

Service Date: September 17, 2010

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

IN THE MATTER of Northwestern Energy's)	REGULATORY DIVISION
Application for Approval of Electric Supply)	
Deferred Cost Account Balance and Projected)	DOCKET NO. D2010.5.50
Electric Supply Cost)	ORDER NO. 7093b

PROTECTIVE ORDER

1. On August 11, 2010, NorthWestern Corporation, doing business as NorthWestern Energy (NorthWestern), filed a Motion for Protective Order (Motion) with the Public Service Commission (Commission) pursuant to ARM 38.2.5001 through 38.2.5030.

2. NorthWestern requests protection of its "business strategy for future market purchases" (Purchase Strategy), including information that "details specific percentages of forecasted electric supply that will be purchased by NorthWestern and the timelines on which the purchases are to occur," as well as "hard targets," or "trigger points at which NorthWestern proposes to purchase supply in corresponding percentages for future delivery." Motion p. 3. This Purchase Strategy is limited to future market purchases, and does not include information about previously executed purchases or contracts for purchase.

3. In its Motion, supported by the Affidavit of Kevin J. Markovich, NorthWestern asserted that its Purchase Strategy is a trade secret. *Id.* p. 4; *see* ARM 38.2.5007(3)(c). A trade secret is "protected under constitutional 'due process' analysis", which protects "against the 'taking' of private property for public use without just compensation." *Great Falls Tribune v. Mont. Pub. Serv. Commn.*, 2003 MT 359, ¶¶ 39, 46, 319 Mont. 38, 82 P.3d 876.

4. In order to claim a trade secret as the basis for a protective order, NorthWestern must demonstrate that: (1) It has considered the Commission is a public agency and that there is a Constitutional presumption of access to documents and information in the Commission's possession; (2) the claimed trade secret material is information; (3) the information is secret; (4) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy; (5) the secret information is not readily ascertainable by proper means; and (6) the

information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy. ARM 38.2.5007(4)(b).

5. In its Motion, NorthWestern asserted that it had considered that the Commission is a public agency and that there is a presumption of access to documents and information in the Commission's possession. Motion p. 2.

6. NorthWestern has demonstrated that its Purchase Strategy, which consists of knowledge, observations and opinions, is information. "Information" includes "knowledge, observations, opinions, data, facts, and the like" ARM 38.2.5001(3). Here, because the Purchase Strategy "constitutes the combined knowledge and observations of [NorthWestern] staff and their opinions as to the appropriate procedures NorthWestern should follow with respect to future market purchases," Markovich Affidavit ¶ 4, the Commission finds that it is information.

7. NorthWestern has demonstrated that the information is secret and subject to reasonable efforts to maintain its secrecy. Only NorthWestern, its agents, attorneys, and authorized representatives have access to the information. *Id.* ¶ 5. It "is not within the public domain," but rather "placed on yellow paper and maintained in a secure location with access limited to those employees with a 'need-to-know'". *Id.* By keeping the information "in the strictest confidence," *Id.* ¶ 4, the Commission finds that NorthWestern has made reasonable efforts to maintain its secrecy.

8. NorthWestern has demonstrated that the information is not readily ascertainable by proper means. Because "[n]o public documents exist which could reveal the information . . . by any means whatsoever", the Commission finds that it is not readily ascertainable by proper means. *Id.* ¶ 5.

9. Finally, NorthWestern has demonstrated that the information derives independent economic value from its secrecy. "Publication of this information could lead to collusion and price fixing among competitors," *id.* ¶ 6, since "bidders would know at what price [NorthWestern] expects to purchase a percentage of its future supply and would not offer a price lower than [its] 'hard target' trigger point", Motion p. 6. Furthermore, "[r]elease of this information could . . . jeopardize reliability through inadequate electric supply." Markovich Affidavit ¶ 4.

10. The Commission finds that NorthWestern has made "a prima facie showing of confidentiality" and demonstrated the six elements required to claim a trade secret as the basis for protection of confidential information. ARM 38.2.5007(3), (4)(b).

11. The Commission hereby GRANTS NorthWestern's Motion and ORDERS that information submitted in accordance with this Order be treated as confidential pursuant to ARM 38.2.5001 through 38.2.5030.

This Order may be challenged at any time pursuant to ARM 38.2.5008.

DONE AND DATED this 31st day of August 2010 by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

GREG JERGESON, Chairman

KEN TOOLE, Vice Chairman

GAIL GUTSCHE, Commissioner

BRAD MOLNAR, Commissioner

JOHN VINCENT, Commissioner

ATTEST:

Verna Stewart
Commission Secretary

(SEAL)

Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

ARM 38.2.5012

Docket No. D2010.5.50, Order No. 7093b

Order Action Date: August 31, 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.

Typed or Printed Name

Signature

Date of Signature

Business Address:

Employer

Party Represented