

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

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 ) ORDER NO. 7177a

**PROTECTIVE ORDER**  
**(Invenergy Wind Development Montana, LLC, Movant)**

1. On June 30, 2011, NorthWestern Corporation d/b/a NorthWestern Energy (NorthWestern) filed a Petition for a Waiver from Full Compliance with the Community Renewable Energy Project Purchase Obligation. The Montana Public Service Commission (Commission) has jurisdiction over this matter pursuant to the Montana Renewable Power Production and Rural Economic Development Act. Mont. Code Ann. §§ 69-3-2001 *et seq.* (2011). The Commission issued a Notice of Petition and Intervention Deadline on July 25, 2011, and granted intervention to the Montana Consumer Counsel and the Natural Resources Defense Council on August 16, 2011.

2. On September 30, 2011, the Commission issued data request PSC-003, which asked NorthWestern to provide “the proposals submitted in response to . . . [NorthWestern’s] 2009 request for information (RFI), including nameplate capacities, capacity factors and prices per-megawatt-hour.”

3. On October 17, 2011, Invenergy Wind Development Montana LLC (Invenergy) filed a Motion for Protective Order (Motion) to protect certain information it supplied in response to NorthWestern’s 2009 RFI. The Motion was accompanied by a supporting affidavit from Invenergy’s Vice President Michael Baird.

4. Invenergy seeks to protect the following information (information) as trade secret: (1) All cost estimates, price information and liquidated damages arrangements; (2) pro forma financial models; (3) legal and environmental risk analysis that names neighbors, landowners,

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and potential lawsuits; (4) wind data and energy estimates; (5) capacity factor information; (6) detailed equipment specification information; (7) information regarding conditions precedent to be satisfied prior to final contract execution; (8) financing and security arrangements or requirements; (9) third party submittals, such as price proposals from turbine manufacturers and balance of plant contractors, as well as cost of capital; and (10) landowner lease, easement and study agreements. Aff. Michael Baird ¶ 13 (Oct. 17, 2011).

### FINDINGS OF FACT

5. Invenergy has 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. *Id.* at ¶ 14; *see* Admin. R. Mont. § 38.2.5007(4)(b)(i) (2011).

6. In its initial response to NorthWestern's 2009 RFI, Invenergy stamped as "confidential" documents that it intended to keep secret. Aff. Baird at ¶ 3.

7. In June 2010, Invenergy and NorthWestern executed a non-disclosure agreement "to protect confidential materials submitted after that date," and to ensure "the continuity of protective measures." *Id.* at ¶ 5.

8. "Invenergy does not share confidential information with the public and its employees and agents treat confidential information as trade secret and do not disclose the information outside of the organization." *Id.* at ¶ 8. "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." *Id.* at ¶ 9.

9. Invenergy's business development process "utilizes proprietary financial models and develops relationships with third parties for preferential financing terms, turbine pricing, and other contractor pricing." *Id.* This process "takes an investment of considerable time (multiple years)" and "generates significant economic value." *Id.* at ¶¶ 9-10. These expenditures "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.* at ¶ 10. Public disclosure of the information "would undermine Invenergy's future ability to negotiate and develop energy projects by allowing its competitors to bypass such time and investment and would allow unfair advantage in the competitive negotiation process." *Id.* at ¶ 15.

### CONCLUSIONS OF LAW

10. The Commission “may issue a protective order when necessary to preserve trade secrets.” Mont. Code Ann. § 69-3-105(2) (2011).

11. 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.

12. In order to claim a trade secret as the basis for a protective order, a movant 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. Admin. R. Mont. § 38.2.5007(4)(b).

13. “Information” includes “knowledge, observations, opinions, data, facts, and the like.” *Id.* at § 38.2.5001(3).

14. Invenergy has made a prima facie showing that the information it seeks to protect is secret, subject to efforts reasonable under the circumstances to maintain its secrecy, and not readily ascertainable by proper means. *Id.* at § 38.2.5007(4)(b)(iii)-(v); *supra* ¶¶ 6-8.

15. Invenergy has made a prima facie showing that it derives competitive advantage from the information, and that the information it seeks to protect derives independent economic value from its secrecy. Admin. R. Mont. § 38.2.5007(4)(b)(vi); *supra* ¶ 9.

16. Invenergy 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. Admin. R. Mont. § 38.2.5007(3), (4)(b).

17. Pursuant to its “affirmative duty . . . to make all of [its] records and proceedings available to public scrutiny,” the Commission will review the protected information after it is filed in order to “make an independent determination whether the records are in fact property rights which warrant due process protection.” *Great Falls Tribune*, ¶¶ 54, 57 (citing Mont. Const. art. II, §§ 8-9).

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18. “Reconsideration is not available in regard to the granting of motion for a protective order.” Admin. R. Mont. § 38.2.4806(7). However, a person with proper standing may challenge a protective order by filing a motion and supporting memorandum. *Id.* at § 38.2.5008(3)(a).

**ORDER**

IT IS HEREBY ORDERED THAT:

19. Invenenergy’s Motion for Protective Order is GRANTED.

DONE AND DATED the 8th day of November 2011 by a vote of 5-0.

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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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TRAVIS KAVULLA, Chairman

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GAIL GUTSCHE, Vice Chairman

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W. A. (Bill) Gallagher, Commissioner

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BRAD MOLNAR, Commissioner

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JOHN VINCENT, Commissioner

ATTEST:

Aleisha Solem  
Commission Secretary

(SEAL)

Protective Orders and Protection of Confidential Information

**Nondisclosure Agreement**

(7-26-00)

ARM 38.2.5012

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Order Action Date: November 8, 2011

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:

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\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Employer

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