

DEPARTMENT OF PUBLIC SERVICE REGULATION  
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  
) ORDER NO. 7219d

**PROTECTIVE ORDER**

**PROCEDURAL HISTORY**

1. On June 1, 2012, NorthWestern Corporation d/b/a NorthWestern Energy (NorthWestern or NWE) filed its annual *Application for Approval of Electricity Supply Cost Account Balance and Projected Electric Supply Cost* with the Montana Public Service Commission (Commission).
2. On July 13, 2012, the Commission issued Data Request PSC-007(e), which asked NorthWestern to “provide any correspondence between NWE and other entities offering or potentially offering regulation service in 2012.”
3. On August 16, 2012, the Commission issued Data Request PSC-017(b), which asked NorthWestern to “provide the bids received in response to NWE’s 2011 regulation service [request for proposals (RFP)] and any subsequent RFP for regulation service, as well as a summary of projected costs for regulation contracts through June 30, 2013.”
4. On September 10, 2012, Powerex Corp. (Powerex) filed a *Motion to Intervene for Purpose of Applying for Protective Order* (Motion for Intervention). On the same day, Powerex filed a *Motion for a Protective Order* (Motion) to protect information requested by the Commission in PSC-007(e) and PSC-017(b). On September 13, 2012, the Commission published notice of the Motion in its weekly agenda, stating that it would not rule on the Motion for at least 10 days and that it would accept comments submitted prior to the ruling.
5. On September 6, 2012, NorthWestern filed responses to PSC-007(e) and PSC-017(b). In its responses, NorthWestern indicated that it had omitted certain documents, correspondence, and technical information pending the Commission’s ruling on the Motion.

### FINDINGS OF FACT

6. On October 3, 2011, NorthWestern issued an RFP for regulation service, and Powerex submitted a bid in response to the RFP on November 22, 2011. Aff. Meredith Aitken ¶ 3 (Sept. 10, 2012). In addition to discussing standard products in its bid, Powerex also “offered for discussion numerous customized options and suggestions for optimizing the [third-party replacement regulation] services provided, as well as specific proposed approaches for lowering costs that may be incurred by the optimization (collectively, ‘Customized Products’).” Mot. p. 2 (Sept. 10, 2012). These Customized Products detail business strategies, capabilities, and non-standardized products conceived by Powerex. *Id.* at p. 6.

7. Powerex did not become aware of the possibility that its Customized Products might be disclosed until August 30, 2012, after the Commission issued Data Requests PSC-007(e) and PSC-017(b). Mot. for Intervention p. 2 (Sept. 10, 2012). Powerex is not taking a position in this proceeding, and granting its Motion for Intervention will not cause delay or prejudice another party. *Id.*

8. Through its Motion, Powerex seeks to protect as trade secrets certain documents and correspondence, including draft agreements and attachments to such correspondence, concerning the Customized Products that it offered to NorthWestern. Mot. at p. 4.

9. Powerex states that it has considered that the Commission is a public agency and that there is a presumption of public access to documents and information filed with the Commission. *Id.*

10. The Customized Products are comprised of knowledge, data and facts resulting from Powerex’s research, experience and efforts; as such, they constitute information. *Id.* at p. 6.

11. Powerex asserts that it “does not share or disclose Customized Products except to potential customers . . . on a confidential basis.” Aff. Aitken at ¶ 5. Powerex describes the Customized Products as secret, claiming that they are subject to reasonable efforts to maintain their secrecy and not readily ascertainable by proper means:

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.

*Id.* at ¶ 6.

12. According to Powerex:

Public disclosure of the Customized Products for which protection is sought 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 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.

*Id.* at ¶ 5.

### CONCLUSIONS OF LAW

13. Any person may petition to intervene in a proceeding before the Commission, but not after the intervention deadline set forth in a procedural order "except for good cause shown." Admin. R. Mont. 38.2.2403. A petition for intervention must set forth "a clear and concise statement of the direct and substantial interest of the petitioner in the proceeding," a position in regard to the matter in controversy, and a statement of the relief desired. *Id.*

14. 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).

15. 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).

16. 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).

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

18. Powerex has a direct and substantial interest in disclosure of documents sought by the Commission in Data Requests PSC-007(e) and PSC-017(b). *Supra* ¶ 12.

19. Powerex has shown good cause as to why it did not petition for intervention before the intervention deadline set forth in Procedural Order 7219b (issued July 27, 2012). *Supra* ¶ 7.

20. Powerex has made a *prima facie* showing that the Customized Products it offered to NorthWestern constitute secret information, and that it derives competitive advantage from the secrecy of this information. *Supra* ¶¶ 10-12.

21. Powerex has made a *prima facie* showing that its Customized Products are trade secrets entitled to protection under constitutional due process requirements. *Supra* ¶¶ 9-12.

## ORDER

IT IS HEREBY ORDERED THAT:

22. Powerex’s Motion for Intervention is GRANTED;
23. Powerex’s Motion for Protective Order is GRANTED; and
24. Information submitted in accordance with this Protective Order shall be treated as confidential pursuant to Title 38, Subchapter 50 of the Administrative Rules of Montana.

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

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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TRAVIS KAVULLA, Chairman

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GAIL GUTSCHE, Vice Chair

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W. A. GALLAGHER, Commissioner

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BRAD MOLNAR, Commissioner

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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. 7219d  
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.

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Typed or Printed Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date of Signature

Business Address:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Employer

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