

Susan Callaghan
CALLAGHAN AND GERNANT, P.C.
17 South Main
Butte, Montana 59701
Telephone: (406) 721-1124
Facsimile: (406) 721-1134
E-Mail: susan@cgplaw.com

Attorneys for Gordon Butte Wind, LLC

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

IN THE MATTER OF NorthWestern Energy's) REGULATORY DIVISION
2011-2012 Electricity Supply Tracker) DOCKET NO. D2012-5.49

GORDON BUTTE WIND, LLC MOTION FOR PROTECTIVE ORDER

Gordon Butte Wind, LLC ("Gordon Butte"), through counsel, moves the Montana Public Service Commission ("PSC" 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. Gordon Butte includes with its motion its brief in support of the motion. Gordon Butte also files in support of its motion the Affidavit of Bryan Rogan, one of the Member's of Gordon Butte Wind, LLC, 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. Gordon Butte owns and operates a 10 MW wind project located around Martinsdale, MT (the "Project"). The Project became operational in January of 2012. Gordon Butte sells energy to NWE pursuant to a power purchase agreement. Gordon Butte has

an interest in this proceeding as certain trade secrets, namely 15-minute and 30-minute energy production data (“Production Data”) in NWE’s possession relating to the Project may be publicly disclosed through NWE’s responses to PSC-081. As the above-captioned proceeding has been ongoing without Gordon Butte’s involvement since June 1, 2012, Gordon Butte did not become aware of the potential disclosure of Production Data until February 27, 2013, after being notified by NWE of the PSC’s data request. If a Protective Order is not issued, the result will be disclosure of the Production Data, trade secrets that qualify for protection under Montana law and Commission rules and practice.

INTRODUCTION

In accordance with Commission Rule ARM 38.2.5007(4)(b)(i), Gordon Butte 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. Following a thorough legal and factual examination, Gordon Butte has determined that it must seek a protective order to preserve the confidentiality of the Wind Data and protect its status as a trade secret.

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

Susan Callaghan
Callaghan and Gernant, P.C.
17 So. Main
Butte, MT 59701
Telephone: 406-721-1124
Facsimile: 406-721-1134
E-Mail: susan@cgplaw.com

ARGUMENT

I. THE PRODUCTION DATA ARE PROTECTABLE AS TRADE SECRETS

The commercially sensitive Production Data that Gordon Butte seeks to protect against public disclosure are protectable as trade secrets. Montana Code Ann. §30-14-401(4) defines the term “trade secret” 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 Commission has established six elements that are required to establish a *prima facie* showing that information may be protected as trade secrets. These elements are:

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

The Production Data Gordon Butte seeks to protect meets the elements required to establish a *prima facie* case.

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 Production Data regarding the Gordon Butte wind project (the “Project”) is information in that this data comprises specific facts regarding energy production at the Project gathered pursuant to

the PPA between Gordon Butte and NWE. The Production Data, as explained in Paragraph 1 of the Affidavit of Bryan Rogan In Support of Gordon Butte Wind, LLC's Motion For Protective Order (the "Affidavit"), can easily be converted into wind data or information about the wind resources for the Project ("Wind Data"). The Wind Data, and by extension, the Production Data, Gordon Butte is secret because the Wind Data, which is derived easily from the Production Data would provide competitors and wind project developers with vital information about the wind resource in the area of the Project and about Gordon Butte's revenues, to Gordon Butte's competitive and economic harm. See, Affidavit ¶ 2-4. Gordon Butte does not share either the Wind Data or the Production Data with the public. In addition to maintaining the confidentiality of the Production Data and Wind Data as a matter of business practice, Gordon Butte takes step such as filing for this Protective Order to ensure the information remains confidential. Further, the fact that NWE notified Gordon Butte that it had a Data Request asking for the Production Data so that it could file for a protective order indicates that NWE did not feel at liberty to disclose, without notice, Project proprietary information. Similarly, Gordon Butte does not share its project revenues with the general public, its competitors, or other wind project developers.

ARM 38.2.5007(4)(b)(v) specifies that the confidential information cannot be "readily ascertainable" by proper means. As set forth in the Affidavit, the Production Data and the Wind Data which can easily be derived from the Production Data, were not prepared or generated from publicly available information, but are the result of Gordon Butte's proprietary efforts to collect the wind resource information about the area in which the Project is located to determine whether a financially project could be located in the area. Were competitors and wind project developers able to gain this information for free, they could use the information for their benefit and to Gordon Butte's detriment. Certainly, a competitor or a wind project developer could

commission studies of the wind resource in the area, but that would require considerable time and expense and thus the Production Data and Wind Data are not readily ascertainable by proper means. As well, the revenues associated with the Project are not readily available to the public, nor are they readily ascertainable.

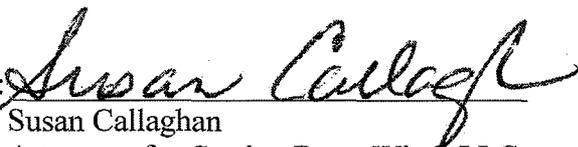
ARM 38.2.5007(4)(b)(v9) specifies that the confidential information must derive independent economic advantage, or competitive advantage from its secrecy. As explained in the Affidavit, Gordon Butte gains a competitive advantage from having secret information regarding the wind resource in the area or the Project. The wind resource information for the Project area as can be derived through the Production Data and Wind Data constitutes an independent economic advantage for Gordon Butte that has allowed it to develop and operate an economically viable wind project and gives it a competitive advantage over others who need to have wind resource data to further their economic and competitive interests in the area for wind projects.

CONCLUSION

For the reasons discussed herein and in the accompanying affidavit of Bryan Rogan, Gordon Butte requests the Commission to issue a Protective Order covering the Production Data described herein.

Dated this 8th day of March, 2013.

Callaghan and Gernant, P.C.

By: 
Susan Callaghan
Attorneys for Gordon Butte Wind, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2013, a copy of the foregoing document has been served by mailing a copy thereof by first class mail, postage prepaid, upon the following:

Charles Magraw
501 8th Ave.
Helena, MT 59601

Dr. Thomas M. Power
920 Evans Ave.
Missoula, MT 59801

John W. Wilson
JW Wilson & Assoc.
1601 North Ken St. Ste. 1104
Arlington, VA 22209

Al Brogan
NorthWestern Energy
208 N. Montana Ave Ste 205
Helena, MT 59620

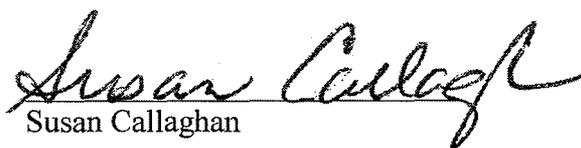
Robert Nelson
Montana consumer counsel
111 N. Last Chance Gulch, Ste 1B
Helena, MT 59620-1703

Joe Schwarzenberger
NorthWestern Energy
40 E. Broadway
Butte, MT 59701

Nedra Chase
NorthWestern Energy
40 E. Broadway
Butte, MT 59701

Sarah Norcott
NorthWestern Energy
208 N. Montana Ave Ste 205
Helena, MT 59620

Kate Whitney
Public Service Commission
1701 Prospect Ave.
PO Box 202601
Helena, MT 59620


Susan Callaghan