

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

IN THE MATTER OF NorthWestern)
Energy's 2011-2012 Electricity Supply)
Tracker)

REGULATORY DIVISION
DOCKET NO. D2012.5.49

POWEREX CORP. MOTION FOR PROTECTIVE ORDER

Powerex Corp. ("Powerex") respectfully moves the Montana Public Service Commission ("MPSC" or "Commission") for a Protective Order in accordance with the Commission's administrative rules, specifically ARM 38.2.5001 - 5030, for protection of confidential trade secrets. Powerex integrates with its motion its brief in support of the motion. It also files in support of its motion the Affidavit of Meredith Aitken, Marketing Manager at Powerex, who has personal knowledge of the trade secrets and is qualified to provide testimony on this matter.

FACTS

This proceeding involves the review of NorthWestern Energy's ("NWE") 2011-2012 electricity supply tracker. Powerex has an interest in this proceeding as certain trade secrets, described below, that include correspondence, attachments, and documents may be publicly disclosed through NWE's responses to certain data requests issued by the MPSC.

By way of background, following the approval and construction of the Dave Gates Generation Station at Mill Creek ("DGGS"), on October 3, 2011, NWE issued a request for proposals ("2011 RFP"), soliciting proposals to provide regulating reserve service and other potential within-hour services that may be used to optimize the

operation of the DGGS and to meet NWE's control performance standards. Powerex submitted a response to the RFP ("Proposal") on November 22, 2011, and in both the Proposal and the transmittal letter accompanying the Proposal, Powerex identified the Proposal as "Confidential." Further, in the Proposal, while Powerex responded to specific questions posed by NWE regarding the standardized products sought in the 2011 RFP, it also offered for discussion numerous alternative product options and suggestions for optimizing the services provided by DGGS, as well as specific additional proposed approaches for lowering costs that might be incurred by the optimization (collectively, "Customized Products"). Powerex was not selected by NWE in the 2011 RFP process.

On January 31, 2012 at 8:10 p.m., NWE had to unexpectedly completely shut down the DGGS facility due to significant equipment damage on each of the three generating units at DGGS to prevent potentially catastrophic damage to the plant's power turbines. NWE does not have any other generation sources that can provide regulation services and needed to solicit potential third party providers to attempt to procure short-term regulation services to maintain the reliable operation of NorthWestern's system and prevent potential reliability impacts on other balancing authority areas in the Western Interconnection. NWE contacted three potential suppliers who had previously expressed an interest in providing regulation services in responses to the 2011 RFP. Powerex responded very quickly to NWE's solicitation.

To replace the capacity deficiency resulting from the outage of the DGGS, Powerex and NWE entered into two agreements whereby Powerex would supply regulation services to NWE. On February 2, 2012, Powerex and NWE entered into an

interim balance-of-the-month ("BOM") agreement that immediately supplied NWE with up to 70 MW of the needed regulating reserve service commencing February 3, 2012 until February 29, 2012. The BOM agreement was based on a structure similar to the 2008 and 2009 regulation services arrangements previously negotiated between NWE and Powerex and approved by the Federal Energy Regulatory Commission. On February 7, 2012, Powerex and NWE executed the balance-of-the-year ("BOY") agreement on terms almost identical to the BOM agreement. The BOY agreement extended the service provided by Powerex under the BOM agreement some ten additional months, from March 1, 2012 through January 8, 2012, with quantities of up to 76 MW that were subject to adjustment or reduction by NWE. The resulting contracts and the associated prices are already in the public forum.

Commission data request PSC-007(e) requests that NWE provide information regarding its procurement of third-party replacement regulation service after the DGGG outage (e.g., the BOM and BOY agreements). Commission data request PSC-017(b) requests information about NWE's 2011 RFP.

As the captioned proceeding has been ongoing without Powerex's involvement since June 1, 2012, Powerex did not become aware of the potential disclosure of Customized Products until August 30, 2012, after being notified by NWE of the MPSC's data requests. If a Protective Order is not issued, the result will be disclosure of the Customized Products, trade secrets that qualify for protection under Montana law and MPSC rules and practice.

More specifically, the Customized Products that Powerex seeks to protect may be described and identified non-confidentially as documents in the possession of NWE,

including (i) information responsive to PSC-007(e) that includes documents and correspondence between Powerex and NWE, and attachments to such correspondence, concerning third-party replacement regulation service after the outage of the DGGS, and (ii) information responsive to PSC-017(b) including correspondence, attachments to such correspondence, and any documents relating to bids received, including draft agreements, in response to NWE's 2011 RFP and any subsequent RFP for regulation service.

INTRODUCTION

Powerex has filed this motion for protective order following a thorough legal and factual examination. In accordance with Commission Rule ARM 38.2.5007(4)(b)(i), Powerex has duly considered that the Commission is a state agency and that there is a presumption of public access to documents held by a state agency. However, given the degree of commercial sensitivity of Powerex's Customized Products, Powerex has no choice but to seek the issuance of a protective order to preserve the confidentiality of its commercial information as the intentional failure to request a protective order could destroy the commercial information's status as a protectable trade secret. "[The trade secret] is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." MCA Section 30-14-402(4)(b).

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

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ARGUMENT

I. THE CUSTOMIZED PRODUCTS THAT POWEREX SEEKS TO PROTECT AGAINST PUBLIC DISCLOSURE ARE PROTECTABLE AS TRADE SECRETS

The commercially sensitive Customized Products that Powerex seeks to protect against public disclosure are protectable as a trade secret. The term "trade secret" has been defined in Montana Trade Secrets Act, MCA Section 30-14-401(4), and Commission rule ARM 38.2.5007 requires an applicant for a protective order to establish by affidavit the required statutory elements. Subsection (4)(b) of ARM 38.2.5007 specifies the elements that must be established by the motion and supporting affidavit. The Administrative Rules enacted by the MPSC to implement the Trade Secrets Act identify six elements for establishing a *prima facie* showing that Information may be protected as trade secret. ARM § 38.2.5007(4)(b). These elements are:

- (i) prior to requesting a protective order, the provider 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 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.

While ARM 38.2.5007(4)(b)(i) was addressed above, ARM 38.2.5007(4)(b)(ii), (iii), and (iv) specify that the confidential information must be "information" that is, in fact, secret. The term "information" is extremely broad. "There is virtually no category of confidential information that cannot, as long as the information is protected from disclosure to the public, constitute a trade secret." Thomas J. Collin, *Determining Whether Information is a Trade Secret Under Ohio Law*, 19 U. Tol. L. Rev. 543, 545 (1988); *U S WEST Communications v. Office of Consumer Advocate*, 498 N.W.2d 711, 714 (Iowa, 1993). As described in the affidavit of Meredith Aitken, the business strategies, capabilities, and non-standard products identified by Powerex in the Customized Products falls within the broad definition of "information." Specifically, the Customized Products is comprised of knowledge, data and facts communicated in writing, and, as such, is information. ARM 38.2.5001(3). Further, the Customized Products are secret as they detail the nature of the commercially sensitive business strategies, capabilities, and non-standardized products conceived by Powerex. Further, Powerex does not share publicly the Customized Products and has sought to prevent its public disclosure in a highly competitive open market; for example Powerex submitted its Proposal to NWE as "Confidential."

ARM 38.2.5007(4)(b)(v) specifies that the confidential information cannot be "readily ascertainable" by proper means. In other words, a compilation of publicly available information can be a trade secret if "the duplication or acquisition of the alleged trade secret information requires substantial investment of time, expense, or effort." *Amoco Production Co. v. Laird*, 622 N.E. 912, 919 (Ind. 1993). The Customized Products that Powerex seeks to protect in this motion were not prepared from publicly

available information, but are the result of Powerex's proprietary research, experience, and efforts. As explained in the affidavit of Meredith Aitken, it reflects confidential and commercially sensitive business strategies, capabilities, and non-standardized products that in a highly competitive energy market competitors of Powerex would seize upon and leverage as their own, to the commercial detriment of Powerex.

ARM 38.2.5007(4)(b)(vi) specifies that the confidential information must derive independent economic advantage, or competitive advantage, from its secrecy. The Commission's rule recognizes that the language of the Trade Secrets Act has been interpreted to carry forward the common law requirement of competitive advantage. *Electro-Craft Corporation v. Controlled Motion*, 332 N.W.2d 890, 900 (Minn. 1983). The affidavit of Meredith Aitken explains that should Powerex's competitors learn of Powerex's strategies, capabilities, and non-standardized products identified in the Customized Products, then those competitors would be able to use that information as their own, depriving Powerex of the benefit created by its own research, experience, and efforts. Because knowledge of the Customized Products imparts a competitive or negotiating advantage, Powerex has historically protected the confidentiality of this type of confidential Information.

II. PUBLIC DISCLOSURE OF POWEREX'S TRADE SECRETS COULD CHILL INNOVATION AND CREATIVE SOLUTIONS IN RFP RESPONSES

For broader policy reasons, the issuance of a protective order will encourage responders to requests for proposals to offer creative customized solutions. For example, with the assurance that an RFP response would remain confidential, a responder may be inclined to suggest non-standard products or solutions that are more efficient than the initially-sought standard product. Conversely, should a confidential

customized product be publicly disclosed, the responder may limit its response to only the standardized product for fear of disclosing capabilities or strategies to its competitors. Therefore, as a result of confidential treatment of a response, the issuer of the RFP, such as NWE, could benefit by obtaining more efficient customized products (thus enabling cost savings for its customers), and the responder, such as Powerex, could benefit by preserving its proprietary efforts.

The type of information for which protection is sought has been accorded protection by the MPSC in similar situations. *See, e.g.*, In the Matter of the Application of NorthWestern Energy for Approval to Purchase and Operate the Spion Kop Wind Project, for Certification of the Spion Kop Wind Project as an Eligible Renewable Resource, and for Related Relief, Order No. 7159f, Docket No. D2011.5.41, ¶7 (Aug. 24, 2011); In the Matter of NorthWestern Energy's Petition for a Short-Term Waiver from Full Compliance with the Community Renewable Energy Project Purchase Requirement, Order No. 7177a, Docket No. D2011.6.53, ¶4 (Nov. 17, 2011).

CONCLUSION

For the reasons discussed in the Motion and the accompanying affidavit of Meredith Aitken, Powerex respectfully asks the MPSC to issue a Protective Order covering the Information described above.

Respectfully submitted September 10, 2012.



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Counsel for Powerex Corp.

Attachments: Affidavit of Meredith Aitken

CERTIFICATE OF SERVICE

I hereby-certify that the foregoing document has, this 10th day of September, 2012, been served by first class mail, postage prepaid, upon the following:

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Dr. Thomas M. Power
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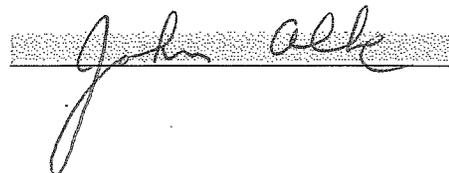
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A handwritten signature in cursive script, appearing to read "John Alk", is written over a horizontal line. The signature is written in black ink on a white background.

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**AFFIDAVIT OF MEREDITH AITKEN IN SUPPORT OF POWEREX CORP.
MOTION FOR PROTECTIVE ORDER**

PROVINCE OF BRITISH COLUMBIA)
CANADA)

Meredith Aitken, being first duly sworn, states:

1. I am employed by Powerex Corp. ("Powerex") as a Marketing Manager, with day-to-day responsibility for engaging in contract negotiations with counterparties in the Western Interconnection on behalf of Powerex. In that role, I was involved in the negotiations with NorthWestern Energy ("NWE") for the purchase of the emergency Regulating Reserve Service. Information about this service is within the scope of Data Requests Nos. PSC-007(e) and PSC-017(b) made by the Montana Public Service Commission ("MPSC") to NWE in this docket.
2. NWE is a utility company with which Powerex has conducted business in the past and will likely continue to conduct business with in the future.
3. NWE issued a request for proposals ("RFP") on October 3, 2011, soliciting proposals to provide regulating reserve service and other potential within-hour services that may be used to optimize the operation of the Dave Gates Generation Station at Mill Creek ("DGGS") and to meet NWE's control performance standards. Powerex submitted a response to the RFP ("Proposal") on November 22, 2011. In the Proposal, Powerex responded to specific questions posed by NWE regarding standardized products, but it also offered for discussion numerous customized options and suggestions for optimizing the services provided, as well as specific proposed approaches for lowering costs that may be incurred by the optimization (collectively, "Customized Products").
4. The prices for executed deals as well as a summary of bids for the standard product sought in the 2011 RFP are already available in the public forum. The specific documents for which protection is sought may be categorically and non-confidentially described as documents in the possession of NWE, including the work products and Customized Products consisting of (i) information responsive to PSC-007(e) that includes documents and correspondence between Powerex

and NWE and attachments to such correspondence concerning third-party replacement regulation service after the outage of the DGGS, and (ii) information responsive to PSC-017(b) including correspondence, attachments to such correspondence, and any documents relating to bids received, including draft agreements, in response to NWE's 2011 RFP and any subsequent RFP for regulation service.

5. The electrical generating industry in Montana and elsewhere in the West is highly competitive, and product and service providers to this industry aggressively market their products and services. Powerex does not share or disclose Customized Products except to potential customers, and even then such disclosure is provided only on a confidential basis, typically governed by a Confidentiality Agreement between parties. Public disclosure of the Customized Products would give Powerex's competitors distinct competitive advantage based on knowledge of Powerex's negotiations and business dealings with NWE, as well as Powerex's sensitive commercial data relating to its customized products, business strategies, and capabilities. Possession of the Customized Products for which protection is sought would give other present and future potential competitors of Powerex insight into Powerex's capabilities to provide customized products and business strategies, and thus detrimentally impact Powerex's ability to compete in the energy markets as well as cause Powerex economic injury. In addition, it is to the benefit of NWE's customers that NWE receive as much information as each bidder is willing to provide under the assumption of confidential treatment.
6. Powerex has protected the secrecy of the Customized Products, subjecting such information to confidentiality provisions that restrict dissemination of the Customized Products beyond the receiving customer. Further, only Powerex employees and representatives with a direct need to know are authorized to access the Customized Products and hard copies of the Customized Products are marked as confidential and destroyed when no longer needed.
7. The 2011 RFP states "all responses will be kept confidential by NWE Transmission Service and its Independent Monitor. Because NWE is regulated, NWE may be required to release the RFP information to the appropriate regulatory authorities and other intervening parties during the course of regulatory proceedings... ." The information for which protection is sought should reasonably be accorded protection such that it can be made available to the appropriate regulatory authority without serving to the benefit of Powerex's competitors.
8. Prior to filing the Motion that this affidavit supports, Powerex considered the presumption in favor of disclosing materials provided to the MPSC. Based on my experience and having fully considered the factual and legal bases required for protection of confidential information, I have, with the assistance of qualified legal counsel, formed a good faith belief that the information described in paragraphs

3 and 4 above, and in the accompanying Motion for a Protective Order are trade secrets that may be protected from public disclosure under the law.

END OF AFFIDAVIT

Dated September 10, 2012



Meredith Aitken
Marketing Manager
Powerex Corp.

SUBSCRIBED AND SWORN TO before me this 10th day of September, 2012.



Notary Public for the Province of British Columbia

Having a business address of 1300 - 666 BURRARD STREET
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