or conditions is standard industry practice. All

quantitative and qualitative contractual attributes are specific to each proposed transaction. This information is kept in the strictest confidence since its disclosure would irreparably damage NWE's ability to receive the most competitive prices and beneficial supply arrangements on behalf of Default Supply Customers. Release of this information could harm NWE's ability to efficiently negotiate and receive the most competitive prices on behalf of customers as well as ensure reliability through adequate gas supply. NWE's inability to protect the confidentiality of suppliers' pricing and terms has the potential to significantly reduce the number of entities willing to enter into negotiations with NWE, whether in regard to the Default Supply or some other business activity. Therefore, NWE considers the information to be confidential and proprietary business information (and also, in the case of suppliers' pricing and terms, that of the supplying party), and a property interest entitled to legal protection from public disclosure.

7. NWE and/or the suppliers protect this information by whatever means available to them. At NWE, this information is kept in a specific secure location, accessible only by designated individuals. After issuance of a protective order, NWE continues to maintain the secrecy of the information to be protected. For docket purposes, this information is then placed on yellow paper and maintained in a secure location with access limited to those employees with a "need to know" based on NWE's internal controls. Further, the information to be protected is destroyed if it becomes dated or otherwise irrelevant. The information described above is held only by NWE and/or the supplier involved. Since this information is not within the public domain, it is not readily ascertainable by any other entity. No public documents exist which could reveal the information to be protected by any means whatsoever. No one could reasonably ascertain this information by accessing any publicly available information.

8. As indicators of NWE's procurement strategies and of suppliers' strategies and pricing proposals, the information has actual and potential economic value to NWE and to Default Supply Customers, and to suppliers. Publication of negotiation information could also lead to collusion and price fixing among competitors. Further, the information is subject to NWE's continuing efforts to maintain its secrecy. On this basis, the material also constitutes NWE's trade secret information.

9. Disclosure of storage and transportation utilization will give buyers access to the economic and qualitative attributes of the various resource strategies. Therefore, the information to be protected has independent economic value aside from its secrecy.

10. In addition to violating NWE's rights and interests in its confidential and proprietary business information and trade secrets, public disclosure of the information would provide unfair competitive advantage to those entities seeking Default Supply contracting opportunities. Any unfair competitive advantage will impair NWE's ability to negotiate or otherwise obtain the most favorable pricing terms on behalf of Default Supply Customers. In this regard, any unfair competitive advantage will ultimately work to the detriment of these customers.

FURTHER AFFIANT SAYETH NOT.

Executed this 29th day of May, 2009

Kevin J. Markovich
Director, Energy Supply Market Operations

SUBSCRIBED AND SWORN TO before me this 29th day of May, 2009.