

Service Date: February 15, 2013

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. 7219f

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-006(c) and (d), which asked NorthWestern to provide documentation and correspondence related to the cause of the outage at the Dave Gates Generating Station (DGGS) and any operational problems preceding the outage. The Commission also issued Data Request PSC-008, which asked NorthWestern to provide: (1) Its warranty with Pratt & Whitney Power Systems, Inc. (PWPS), including any amendments, supplements, or extensions, applicable to the DGGS; (2) any other insurance or warranty product purchased by, offered to, or sought out by NorthWestern that provides or could have provided coverage to the DGGS; and (3) any documentation and correspondence related to warranty and insurance coverage of the DGGS.

3. On August 23, 2012, PWPS filed a *Motion to Intervene for Purpose of Applying for Protective Order, Motion for Protective Order* and a *Proposed Protective Order*.

4. On September 13, 2012, the Commission published notice of PWPS' *Motion for Protective Order* in its weekly agenda.

5. On September 5, 2012, PWPS filed a *Supplemental Motion for a Protective Order* and a *Proposed Protective Order*.

6. On January 5, 2013, PWPS filed a *Second Supplemental Motion for Protective Order* (Motion), the *Affidavit of Tanya Tymchenko in Support of PWPS' Second Supplemental Motion for Protective Order*, and a *Proposed Protective Order*.

7. On January 31, 2013, the Commission published notice of PWPS' Motion in its weekly agenda.

FINDINGS OF FACT

8. In its Motion, PWPS describes the information for which trade secret protection is sought as

confidential PWPS technical and financial information, as well as confidential contract terms, including Information which discloses how PWPS responds to its customers who encounter potential problems with PWPS products, PWPS testing protocols, PWPS software development and changes to same, PWPS technical recommendations, and PWPS insurance and warranty offerings.

Mot. p. 10 (Jan. 5, 2013). According to Tanya Tymchenko, Counsel for PWPS, the information includes:

- warranty claims by NWE concerning PWPS products;
- PWPS' response to NWE's questions and/or concerns about PWPS products and their performance, including PWPS' response to these warranty claims;
- technical data and drawings regarding PWPS' products;
- PWPS' root cause analysis;
- PWPS' parts repair quotes;
- PWPS' standard terms and conditions for overhaul and repair of products; and
- detailed contract pricing information.

Aff. Tanya Tymchenko p. 2 (Jan. 5, 2013).

9. In its Motion for Intervention, PWPS asserts that it did not become aware that its trade secrets could be disclosed in this proceeding until after the Commission issued Data Requests PSC-006 and PSC-008 on July 12, 2012:

Upon learning of the potential for disclosure of its trade secrets in responses by NorthWestern Energy to the Public Service Commission's Data Requests, on August 9, 2012, Movant acted expeditiously to confirm the possibility of disclosure, to identify the Information which could comprise trade secrets, to evaluate the Montana constitutional presumption in favor of disclosure of documents in proceedings before the Public Service Commission, and to prepare its motions and supporting documentation for filing.

Mot. for Intervention p. 2 (Aug. 23, 2012).

10. According to Ms. Tymchenko, PWPS has considered the constitutional presumption in favor of disclosing materials provided to the Commission. *Id.*

11. The information for which protection is sought is comprised of knowledge, data and facts communicated in writing. Mot. at p. 10.

12. PWPS claims that the information is secret, is subject to efforts to maintain its secrecy, and is not readily ascertainable by proper means:

PWPS does not share or disclose the information it considers proprietary, trade secret and/or otherwise confidential information, and this information cannot be obtained by third persons such as PWPS' competitors, by proper means. Only PWPS employees and representatives with a direct need to know are authorized to access the Information and hard copies of the Information are marked as confidential and destroyed when no longer needed.

Aff. Tymchenko at p. 1.

13. Contract terms and conditions (including warranties), pricing information, and technical data and drawings that were included in NorthWestern's *Application for Approval of Mill Creek Generating Station* are readily ascertainable by proper means and are not secret. See e.g. Docket D2008.8.95 Ex. WTR-05 (Aug. 25, 2008).

14. PWPS asserts that it derives competitive advantage from the secrecy of the information described above:

The products PWPS sold to NWE are high technology, aero-derivative gas turbines. There are only three aero-derivative gas turbine manufacturers in the world. Information the other two manufacturers glean from PWPS' interaction with its customers, including obtaining such vital information such as technical drawings, specifications, performance guarantees, management of any potential or actual product performance or durability issues, and pricing, confers a competitive advantage to those manufacturers and risks giving the competitors a significant and unfair advantage in the industry, and could put PWPS out of business. . . .

Additionally, to the extent access to the described documents allow competitors to understand how PWPS handles customer complaints, product issues and warranty claims, it allows a competitor to adjust its response to customer complaints accordingly, potentially undercutting PWPS in the marketplace.

Further, if another customer understood how PWPS was handling this specific warranty complaint, the customer could use this information to demand similar recourse from PWPS even where such recourse would not be appropriate for that customer's particular product performance issue, thus eroding PWPS' position with that customer and potentially requiring PWPS to offer unnecessary and costly product improvements to that customer, again eroding PWPS profitability.

Aff. Tymchenko at p. 2.

CONCLUSIONS OF LAW

15. 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 (2013). 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.*

16. PWPS has a direct and substantial interest in disclosure of documents sought by the Commission in Data Requests PSC-006 and PSC-008. *Supra* ¶ 14.

17. PWPS 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* ¶ 9.

18. 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.

19. 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).

20. 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).

21. 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).

22. “Information” includes “knowledge, observations, opinions, data, facts, and the like.” *Id.* at 38.2.5001(3). The materials for which PWPS seeks protection, consisting of knowledge, data and facts communicated in writing, are “information.” *Supra* ¶ 11.

23. PWPS has made a *prima facie* showing that, to the extent it was not included in NorthWestern’s *Application for Approval of Mill Creek Generating Station*, the following information is secret, subject to reasonable efforts to maintain its secrecy, and not readily ascertainable by proper means:

- PWPS’ responses to NWE’s questions or concerns about PWPS products and their performance, including PWPS’ response to warranty claims;
- technical data and drawings regarding PWPS’ products;
- PWPS’ root cause analysis;
- PWPS’ parts repair quotes;
- PWPS’ standard terms and conditions for overhaul and repair of products; and
- detailed contract pricing information

Supra ¶¶ 12-13. To the extent this information is secret, PWPS has made a *prima facie* showing that it derives competitive advantage from its secrecy, and that the materials constitute property rights protected under constitutional due process requirements. *Supra* ¶ 14.

24. Because PWPS has not explained how it derives a competitive advantage from the secrecy of NorthWestern’s warranty claims, it has not made a *prima facie* showing that this information is a trade secret. To the extent that NorthWestern’s warranty claims include technical data and drawings regarding PWPS’ products that are not readily ascertainable by proper means, however, PWPS has made a *prima facie* showing of confidentiality.

ORDER

IT IS HEREBY ORDERED THAT:

25. PWPS’ *Motion for Intervention for Purpose of Applying for Protective Order* is GRANTED;

26. PWPS’ *Second Supplemental Motion for Protective Order* is GRANTED in part and DENIED in part in accordance with paragraphs 23 and 24 of this Order; and

27. 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 12th day of February 2013 by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

W. A. GALLAGHER, Chairman

BOB LAKE, Vice Chairman

KIRK BUSHMAN, Commissioner

TRAVIS KAVULLA, Commissioner

ROGER KOOPMAN, 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. 7219f
Order Action Date: February 12, 2013

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