

5. On March 8, 2013, Gordon Butte Wind, LLC (Gordon Butte) filed a *Motion to Intervene for Purpose of Applying for Protective Order*, and a *Motion for a Protective Order* (Motion) to protect information requested in Data Request PSC-081.

6. On March 8, 2013, NorthWestern filed a partial response to PSC-081, in which it indicated that it would provide the requested data for Gordon Butte once the Commission issues a decision on the Motion.

7. On March 14, 2013, the Commission published notice of the Motion in its weekly agenda. At a regularly-scheduled work session on March 26, 2013, the Commission adopted this Protective Order.

FINDINGS OF FACT

8. Gordon Butte sells the energy production from a 10 megawatt wind energy project that it owns and operates near Martindale, Montana to NorthWestern pursuant to a purchase power agreement (PPA). *Aff. Bryan Rogan ¶¶ 1-2 (Mar. 8, 2013)*.

9. Gordon Butte describes the information for which it seeks protection as 15-minute and 30-minute energy production data (Production Data) that NorthWestern has obtained as a result of the PPA. *Id.* at ¶ 1.

10. According to Gordon Butte, it did not become aware of the potential disclosure of its Production Data until February 27, 2013. *Mot. for Intervention p. 2 (Mar. 8, 2013)*. Gordon Butte asserts that it will not take a position in this proceeding, and that granting intervention will not cause delay or prejudice another party. *Id.*

11. Gordon Butte 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. *Aff. Rogan ¶ 5*.

12. Gordon Butte asserts that it does not share its Production Data with anyone, but rather “takes steps to protect this information.” *Id.* at ¶ 2.

13. Bryan Rogan, a member of Gordon Butte, stated that Gordon Butte derives a competitive advantage from the secrecy of the Production Data:

Because of the nature of wind, the Production Data can easily be converted to Wind Data. . . . If the Production Data were made public, then third parties, including competitors and wind project developers, would gain valuable

information regarding the Project's wind resources, to the competitive and economic detriment of Gordon Butte.

The Production Data constitutes proprietary information because it provides valuable information regarding the wind resource in the vicinity of the Project. Developers of wind projects must spend a lot of money to test the wind resource in any potential project location to determine if there is potential for an economically viable project. If the Production Data were publicly available, then competitors and wind project developers would have free information about the wind resources in the area of the Project that could be used for their benefit. Furthermore, as the rate NorthWestern Energy pays for the energy production from the Project is public information, if the Production Data were publicly available, then the Project revenues would be publicly available, again information that is not readily available to the public.

Id. at ¶¶ 2-3.

CONCLUSIONS OF LAW

14. 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.*

15. Gordon Butte has a direct and substantial interest in disclosure of documents sought by the Commission in Data Request PSC-081, and has shown good cause as to why it did not petition for intervention before the intervention deadline. *Supra* ¶¶ 10, 12-13.

16. 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).

17. 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. 38.2.5007(3).

18. A request for protective order generally must include “a complete and specific nonconfidential identification, description, and explanation of the information, item by item or by category of items which are alike, of all information for which protection is requested, suitable for meaningful use in testimony, arguments, public discussion, orders, and the public record.” Admin. R. Mont. at 38.2.5007(3)(b); *see also* 38.2.5007(8) (The Commission notices requests for protective orders and the issuance of protective orders on its weekly agenda).

19. 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. *Id.* at 38.2.5007(4)(b); *see also* 38.2.5001(3) (defining “information” as “knowledge, observations, opinions, data, facts, and the like.”).

20. The Commission declined to protect 15-minute and 30-minute data relating to the wind facility at Judith Gap in Docket D2007.12.152. *See* Not. of Commn. Actions p. 2 (Feb. 26, 2008). The Commission reasoned:

All of the output of Judith Gap is currently contracted for sale to NWE. [Judith Gap Energy, LLC] can neither gain nor lose economic value or competitive advantage with respect to the current wind farm. The comparison between the existing wind farm and any potential expansion is too speculative to support a conclusion that the Information derives independent economic value from its secrecy or that competitive advantaged is derived from the Information’s secrecy.

Id.

21. Like the facility at Judith Gap, Gordon Butte sells all of its output to NorthWestern. *Supra* ¶ 8. Although its Production Data would have value to developers of nearby projects, Gordon Butte has not made clear how it competes with such developers now that it has a long-term PPA with NorthWestern. Like the facility at Judith Gap, Gordon Butte has not shown how it can gain or lose economic value or competitive advantage with respect to the current wind farm.

22. Although Gordon Butte has made a *prima facie* showing that its Production Data is secret information, it has not shown how it derives independent economic value or competitive

advantage from its secrecy. *See supra* ¶¶ 12-13. As a result, Gordon Butte has not made a *prima facie* showing that its Production Data is a trade secret entitled to protection under constitutional due process requirements.

ORDER

IT IS HEREBY ORDERED THAT:

23. Gordon Butte's *Motion to Intervene for Purpose of Applying for Protective Order* is GRANTED;

24. Gordon Butte's *Motion for Protective Order* is DENIED.

DONE AND DATED this 26th day of March 2013 by a vote of 3 to 2. Commissioners Lake and Gallagher dissenting.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

W. A. GALLAGHER, Chairman (Dissenting)

BOB LAKE, Vice Chairman (Dissenting)

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).