

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

IN THE MATTER OF the Application of) REGULATORY DIVISION
NorthWestern Energy for Hydro Assets) DOCKET NO. D2013.12.85
Purchase) ORDER NO. 7323e

PROTECTIVE ORDER

PROCEDURAL HISTORY

1. On December 20, 2013, NorthWestern Corporation doing business as NorthWestern Energy (NorthWestern) filed its *Application for Hydro Assets Purchase* (Application) with the Montana Public Service Commission (Commission). The Commission issued a *Notice of Application and Intervention Deadline and Initial Procedural Schedule* on December 23, 2013.

2. On December 27, 2013, the Commission issued Data Request PSC-018(a), which asked NorthWestern to provide, “for each year represented in the LT Rev Req Model and the DCF Model, . . . an itemized list of the capital expenditures included in the exhibits [attached to its Application] as aggregate figures.”

3. On January 17, 2014, NorthWestern filed a *Motion for Protective Order of Confidential Information and Brief in Support* (Motion), as well as the *Affidavit of Charles S. Baker*. The Commission published notice of the Motion in its weekly agenda on January 23, 2014.

FINDINGS OF FACT

4. In its Motion, NorthWestern seeks to protect the “description column and the annual amount columns” of the itemized list of capital expenditures (PPL Capital Expenditures) for the generation facilities currently owned by PPL Montana, LLC (PPL Montana). Mot. p. 3 (Jan. 17, 2014). The list of PPL Capital Expenditures “contains information about PPL Montana’s operations and budget for its generation facilities, including details about the

planned maintenance at generation facilities and the cost of such maintenance, for the period from 2013 through 2017.” Aff. Charles S. Baker ¶ 5 (Jan. 17, 2014).

5. 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. Mot. at p. 2.

6. The PPL Capital Expenditures consist of “observations, data, and facts in the nature of operations and maintenance descriptions and budgetary amounts formulated by PPL[Montana] staff for its generation facilities.” *Id.* at p. 3.

7. According to Charles S. Baker, the Controller for PPL Montana, the list of PPL Capital Expenditures “is secret, not available anywhere publicly, either in financial disclosure documents regulatory filings or elsewhere, and is treated as extremely sensitive and confidential by PPL Montana and its affiliates.” Aff. Baker at ¶¶ 6-7 (“PPL Montana revealed this information to NorthWestern on the condition that NorthWestern had entered into a confidentiality agreement”).

8. According to Mr. Baker, “No public documents exist which could reveal this information by any means,” and “no one could reasonably ascertain this information by accessing any publicly available information.” *Id.* at ¶ 8.

9. NorthWestern and PPL Montana assert that disclosure of the PPL Capital Expenditures

would give competitors and potential competitors insight into the timing of repairs, replacements, upgrades, [and] maintenance at individual generation facilities, which would give competitors and potential competitors the ability to discern the timing and length of planned outages and determine the amount of supply PPL Montana has available for sale. Competitors could then take advantage of this information to position their own generation, assets, or purchased power to capitalize on PPL Montana’s need to purchase electricity from the market to cover its electricity commitments while its own generation assets are offline. . . .

[V]endors that submit bids for PPL Montana's capital expenditure projects would be able to see amounts the PPL Montana has budgeted for and anticipates spending on a particular project. The vendors may then escalate their bids to provide services to PPL Montana based on their knowledge of PPL Montana's valuation of the project.

Aff. Baker at ¶¶ 9-10; Mot. at p. 6.

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) (2013).

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) (2014).

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); *see also* 38.2.5001(3) (defining “information” as “knowledge, observations, opinions, data, facts, and the like.”).

13. NorthWestern has demonstrated that the list PPL Capital Expenditures are secret information that is not readily ascertainable by proper means, is subject to reasonable efforts to maintain its secrecy, and derives independent economic value from its secrecy. *Supra* ¶¶ 6-9. NorthWestern has therefore made a *prima facie* showing that the PPL Capital Expenditures are trade secrets entitled to protection under constitutional due process requirements.

ORDER

IT IS HEREBY ORDERED THAT:

14. NorthWestern’s *Motion for Protective Order* is GRANTED;

15. Information submitted in accordance with this Order be treated as confidential pursuant to Title 38, Subchapter 50 of the Administrative Rules of Montana; and

16. NorthWestern file the response to PSC-018 in accordance with this Order by January 30, 2014.

DONE AND DATED this 28th day of January, 2014 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)

Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

(7-26-00)

ARM 38.2.5012

Docket No. D2013.12.85, Order No. 7323e

Order Action Date: January 28, 2014

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