

AL BROGAN
NorthWestern Energy
208 North Montana, Suite 205
Helena, Montana 59601
Telephone: (406) 443-8903
Fax: (406) 443-8979
al.brogan@northwestern.com

SARAH NORCOTT
NorthWestern Energy
208 North Montana, Suite 205
Helena, Montana 59601
Telephone: (406) 443-8996
Fax: (406) 443-8979
sarah.norcott@northwestern.com

Attorneys for NorthWestern Energy

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

IN THE MATTER OF NorthWestern Energy's)	
Application for Approval to Purchase and Operate)	REGULATORY DIVISION
PPL Montana's Hydroelectric Facilities, for)	
Approval of Inclusion of Generation Assets Cost)	DOCKET NO. D2013.12.85
of Service in Electricity Supply Rates, for)	
Approval of Issuance of Securities to Complete the)	
Purchase, and for Related Relief)	

**NorthWestern Energy's Motion for Protective Order and
Brief in Support of the Hydroelectric Generating Facilities'
Critical Energy Infrastructure Information**

NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") hereby submits to the Montana Public Service Commission ("Commission") this *Motion for Protective Order and Brief in Support* ("Motion"). NorthWestern hereby moves the Commission, pursuant to ARM 38.2.5001 through 38.2.5030, for a protective order to govern the use and disclosure of the

information identified herein. In support of NorthWestern's Motion, NorthWestern files the *Affidavit of William T. Rhoads* ("Rhoads Affidavit"), attached hereto as Attachment 1.

I. INTRODUCTION

On October 11, 2013, pursuant to Administrative Rule of Montana ("ARM") 38.5.8228(1), NorthWestern hand delivered to the Commission staff a pre-filing letter regarding its intent to file an application seeking Commission approval of the purchase of PPL Montana, LLC's ("PPLM") 11 hydroelectric generating facilities, one storage reservoir and related assets in Montana ("Hydros") and for related relief ("Application"). At this time, NorthWestern intends to file information related to the Hydros' safety and operation with its Application.

NorthWestern also anticipates that similar information may be asked for in the discovery process. This information is Critical Energy Infrastructure Information ("CEII") pursuant to the Federal Energy Regulatory Commission's ("FERC") regulations.

As described more specifically herein, NorthWestern seeks a protective order from the Commission to keep confidential certain information, specifically any of the Hydros' CEII needed to either support its Application or requested by the Commission or a party in the docket. Therefore, NorthWestern, as the provider, respectfully requests the Commission grant protection of the CEII that will be filed with NorthWestern's Application and any CEII that is responsive to discovery or included in the rebuttal testimony in this docket.

NorthWestern has considered that the Commission is a public agency and that there is a presumption of access to documents and information in the Commission's possession. NorthWestern understands it has the burden of demonstrating that the identified information is confidential information and that it must, within this Motion, establish a *prima facie* showing of confidentiality, factually and legally, and make clear the basis for the claim of confidentiality.

NorthWestern fully appreciates the dilemma faced by the Commission in administering the state's broad right to access public information. NorthWestern, in this Motion, respectfully represents that it has overcome the presumption that the public should have unrestricted access to the documents and information described herein. NorthWestern provides herein a *prima facie* showing of confidentiality, both factually and legally, and explains the basis for the claim of confidentiality.

NorthWestern notes for the benefit of the Commission that the Commission in the past, pursuant to § 69-3-105, MCA, has protected information that was identified as "critical security infrastructure information" as it "certainly appears to require protection in the interests of public safety." See Docket No. D2005.6.105, Motion for Protective Order filed by Qwest Corporation, Protective Order No. 6670a, p. 2; see also Commission minutes for the week of February 27, 2006, ¶ 77 ("Commissioner Schneider moved to grant the Protective Order related to item 1 on the grounds of confidential business information for critical security infrastructure information. Commissioner Raney seconded the motion, which passed unanimously.").

II. CONTACT PERSONS

The contact persons regarding this Motion and regarding the documents to be protected are:

AL BROGAN
NorthWestern Energy
208 North Montana, Suite 205
Helena, MT 59601
Telephone: (406) 443-8903
Fax: (406) 443-8979
Email: al.brogan@northwestern.com

SARAH NORCOTT
NorthWestern Energy
208 North Montana, Suite 205
Helena, MT 59601
Telephone: (406) 443-8996
Fax: (406) 443-8979
Email: sarah.norcott@northwestern.com

III. IDENTIFICATION OF CONFIDENTIAL INFORMATION

A complete and specific non-confidential identification, item by item or by category of like items, for which protection is being sought, includes all information designated as CEII by FERC on its website for the hydroelectric projects identified as P-2188, P-1869, P-2301, and P-5. More specifically, the documents that contain confidential and trade secret information relating to the Hydros for which NorthWestern seeks protection are identified as follows:

1. portions of the annual safety inspections and reports performed on the Hydros by FERC as well as portions of those safety reports performed pursuant to Section 18, Part 12 of the Federal Power Act;
2. portions of the Emergency Action Plans (“EAP”) for the Hydros; and
3. any and all other CEII for the Hydros that might be sought by the Commission or a party in the docket, or that is needed to support NorthWestern’s rebuttal testimony, if any.

(collectively referred to as “Hydros’ CEII”).

IV. FACTUAL AND LEGAL BASES FOR PROTECTION

For the items listed above, a complete and specific factual basis, including thorough identification and explanation of specific facts, and a complete and specific legal basis and application of the law to facts follows. An affidavit supporting the facts is attached as required by ARM 38.2.5007(3)(c). The affiant is a person qualified on the subject matter, and the affidavit supports the claim of confidentiality of the Hydros’ CEII.

NorthWestern offers alternative bases for protection of the information. First, CEII is entitled to legal protection based on FERC’s regulations that CEII is

specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that: (i) Relates details about the production, generation, transportation, transmission, or distribution of energy; (ii) Could be useful to a person in planning an attack on critical infrastructure; (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and (iv) Does not simply give the general location of the critical infrastructure.

18 C.F.R. § 388.113(c)(1)¹. Critical infrastructure is “existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.” 18 C.F. R. § 388.113(c)(2). Information can be designated as CEII by FERC or the person providing it to FERC. FERC regulations provide that CEII shall not be readily accessible by the public. 18 C.F.R. § 388.113(d). The Commission may protect information that is “otherwise legally protectable. ARM 38.2.5007(2). Section 69-3-105(2), MCA, provides in part that “[t]he commission may issue a protective order when necessary to preserve . . . other information that must be protected under law, as required to carry out its regulatory functions.”

Given the nature of CEII and the protection given to it by FERC, the Commission should likewise protect the interest of the public by granting NorthWestern’s request for a protective order for the Hydros’ CEII. Pursuant to § 2-2-103, MCA, the Commission has a responsibility to carry out its public duties for the benefit of Montana citizens; it is in a position of public trust. Thus, any Commission action or decision should not put Montana citizens in harm’s way. Public disclosure of the Hydros’ CEII could potentially do just that and therefore should be avoided. Thus, the Commission should grant NorthWestern’s request to protect the Hydros’ CEII pursuant to § 69-3-105(2), MCA, in order to avoid such a situation and because, as described above, the information is otherwise legally protectable.

¹ After the events of September 11, 2001, FERC determined that certain information that previously had been public would no longer be available to the general public. *See* 68 Fed. Reg. 9857-01 (March 3, 2003). Due to the terrorist events that occurred as well as the threat of future terrorist acts, FERC was “convinced that the responsible course is to protect CEII.” *Id.*, at 9859. With that conviction in mind, FERC later adopted regulations that provided the appropriate procedure for requests to treat information as privileged CEII as well as rules that govern access to such information. 18 C.F.R. §§ 388.112 and .113.

Alternatively, the Commission should protect the Hydros' CEII as trade secret. ARM 38.2.5007(2). Section 69-3-105(2), MCA, provides that "[t]he commission may issue a protective order when necessary to preserve trade secrets, as defined in [§] 30-14-402...as required to carry out its regulatory functions."

With respect to protection based on trade secret, § 30-14-402(4), MCA, provides, in pertinent part:

"Trade secret" means information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

NorthWestern provides the following analysis to support its argument that the Hydros' CEII should be protected as trade secret.

1. The confidential material is information.

"Information" includes knowledge, observations, opinions, data, facts, and the like, whether recorded or communicated in writing, orally, electronically, or otherwise, and whether provided through pleadings, reports, exhibits, testimony, work papers, or similar items or attachments to such items, or in response to discovery, subpoena, order, audit, investigation, or other request. ARM 38.2.5001(3).

The Hydros' CEII constitutes opinions, data, facts and the like regarding the Hydros' (1) EAP, which provide the appropriate procedures for notification during the occurrence of certain major events and includes maps showing the areas of inundation in the event of a dam failure (from a terrorist standpoint this could be valuable information); (2) annual dam safety inspections performed by FERC; and (3) Part 12 safety reports prepared by an independent engineering firm every five years. Rhoads Affidavit, ¶7.

2. The confidential information is in fact secret.

The Hydros' CEII is in fact secret since the FERC has limited access to such information and will not generally disclose it to the public. Rhoads Affidavit, ¶ 8. To the best of NorthWestern's knowledge, this information is kept secret by PPLM. *Id.* Prior to obtaining any information regarding the Hydros, including the Hydros' CEII, NorthWestern had to sign a non-disclosure agreement, which provisions of confidentiality continue to exist today. *Id.*, at ¶ 6. Perhaps most importantly, the confidential information is kept secret for a good reason, namely, the protection of critical infrastructure like dams from those seeking to do harm to that infrastructure and persons in proximity to such facilities.

3. The confidential information is subject to efforts reasonable under the circumstances to maintain its secrecy.

Since obtaining a copy of parts of the Hydros' CEII, NorthWestern has only disseminated the documents internally on a "need to know" basis. Rhoads Affidavit, ¶ 9. Furthermore, NorthWestern protects similar CEII information from public disclosure. *Id.* Pursuant to FERC Order 890, ¶ 404, NorthWestern, as it relates to its transmission-related information, which also contains information considered to be CEII by FERC, has established a procedure to release that information to third parties. Rhoads Affidavit, Exhibit A. NorthWestern does not release CEII unless the requestor (1) has a legitimate need for the information and (2) will sign a confidentiality agreement. Rhoads Affidavit, ¶ 9.

After issuance of a protective order from this Commission, NorthWestern will maintain the secrecy of the information to be protected. Rhoads Affidavit, ¶ 10. For docket purposes, the protected information is placed on yellow paper and maintained in a secure location with access limited to those NorthWestern employees, attorneys and consultants who have a "need to know" based upon NorthWestern's internal controls. *Id.* Because NorthWestern continues to maintain

the secrecy of the Hydros' CEII, the information maintains its status as a NorthWestern trade secret. *See* § 30-14-402(4), MCA.

4. The confidential information is not readily ascertainable by proper means.

Since the information to be protected is not within the public domain, it is not readily ascertainable by any other person or entity. The information is not released to the general public. Rhoads Affidavit, ¶ 8. As noted above, at NorthWestern, CEII may be released to a requester after demonstrating need and signing a confidentiality agreement. *Id.*, at ¶ 9. Since the Hydros' CEII, specifically the dam safety reports and EAP, is dated post-September 11, 2001, no one could reasonably ascertain it by accessing any publicly available information. *Id.*, at ¶¶ 7 and 8.

5. The confidential information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy.

ARM 38.2.5007(4)(b)(vi) specifies that the secret information must derive independent economic value or competitive advantage from its secrecy. As described in the Rhoads Affidavit, the Hydros' CEII derives economic value or competitive advantage from its secrecy since it prevents certain information about critical energy infrastructure from being available and accessible by terrorists or other individuals that might attempt to attack these facilities. Rhoads Affidavit, ¶ 11.

V. SUMMARY AND REQUEST FOR RELIEF

Accordingly, the Hydros' CEII contains trade secret and otherwise legally protectable confidential information within the meaning of ARM 38.2.5007. Protection of this information is required in order to protect public safety and critical energy infrastructure in a world where there are those who seek to attack such infrastructure. As a result, the Commission is well supported in a decision to preserve the confidentiality of such information identified above through the issuance of a protective order. Consistent with the Montana Supreme Court's pronouncements in

Great Falls Tribune v. Montana Public Service Commission, 2003 MT 359, 319 Mont. 38, 82 P.3d 876, and the Commission's authority under § 69-3-105(2), MCA, NorthWestern therefore respectfully requests a protective order covering the Hydros' CEII. In support of this Motion, NorthWestern has attached the *Affidavit of William T. Rhoads*.

Respectfully submitted this 3rd day of December, 2013.

NORTHWESTERN ENERGY

By: 
Sarah Norcott
Al Brogan
Attorneys for NorthWestern Energy

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

IN THE MATTER OF NorthWestern Energy's)
Application for Approval to Purchase and Operate) REGULATORY DIVISION
PPL Montana's Hydroelectric Facilities, for)
Approval of Inclusion of Generation Assets Cost) DOCKET NO. D2013.12.85
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Purchase, and for Related Relief)

Affidavit of William T. Rhoads

STATE OF MONTANA)
) : ss.
County of Missoula)

I, William T. Rhoads, being first duly sworn upon oath, depose and state as follows:

1. I am the General Manager of Generation for NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern"). My responsibilities include management of all NorthWestern's generation facilities as well as NorthWestern's environmental and real estate departments. Part of my job duties are to ensure that NorthWestern's generation facilities are operated efficiently and safely.

2. This affidavit is provided to explain and support why the Critical Energy Infrastructure Information ("CEII") documents are protectable under the law as "otherwise legally protectable" information and as trade secret information within the meaning of ARM 38.2.5007.

3. NorthWestern has entered an agreement to acquire 11 hydroelectric generating facilities, one storage reservoir and other related assets (the "Hydros") from PPL Montana, LLC ("PPLM") and requests that any and all CEII relating to the Hydros in this docket: (i) be

determined as protectable under the law as “otherwise legally protectable” in order to protect public safety; (ii) alternatively, be determined to be trade secret and thus, confidential information; and (iii) be made subject to a protective order, preventing public disclosure of that information.

4. Several CEII documents could be attached as exhibits to my pre-filed direct testimony in this docket. These documents include portions of the Hydros’ annual safety inspections and reports and portions of the Hydros’ Emergency Action Plans (“EAP”). Additionally, other CEII documents may be requested by the Commission or other parties to the docket through the discovery process or included in rebuttal testimony.

5. I am familiar with the CEII documents related to the Hydros and have personal knowledge of the facts stated herein. Opinions expressed herein are based upon my experience, as well as my knowledge of the treatment of CEII documents generally.

6. CEII is information that the Federal Energy Regulatory Commission (“FERC”) defines as

Specific engineering, vulnerability, or detailed design information about proposed or existing infrastructure that: (i) Relates to the production, generation, transportation, transmission, or distribution of energy; (ii) Could be useful to a person planning an attack on critical infrastructure; (iii) Is exempt from statutory mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and (iv) Does not simply give the location of the critical infrastructure.

18 C.F.R. § 388.113(c)(1). As stated above, I intend to attach to my pre-filed direct testimony copies of documents that contain information regarding the Hydros’ dam safety and operations. These documents are CEII. NorthWestern received copies of these CEII documents for which it seeks protection from PPLM during NorthWestern’s due diligence process on the Hydros and as more recent documents have been made available. Prior to receiving a copy of these documents, NorthWestern had to sign a non-disclosure agreement, which agreement is still applicable today.

7. More specifically, the CEII documents that I intend to attach to my testimony are documents that contain opinions, data and facts regarding the Hydros' (1) EAP, which provide the appropriate procedures for notification during the occurrence of certain major events and include maps showing the areas of inundation in the event of a dam failure (from a terrorist standpoint, this could be valuable information); (2) annual dam safety inspections performed by FERC; and (3) Part 12 safety reports prepared by an independent engineering firm every five years. These documents are all recently dated documents.

8. Documents that are CEII are not available to the public. FERC's website prevents access to these documents. With regard to the Hydros' information that is CEII, the FERC on its website (identified by FERC as P-2188, P-1869, P-2301, and P-5) has limited access to many documents because they contain CEII. To the best of my knowledge, PPLM has also kept this CEII information secret and out of the public domain. Thus, in my opinion, this information could not be reasonably ascertained in any publicly available information. The CEII information is in fact secret.

9. The CEII information in this case has only been provided to or viewed by those individuals at NorthWestern with a "need to know" basis. This information is subject to efforts reasonable under the circumstances to maintain its secrecy and the documents are not readily ascertainable by proper means within the meaning of ARM 38.2.5007(4)(b)(iv) and (v).

NorthWestern has also adopted a policy to protect information that is CEII. See the attached Exhibit A for a copy of NorthWestern's policy on this matter. NorthWestern will not provide information that contains CEII unless (i) the requestor has a legitimate need for the information; and (ii) will sign a non-disclosure agreement.

10. After issuance of a protective order by this Commission, NorthWestern will continue to maintain the secrecy of the CEII documents. For docket purposes, the CEII documents will be placed on yellow paper, pursuant to Commission rules, and maintained in a secure location with access limited to those NorthWestern employees, attorneys and consultants with a “need to know” basis, which is consistent with NorthWestern’s internal controls.

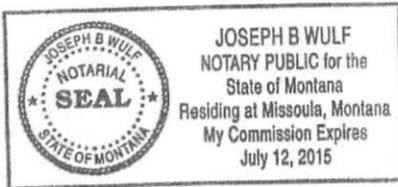
11. NorthWestern derives independent economic value from keeping the Hydros’ CEII documents secret within the meaning of ARM 38.2.5007(4)(b)(vi) because it prevents certain information about critical energy infrastructure from being available and accessible by terrorists or other individuals that might attempt to attack these facilities.

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DATED this 3rd day of December 2013.

William T Rhoads
William T. Rhoads

SUBSCRIBED AND SWORN TO BEFORE me this 3rd day of December 2013.



Joseph B Wulf
Print or Type Name: JOSEPH B WULF
Notary Public for the State of Montana

Residing at MISSOULA, Montana

My Commission Expires: JULY 12, 2015

EXHIBIT A

NorthWestern Energy (NWMT) Procedure for Required Disclosure of Critical Energy Infrastructure Information (CEII)

In the event the company receives a request for transmission-related information that is considered CEII or of a confidential nature, the requestor will be asked to submit the request in written or electronic format. Such requests will be forwarded to the Director-Transmission Operations for review and approval.

If the requestor is determined to have a legitimate need for the information, NWMT will forward a non-disclosure agreement for completion by the requestor. Non-disclosure agreements will include a description of the information being provided and the use the requestor intends for the information.

Upon receipt of the completed non-disclosure agreement from the requestor, the Director-Transmission Operations will provide written authorization for the appropriate personnel to release the subject information to that specific party.

CERTIFICATE OF SERVICE

I hereby certify that a copy of NorthWestern Energy's Motion for Protective Order and Brief in Support of the Hydroelectric Generating Facilities' Critical Energy Infrastructure Information in Docket No. D2013.12.85 has been hand delivered to The Montana Public Service Commission (MPSC) and The Montana Consumer Counsel. A copy has been e-filed on the MPSC website.

Date: December 3, 2013



Nedra Chase
Administrative Assistant
Regulatory Affairs

Ms. Kate Whitney
Administrator
Montana Public Service Commission
1701 Prospect Ave.
P. O. Box 202601
Helena MT 59620-2601

Mr. Robert A. Nelson
Montana Consumer Counsel
111 N. Last Chance Gulch
Suite 1B
Helena MT 59620-1703