

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

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IN THE MATTER OF NorthWestern Energy's)	REGULATORY DIVISION
Petition for a Short-Term Waiver from Full)	
Compliance with the Community Renewable)	DOCKET NO. D2011.6.53
Energy Project Purchase Requirement)	

INVENERGY'S MOTION FOR PROTECTIVE ORDER

Invenergy Wind Development Montana LLC ("Invenergy") respectfully moves the Commission for the issuance of a protective order in accordance with the Commission's administrative rules, specifically ARM 38.2.5001 *et seq.* Invenergy integrates with its motion its brief in support of the motion. It also files in support of its motion the Affidavit of Michael Baird.

INTRODUCTION

Invenergy is not a party in this proceeding. However, both the Montana Consumer Counsel ("MCC") and the Commission have issued data requests to NorthWestern Energy ("NWE"), the Applicant in this docket, which request information from NWE which is the confidential business information of Invenergy - a trade secret.

The information in question was provided by Invenergy to NWE in response to a 2009 Request for Information ("RFI") in which NWE sought proposals for renewable resources to be added to its resource portfolio. In PSC Data Request 3(a), the Commission asks NWE to provide it with the responses it received to the RFI, which would include the response provided by Invenergy. In MCC Data Request 4 (a), the MCC requests the "diurnal pattern of power delivery proposed in the Invenergy submittal in the 2009 RFI". In MCC Data Request 4 (b), it asks for the price bid by Invenergy in its response to the RFI. The information requested from NWE in those two data requests includes confidential trade secret information which Invenergy

provided to NWE on a confidential basis. Phrased another way, NWE only received Invenergy's confidential trade secret information during the bid and negotiation process because it promised to maintain their confidentiality.

DESCRIPTION OF TRADE SECRET INFORMATION

Invenergy's response to NWE's 2009 RFI, and information provided during follow-up discussions and negotiations, included the following information which is an Invenergy trade secret:

- (1) Cost estimates, price information and liquidated damages arrangements;
- (2) Pro forma financial models;
- (3) Legal and environmental risk analysis that names neighbors, land owners, and potential lawsuits;
- (4) Wind data and energy estimates, including capacity factor information
- (5) Detailed equipment specification information; lease and easement agreements;
- (6) Information regarding conditions precedent to be satisfied prior to final contract execution
- (7) Financing and or security arrangements or requirements;
- (8) Third party submittals, such as price proposals from turbine manufacturers and balance of plant contractors as well as cost of capital; and landowner lease, easement, and study agreements.

Much of the information that Invenergy seeks to protect was provided to NWE after its initial response to the RFI and following the conclusion of NWE's initial selection process. It includes portions of documents, electronic information, and presentations spanning the period of September 2009 to the present. This subsequent information was submitted pursuant to a

non-disclosure agreement executed in June 2010 (“NDA”), a mutually-agreed upon step that replaced NWE’s directions for submitting confidential information in the RFI

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BACKGROUND

On August 17, 2009, NWE issued its RFI. The RFI included detailed requirements for the treatment of confidential information, which Invenergy followed in the initial RFI responses, until the execution of the supplementary NDA between the parties in June 2010. Invenergy’s initial response was provided on September 30, 2009. See Baird Affidavit, ¶ 3. Invenergy followed NWE’s direction in the first filing by stamping those pages that required protection as “confidential.” Id. Following the RFI submittal, and typical for any ongoing negotiations, NWE asked a series of questions through informal tools such as email and phone calls. These subsequent materials were extensive, costly to prepare and submit, and contained trade secrets and materials protected by Invenergy as well as a number of third parties. Invenergy provided this material to NWE with the understanding that the filings were protected from public disclosure by an NDA. Invenergy filed these materials without stamping them as confidential because the NDA did not require that step. See Baird Affidavit, ¶ 6.

Guidelines in the RFI indicated that the intent of the RFI was a two-step process of which the RFI would be used as a mechanism to examine general information about renewable energy projects across a broad spectrum. The RFI anticipated concluding the RFI process and moving into a separate process:

Based on the information procured through this RFI, NorthWestern Energy may choose to conclude the process any of the following manners: 1)

Enter directly into bilateral discussions for the purchase of the project from the proposer. Ownership transfer may occur before or after commercial operation as may be determined by the parties. NorthWestern may contemplate operations and maintenance agreements with 3rd parties for projects purchased outright. 2) Enter directly into bilateral discussions for the purchase of the project output under a long term purchase power agreement, allowing the proposer to retain ownership and operational responsibilities. 3) Issue a Request for Proposals as a method to further screen proposals. 4) Do nothing. 5) Any combination of 1-4 as determined by NorthWestern Energy. It is anticipated that the RFI process will be completed more rapidly than an RFP process and allow NorthWestern to pursue renewable resources in a more efficient manner. The process is intended also to reduce the burden on Respondents.

In June 2010, NWE informed Invenergy that it was one of two finalists for the project. See Baird Aff., ¶ 4. This marked the beginning of a new process under the RFI guidelines, specifically the process of collecting additional information and working toward executing a term sheet. Id. In June 2010, Invenergy and NWE entered into the NDA to protect these materials and communications when Invenergy was named as a finalist in the RFI process. See Baird Aff., ¶ 5. This NDA ensured the continuity of protective measures for the submission of Confidential Information by the parties. Id.

None of the materials that Invenergy submitted after the NDA was executed followed the guidelines in the original RFI that called for stamping pages as “confidential.” See Baird Aff., ¶ 6. Rather, the parties used the process provided by the NDA. Many of the materials supplied by Invenergy following the execution of the NDA constitute trade secrets under Montana law and should be protected. Id.

As described above, the official RFI process ended when NWE sent notice concluding the RFI screening and began the process of seeking information for the drafting and execution of a term sheet for the Big Otter project. Invenergy and NWE executed a term sheet on January 5, 2011, which was subsequently terminated by NWE on February 25, 2011. The type of information requested by NWE throughout NWE’s evaluation of the Big Otter project and the

protections in place changed substantially at that point that the information sought by NWE went from RFI-level information that would be protected by stamping pages as “confidential” to submittals in which the majority of the information provided constituted trade secrets. Therefore, Invenergy seeks a Protective Order for the trade secrets it submitted to NWE both prior to and subsequent to the RFI process.

FACTUAL AND LEGAL BASIS FOR ISSUANCE OF PROTECTIVE ORDER

In order to obtain a protective order, Invenergy must show:

- (i) consideration 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 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.

A.R.M. § 38.2.5007(4)(b).

A. Invenergy has considered that the Commission is a public agency.

Invenergy 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. See Baird Aff., ¶ 13. Invenergy’s requested relief would provide the Commission with access to the information that has been requested in discovery in this docket, and not

restrict its ability to evaluate issues in the this docket, while still protecting Invenergy 's intellectual property.

B. The claimed trade secret material is information.

Information is defined to include:

Knowledge, observations, opinions, data, and 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, investigations, or other request. A.R.M. § 38.2.5001.

The information which Invenergy seeks to protect is information and contains data, memos, financial models, and analysis as described above. This is "information" as defined by A.R.M. § 38.2.5001 and is eligible for protection.

C. The information is in fact secret.

Mont. Code Ann. § 69-3-105(2) 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." Mont. Code Ann. § 30-14-402(4) provides:

"Trade secret" means 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 subject to efforts that are reasonable under circumstances to maintain its secrecy.

Under the Administrative Rules of Montana, a trade secret is "information" which is, in fact, secret. Virtually any category of information can constitute a trade secret, as long as the information is not disclosed to the public. *US West Communications v. Office of Consumer Advocate*, 498 N.W.2d 711, 714 (Iowa, 1993).

The information that Invenergy seeks to protect is proprietary and includes proprietary financial models, preferential financing terms, turbine pricing, and other contractor pricing. Invenergy's development process takes an investment of considerable time (multiple years) and generates significant amounts of information. See Baird Aff., ¶ 9. Invenergy does not share this information with the public and the information is not ascertainable by the public. See Baird Aff., ¶ 8. Further, the employees and agents of Invenergy treat this information as trade secret and do not disclose the information outside of the organization. Id. All third-party consultants and bidders are protected through non-disclosure agreements. See Baird Aff., ¶ 9. Therefore, the information is in fact secret.

D. The information is subject to reasonable efforts under the circumstances to maintain secrecy.

Recognizing the confidential and proprietary nature of this information, Invenergy always maintains the secrecy of this information, typically through non-disclosure agreements with its partners, statements regarding confidentiality on all bid-submittal information and through express provisions included in vendor, financing and landowner agreements. See Baird Aff., ¶ 9.

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

Invenergy has made reasonable efforts to maintain the secrecy of the documents. None of the information identified as secret can be accessed through standard means. The information is not readily ascertainable by the public and no one could ascertain the information through a public source. Documents that can be accessed through public means, such as those related to land use permits, are not claimed as secret by Invenergy. Materials from third parties are typically only obtained after a business relationship has been developed and an NDA has been executed.

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

The information derived from Invenergy's development process generates significant economic value. See Baird Aff., ¶ 10. Development expenditures in the industry can be a significant portion of project installation costs, and Invenergy views the minimizing of those costs as a primary competitive advantage in the market. Id.

Invenergy's submittals to NWE contained proprietary information, including but not limited to: 1) cost estimates, price information and liquidated damages arrangements; 2) pro forma financial models; 3) legal and environmental risk analysis that names neighbors, land owners, and potential lawsuits; 4) wind data and energy estimates, including capacity factor information; 5) detailed equipment specification information; lease and easement agreements; 6) information regarding conditions precedent to be satisfied prior to final contract execution; 7) financing and or security arrangements or requirements; and 8) third party submittals, such as price proposals from turbine manufacturers and balance of plant contractors, as well as cost of capital for proposed projects, and landowner lease, easement and study agreements. See Baird Aff., ¶ 12.

For example, Invenergy has spent significant time and financial resources negotiating with NWE. The pricing and deal structuring is the proprietary culmination of discussions with product vendors and market experts, together with the expertise borne of Invenergy's development of 2500MW of operating wind projects in 15 states.

The information which Invenergy seeks to protect is comprised of information that Invenergy has spent significant time and investment to develop and public disclosure of such information at this stage in the negotiations would harm Invenergy by allowing its competitors to bypass such time and investment and would allow unfair advantage in the competitive

negotiation process. See Baird Aff., ¶ 14. Specifically, if the information is made public, Invenergy's competitors will be able to undercut Invenergy's prices and structure their transactions, marketing, and negotiations using information that Invenergy has taken multiple years to develop. *See Utah v. U.S. Dept. of the Interior*, 256 F.3d 967, 971 (10th Cir. 2001).¹

This information has significant economic value to Invenergy as the information, if made public, would compromise Invenergy's ability to compete in the energy market as it would have lost considerable time and effort and would have an economic disadvantage compared to other competitors. Further, if the information were made public, it would substantially inhibit the ability of Invenergy to negotiate with other utilities because they would know the financial and legal details of Invenergy's prior business agreements. See Baird Aff., ¶ 14. Finally, information submitted by third parties and included in Invenergy's RFI is protected as confidential by separate non-disclosure agreements entered into by Invenergy and the third parties, and public disclosure of such information would potentially place Invenergy in breach of those agreements and would allow competitors to undermine pricing by leveraging their own prices against those Invenergy submitted from third parties.

CONCLUSION

Invenergy requests the Commission to issue a Protective Order to prevent public disclosure of all trade secret information provided by Invenergy to NWE.

¹ *Utah* held that defendants had demonstrated that actual competition existed and that disclosure would lead to substantial competitive injury where defendants provided affidavits stating that if the information was disclosed, "it will give the Band's "competitors valuable information which they could use to negotiate lower payments.""

DATED this 14th day of October, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing INVENERGY'S MOTION FOR PROTECTIVE ORDER was served upon the following by mailing a true and correct copy thereof on **October 14th** addressed as follows:

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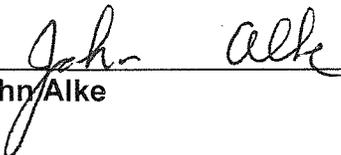
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