

5. The 2011 hedging strategy is information because it “constitutes the combined knowledge and observations of NWE staff and their opinions as to the appropriate procedures NWE should follow with respect to future market purchases.” Aff. Kevin J. Markovich ¶ 4 (Sept. 5, 2012).

6. In the Motion, NorthWestern describes the information as secret, and claims the information is subject to reasonable efforts to maintain its secrecy:

Acting under normal industry standard protocol, NWE protects confidential information (including this information which is a part of its Electronic Supply Hedging Strategy) by whatever means available to it. Only persons with a "need to know" basis have access to this strategy, and the information is treated as confidential information by NWE.

Mot. for Protec. Ord. at p. 6. The information “is kept in a specific secure location. . . . with access limited to those employees with a ‘need-to-know’ based on NorthWestern’s internal controls.” Aff. Markovich at ¶ 7.

7. The 2011 hedging strategy is not readily ascertainable by proper means. “No public documents exist which could reveal the information,” and “it is not readily ascertainable by any other entity.” *Id.*

8. Although NorthWestern disclosed the hedging targets in its 2009 hedging strategy, the 2011 hedging strategy is “autonomous and independent of” the 2009 strategy:

NWE’s 2011 hedging strategy . . . has been revamped to make it more suited to current market conditions. Many of the metrics have changed, including the way specific percentages of forecasted supply are calculated and the timelines and periods under which the hedging window applies. The 2011 hedging strategy provides more flexibility and discretion in entering transactions in light of changing market fundamentals brought on by advances in technology.

Id. at ¶ 6.

9. NorthWestern states that its 2011 hedging strategy, “when combined with public information of transactions already consummated, could allow a potential supplier to determine exactly when and how much electric supply NWE intends to purchase which in turn could give them an advantage in bilateral negotiations or in any offers they make.” Aff. Markovich at ¶ 4. Disclosure of this information could “raise the price of future offer proposals to NWE, as others [would] know the volume and price at which NorthWestern plans to transact.” *Id.*

CONCLUSIONS OF LAW

10. The Montana Constitution imposes “an ‘affirmative’ duty on government officials to make all of their records and proceedings available to public scrutiny.” *Great Falls Tribune v. Mont. Pub. Serv. Commn.*, 2003 MT 359, ¶ 54, 319 Mont. 38. However, “a trade secret is one form of information in which there is a statutorily defined property right.” *Id.* at ¶ 59. As a result, the Commission “may issue a protective order when necessary to preserve trade secrets . . . as required to carry out its regulatory functions.” Mont. Code Ann. § 69-3-105(2) (2011).

11. An entity seeking a protective order “must support its claim of confidentiality by filing a supporting affidavit making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements.” *Great Falls Tribune*, ¶ 56. “The claimant’s showing must be more than conclusory” and “must make clear . . . the basis for the request.” *Id.*; Admin. R. Mont. 38.5.5007(3) (2012).

12. In order to claim a trade secret as the basis for a protective order, a claimant 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. NorthWestern has made a *prima facie* showing that it derives competitive advantage from the secrecy of its 2011 hedging strategy. *Supra* ¶ 9.

15. NorthWestern has made a *prima facie* showing that its 2011 hedging strategy is a trade secret entitled to protection under constitutional due process requirements. *Supra* ¶¶ 4-9.

ORDER

IT IS HEREBY ORDERED THAT:

1. NorthWestern's Motion for Protective Order is GRANTED; and
2. Information submitted in accordance with this Protective Order is to be treated as confidential pursuant to Title 38, Subchapter 50 of the Administrative Rules of Montana.

DONE AND DATED this 2nd day of October 2012 by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

TRAVIS KAVULLA, Chairman

GAIL GUTSCHE, Vice Chair

W. A. GALLAGHER, Commissioner

BRAD MOLNAR, Commissioner

JOHN VINCENT, Commissioner

ATTEST:

Aleisha Solem
Commission Secretary

(SEAL)

NOTE: Reconsideration is not available in regard to the granting of a motion for protective order, but is available in regard to the denial of a protective order. Admin. R. Mont. 38.2.4806. A person with proper standing may challenge a protective order. *Id.* at 38.2.5008(3).

Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

(7-26-00)

ARM 38.2.5012

Docket No. D2012.5.49, Order No. 7219c

Order Action Date: October 2, 2012

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