

Service Date: July 22, 2010

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 ) ORDER NO. 7004b

**ORDER GRANTING IN PART AND DENYING IN PART**  
**MOTION FOR PROTECTIVE ORDER**

**Background**

1. On May 29, 2009, NorthWestern Corporation doing business as NorthWestern Energy (NWE) filed a Motion for Protective Order (Motion) with the Public Service Commission (Commission). NWE sought protection for certain information expected to be filed in the above-entitled NWE Gas Cost Tracker True-up. NWE supported the motion with an Affidavit by Kevin J. Markovich (Markovich Aff.). NWE asserted that the following items were trade secret and sought protection from public disclosure of:

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

- 2. The Commission noticed the motion in the Utility Division Agenda.
- 3. No intervenor or member of the public commented on the motion.

### **Discussion, Analysis, Findings, and Conclusions**

4. The Montana Supreme Court has ruled, “A non-human entity seeking protective orders or other protective measures for materials filed with a regulating governmental agency, such as the PSC, must support its claim of confidentiality by making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements.” *Great Falls Tribune v. Public Serv. Comm’n*, 2003 MT 359, ¶ 56, 319 Mont. 38, ¶ 56, 82 P.3d 876, ¶ 56.

5. The Commission has implemented the Court’s ruling through amendment or repeal of administrative rules concerning protective orders. *See* ARM 38.2.5001 – 5030.

6. If information is determined by a governmental agency or reviewing authority to qualify as a property right in the form of a trade secret which warrants due process protection, secrecy can be preserved by the agency through reasonable means, including a protective order. *Great Falls Tribune*, 319 Mont. 38, ¶62, 82 P.3d 876, ¶62.

7. "Trade secret" is defined by § 30-14-402, MCA, as "information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) 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 (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

8. A party requesting a protective order based on trade secret must demonstrate that “(i) prior to requesting a protective order, the [party] has considered that the commission is a public agency and that there is a constitutional presumption of access to documents and information in the commission’s possession; (ii) the claimed trade secret material is information; (iii) the information is in fact secret; (iv) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy; (v) the secret information is not readily ascertainable by proper means; and (vi) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy.” ARM 38.2.5007(4) (b).

9. In its motion, NWE stated that it “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.” Motion at 1.

10. “ ‘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 are attachments to such items, or in response to discovery, subpoena, order, audit, investigation, or other request.” ARM 38.2.5001(3). For each of the items, NWE stated, “Knowledge and data concerning [item] are communicated in writing and/or in electronic format. . . .” Motion at 3.

11. NWE represented that each of the items is, in fact, secret. For each of the items, NWE stated, “NWE enters into agreements with suppliers that contain confidentiality provisions that require that this information be kept secret.” Motion at 4.

12. For the items, NWE stated, “Acting under normal industry standard protocol, NWE and/or its suppliers or purchasers protect confidential information by whatever means available to them. . . . This information is kept at NWE in a specific secure location, accessible only by designated individuals.” Motion at 8.

13. NWE stated, “Since the information to be protected is not within the public domain, it is not readily ascertainable by any other entity. . . . No one could reasonably ascertain this information through a public source.” Motion at 9.

14. The Commission determines that the requested items are information, they are secret, they are subject to reasonable efforts to maintain its secrecy, and they are generally not readily ascertainable.

15. The key factor at issue here in the trade secret analysis is whether the information that NWE is seeking to protect, derives independent economic value from its secrecy or that competitive advantage is derived from its secrecy. Motion at 9.

16. NWE argues that if Items A through I are disclosed, buyers seeking to acquire natural gas supply contracts as well as suppliers would gain unnecessary, detailed insight into NWE's forecast plans. If suppliers know when NWE plans to purchase natural gas, the focus of the procurement process will shift, resulting in higher prices for consumers.

17. NWE argues that if this information is disclosed, prices may increase for default supply customers and sellers may be reluctant to sell natural gas to NWE. It alleges that if suppliers have access to prices charged by other suppliers, new suppliers may adjust their offers to beat the competitor by making an offer that is not necessarily the lowest offer that could be submitted. Additionally, NWE argues that disclosure will give buyers access to the economic

and qualitative attributes of the various supply arrangements, which have been entered into to ensure supply adequacy and system optimization benefit for default supply customers. Disclosure of this information could result in higher prices to be paid by default supply customers and have a detrimental impact on reliability and system flexibility.

18. NWE indicates that if Items A, B, and D are disclosed it will give buyers access to the specific conditions under which NWE intends to purchase specific volumes at specific prices and providing information regarding NWE's purchasing and storage strategies by providing an indication of the system requirements.

19. Disclosure of Items C and E may inform buyers of 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.

20. Disclosure of Items F, G, and H may give other natural gas buyers access to the economic and qualitative attributes of various proposed supply agreements, 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 impact on customers. Disclosure of Item I could result in gaming of the procurement process if competitors know the strategy and pricing proposals of other competitors.

21. The Commission has previously rejected a utility's argument that possible price increases or decreases of pass-through items establish independent economic value. *In the Matter of NorthWestern Energy's Application for Approval of Electric Supply Deferred Cost Account Balance and Projected Electric Supply Cost*, Docket Nos. D2007.5.46 and D2006.5.66, Order No. 6836b (September 25, 2007). In a July 2, 2008, Order Denying Motion for Protective Order, the Commission denied protection for all current tracker information related to gas transactions. *In the Matter of NorthWestern Energy's Application for Approval for Authority to Establish Increased Natural Gas and Electric Delivery Service Rates*, Docket No. D2007.7.82, Order No. 6852g (July 2, 2008). The Commission determined that information related to past contracts did not have independent economic value or confer competitive advantage. Docket No. D2008.5.44, Order No. 6930a. NWE subsequently provided that information, unprotected.

22. For each of the items, NWE argued that the Commission has granted protection to

similar information in prior dockets including Docket No. D2008.5.44, Order No. 6930a.

23. The Commission finds that the Items A through D and F through I shall be protected from disclosure. Details regarding future transactions and forecasts should be protected because of the possibility of economic value and competitive advantage associated with these future transactions. Disclosing future planned activities by NWE could negatively impact the market prior to NWE having the opportunity to enter into these contracts on the behalf of 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 impact on customers. NWE has presented valid concerns involving future contemplated contracts and purchases. NWE's request does not include protection for past or previous costs, volumes, parties, proposals, or evaluation, which the Commission has previously refused to protect.

24. The Commission finds that NWE has failed to show that Item E, the identity of parties currently and prospectively in negotiation with NWE for provision of natural gas derives independent economic value or competitive advantage from its secrecy. The identity of parties in negotiation with NWE primarily consists of a limited set of companies that have physical delivery access to NWE's natural gas pipeline system. The parties with the pipeline capacity and ability to deliver natural gas to the NWE system are fairly consistent from year to year based on pipeline system design and constraints. Since the parties available to deliver natural gas are limited and do not vary much from year to year, it is likely that this information is known by informed individuals and entities involved in the natural gas business and could possibly be determined from various regulatory filings. NWE has failed to make a *prima facie* showing that it derives independent economic value or competitive advantage by protecting the identity of parties with whom it is currently and prospectively negotiating.

25. NWE has made a *prima facie* showing that information described in Items A through D and F through I, involving future transactions, forecasts, and continuing negotiations, derives independent economic value from its secrecy, which as property rights, are protected under constitutional due process requirements.

### **Order**

THEREFORE, based upon the foregoing, it is ORDERED that:

1. NorthWestern Energy's Motion for Protective Order covering: Information detailed in Items A, B, C, D, F, G, H, I is GRANTED.

2. NorthWestern Energy's Motion for Protective Order covering Item E, identity of parties currently and prospectively in negotiation with NWE for provision of natural gas is DENIED.

3. NorthWestern Energy must produce the information consistent with this Protective Order by August 2, 2010.

Done and dated this 18th day of May 2010 by a vote of 4-1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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GREG JERGSON, Chairman

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KEN TOOLE, Vice Chairman

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GAIL GUTSCHE, Commissioner

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BRAD MOLNAR, Commissioner (Dissenting)

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JOHN VINCENT, Commissioner

ATTEST:

Verna Stewart  
Commission Secretary

(SEAL)

NOTE: There is no reconsideration of the granting of a protective order. There is a procedure to challenge the provider's claim of confidentiality. See ARM 38.2.5008

Protective Orders and Protection of Confidential Information

**Nondisclosure Agreement**

ARM 38.2.5012

Docket No. D2009.5.63, Order No. 7004b

Order Action Date: May 18, 2010

I understand that in my capacity as counsel or expert witness for a party to this proceeding before the commission, or as a person otherwise lawfully so entitled, I may be called upon to access, review, and analyze information which is protected as confidential information. I have reviewed ARM 38.2.5001 through 38.2.5030 (commission rules applicable to protection of confidential information) and protective orders governing the protected information that I am entitled to receive. I fully understand, and agree to comply with and be bound by, the terms and conditions thereof. I will neither use nor disclose confidential information except for lawful purposes in accordance with the governing protective order and ARM 38.2.5001 through 38.2.5030 so long as such information remains protected.

I understand that this nondisclosure agreement may be copied and distributed to any person having an interest in it and that it may be retained at the offices of the provider, commission, consumer counsel, any party and may be further and freely distributed.

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Typed or Printed Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date of Signature

Business Address:  
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\_\_\_\_\_  
Employer

\_\_\_\_\_  
Party Represented