

Service Date: February 18, 2014

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. 7323f

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).
2. On January 28, 2014, the Commission granted NorthWestern's *Motion for Protective Order of Confidential Information and Brief in Support*, supported by the *Affidavit of Charles S. Baker*. The Commission specifically protected the itemized list of capital expenditures for the generation facilities owned by PPL Montana, LLC (PPLM) requested in Data Request PSC-018. *See Or. 7323e ¶ 4* (Jan. 28, 2014).
3. On January 24, 2014, NorthWestern filed a *Motion for Protective Order of Confidential Capital Expenditure Information and Brief in Support* (Second Motion), as well as the *Affidavit of Charles S. Baker* (2d Aff. Baker).
4. On January 31, 2014, NorthWestern filed a *Motion for Protective Order of Confidential Information Provided in Response to Data Request PSC-057 and Brief in Support* (Third Motion), as well as the *Affidavit of Charles S. Baker* (3d Aff. Baker).
5. In its Third Motion, NorthWestern asserts that it "received several Data Requests from Commission staff," and as "part of its response to Data Request PSC-057, NorthWestern is providing Attachments 2 and 3 thereto." 3d Mot. p. 1 (Jan. 31, 2014). Although NorthWestern's Response to Data Request PSC-057¹ did not refer to Attachments 2 or 3, its Response to Data

¹ Data Request PSC-057 asked why NorthWestern, "in a transaction of this magnitude, [could] not be expected to finance a greater share of the acquisition through debt, rather than equity, thereby reducing the overall cost. . . ."

Request MCC-057² filed on February 4, 2014 did refer to those Attachments: “On January 31, 2014, NorthWestern filed a motion for protective order regarding Attachments 2 and 3.”

6. The Commission published notice in its weekly agenda of the Second Motion on January 30, 2014, and the Third Motion on February 6, 2014.

FINDINGS OF FACT

7. In its Second Motion, NorthWestern indicates that it “is providing certain documents designated as by [sic] Bates Numbers MCC_006_00000001-MCC_006_00000422 in partial response to one or more of the Data Requests,” including

- References to specific capital expenditures for pond liners and bag houses at fossil units at Bates Numbers MCC_006_00000048 and MCC_006_00000070;
- References to Colstrip Unit 1 & 2 generator rewind and drag chain capital expenditures on Bates Number MCC_006_00000095; and
- References to Colstrip Unit 3 & 4 generator rewind issues on Bates Numbers MCC_006_00000095 and MCC_006_00000096.

2d Mot. p. 3 (Jan. 24, 2014); 2d Aff. Baker ¶ 2 (Jan. 24, 2014).

8. In its Third Motion, NorthWestern seeks to protect “references to capital expenditure projects and operations and maintenance, including descriptions of the projects, budgeted costs, and projected, future costs in Attachments 2 and 3 to Data Request [MCC]-057.”

3d Mot. at p. 3. Specifically:

These documents contain limited references to specific, future capital expenditures and operation and maintenance of PPLM that were provided by PPLM to NorthWestern during the course of negotiations of the proposed transaction on the basis that NorthWestern would protect the confidentiality of the information.

Id. at pp. 1-2. According to Charles S. Baker, the Controller for PPL Montana:

The information in Attachments 2 and 3 for which protection is sought contains information about PPL Montana's budget for its generation facilities and/or estimates of capital expenditures for its generation facilities outside of the budget, including details about the planned maintenance and/or upgrades at generation facilities and the cost of such maintenance and/or upgrades, for future periods of time.

² Data Request MCC-057 asked NorthWestern to “provide a complete list of historical expenditures (dates, dollar amounts and equipment) and proposed budget forecasts for each unit at each plant.”

3d Aff. Baker ¶¶ 5-6 (Jan. 31, 2014); *see also* Or. 7323e at ¶ 4 (protecting “information about [PPLM’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”).

9. 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. 2d Mot. at p. 2; 3d Mot. at p. 2.

10. The information NorthWestern seeks to protect in both Motions “constitutes material observations, data, and facts in the nature of operations and maintenance descriptions and budgetary amounts formulated by PPLM staff for its generation facilities.” 2d Mot. at p. 4; 3d Mot. at pp. 3-4.

11. According to both Motions:

The Confidential Information is in fact secret. It is not available anywhere publicly and is considered extremely sensitive. The Confidential Information is required to be kept secure, both physically and electronically, under the Information Security policies of PPL Corporation and PPLM. The Confidential Information was provided to NorthWestern by PPLM only after NorthWestern entered into a confidentiality agreement whereby it agreed not to disclose any confidential information obtained from PPLM, including the Confidential Information. As such, NorthWestern is obligated to protect the Confidential Information from public disclosure.

2d Mot. at p. 5; 3d Mot. at p. 4 (internal citations omitted).

12. According to Mr. Baker, the Controller for PPL Montana:

Information about future operations and maintenance data, including 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.

PPL Montana engages in extensive efforts to protect the confidentiality of the type of information for which protection is sought. Under the Information Security policies of PPL Corporation and PPL Montana, PPL employees are required to keep this information secure, both physically and electronically, and accessible only to employees with the appropriate need to know such information. PPL Montana revealed this type of information to NorthWestern on the condition that NorthWestern had entered into a confidentiality agreement whereby they had agreed not to disclose this type of information.

2d Aff. Baker at ¶¶ 6-7; 3d Aff. Baker at ¶¶ 6-7.

13. 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.” 2d Aff. Baker at ¶ 8; 3d Aff. Baker at ¶ 8.

14. NorthWestern and PPL Montana assert that disclosure of the information 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.

2d Aff. Baker at ¶¶ 9-10; 3d Aff. Baker at ¶¶ 9-10; *see also* 2d Mot. at pp.7-8; 3d Mot. at pp. 6-7.

CONCLUSIONS OF LAW

15. 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).

16. 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).

17. 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.”).

18. The Commission has previously protected future capital expenditures planned by PPLM at its generation facilities, including its budget and “details about the planned maintenance at generation facilities and the cost of such maintenance.” *See* Or. 7323e at ¶ 4.

19. NorthWestern has demonstrated that itemized, future capital expenditures planned by PPLM at its generation facilities are secret, are not readily ascertainable by proper means, are subject to reasonable efforts to maintain their secrecy, and derive independent economic value from their secrecy. *Supra* ¶¶ 9-13. NorthWestern has therefore made a *prima facie* showing that future capital expenditures planned by PPLM at its generation facilities are trade secrets entitled to protection under constitutional due process requirements.

ORDER

IT IS HEREBY ORDERED THAT:

20. NorthWestern’s Second and Third Motions are GRANTED;
21. Information submitted in accordance with this Order be treated as confidential pursuant to Title 38, Subchapter 50 of the Administrative Rules of Montana; and
22. NorthWestern file responses to any Data Requests seeking information about future capital expenditures planned by PPLM at its generation facilities no later than February 18, 2014.

DONE AND DATED this 13th day of February, 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. 7323f

Order Action Date: February 13, 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