

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. 7323g

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 December 27, 2013, the Commission issued Data Request PSC-001, which asked NorthWestern to provide the Confidential Information Memorandum (CIM) of PPL Montana, LLC (PPLM) referred to in testimony attached to the Application.
3. On January 3, 2014, the Montana Consumer Counsel (MCC) issued Data Requests MCC-009 and MCC-010, which asked NorthWestern to “provide copies of all communications” with PPL Montana, LLC (PPLM), to identify all meetings with PPLM and the people involved, and to “provide copies of all notes and other documents related to those meetings.”
4. On January 10, 2014, NorthWestern filed a *Motion for Protective Order of Confidential Projections and Brief in Support* (First Motion), as well as the *Affidavit of Joel D. Cook*, Vice President of Retail Marketing and Western Trading of PPL EnergyPlus, LLC (PPL EnergyPlus), an affiliate of PPLM. NorthWestern’s First Motion referred to information contained in the CIM.
5. On January 23, 2014, the Commission granted NorthWestern’s First Motion in *Protective Order 7323c*, protecting “PPL EnergyPlus’ projected, future incremental prices and revenue.” Or. 7323c ¶¶ 4, 14 (Jan. 23, 2014).

6. On January 24, 2014, NorthWestern objected to Data Requests MCC-009 and MCC-010. On February 3, 2014, the MCC filed a *Response to Objections and Motion to Compel*.

7. On February 6, 2014, the Commission overruled NorthWestern's objections to Data Requests MCC-009 and MCC-010 in part (to the extent they were not narrowed by the MCC itself). *See* Notice of Commn. Action p. 4 (Feb. 10, 2014).

8. On February 18, 2014, NorthWestern filed a *Motion for Protective Order of Confidential Projections in MCC-009 and MCC-010 Responses and Brief in Support* (Second Motion) with a second *Affidavit* from Mr. Cook. NorthWestern explained that during its review of communications and meeting documents responsive to Data Requests MCC-009 and MCC-010, it "identified a series of documents" containing "projected information about PPL EnergyPlus['] Western Power Marketing Business and PPL EnergyPlus' existing wholesale and retail marketing contracts," as well as "**forecasts of uncontracted generation** from PPL Montana's generation fleet **through 2019**." 2d Mot. p. 2 (Feb. 18, 2014) (emphasis added)

9. On February 20, 2014, the Commission published notice of NorthWestern's Second Motion in its weekly agenda.

FINDINGS OF FACT

10. In *Protective Order 7323c*, the Commission protected "estimates and projected information," including

details about PPL EnergyPlus' projected, future incremental prices and revenue, such as average peak prices for and streams of revenue from existing wholesale and retail contracts that NorthWestern will not be acquiring as part of NorthWestern's agreement to purchase the hydroelectric facilities of PPLM.

Or. 7323c at ¶¶ 4, 14.

11. In its Second Motion, NorthWestern again seeks to protect "estimates and projected information" on behalf of PPL EnergyPlus, namely:

projected, future incremental prices, **aggregate uncontracted generation amounts**, revenue, **and expenses** such as average peak prices for and streams of revenue from existing wholesale and retail contracts **and generation** that NorthWestern will not be acquiring as part of NorthWestern's agreement to purchase the hydroelectric facilities of PPLM.

2d Mot. at p.4 (emphasis added). Mr. Cook describes this information as

details about projected, future incremental prices and revenue from existing PPL EnergyPlus wholesale and retail marketing contracts, both financial and physical, **and marketing expenses for the period from late 2013 through as late as 2032.** . . . The estimates include average peak prices for and streams of revenue from existing wholesale and retail contracts that NorthWestern will not be acquiring as part of NorthWestern's agreement to purchase the hydroelectric facilities of PPL Montana.

Aff. Joel D. Cook ¶ 6 (Feb. 18, 2014) (emphasis added).

12. In *Protective Order 7323c*, the Commission described what it was protecting more specifically as

information [that] provides significant insights about: future average estimated prices that PPL EnergyPlus expects for the next **five** years; indications to competitors and customers about PPL EnergyPlus' future financial position, relative financial strength or weakness, and the amount of hedging activity undertaken by PPL EnergyPlus; a picture of the amount of volume remaining available for sale by PPL EnergyPlus in future years and the volumes already committed to sale; the relative portions of PPL EnergyPlus' supplies committed to wholesale versus retail sales in future years; estimates of PPL EnergyPlus' future wholesale and retail pricing strategies for wholesale and retail sales; and estimates of future retail and wholesale prices actually agreed to by PPL EnergyPlus in past periods.

Or. 7323c at ¶ 4 (emphasis added).

13. In support of the Second Motion, Mr. Cook describes what NorthWestern is again seeking to protect as

information [that] provides significant insights about: future average estimated prices that PPL EnergyPlus expects for the next **six** years; indications to competitors and customers about PPL EnergyPlus' future financial position, **expenses**, relative financial strength or weakness, and the amount of hedging activity undertaken by PPL EnergyPlus; a picture of the amount of volume remaining available for sale by PPL EnergyPlus in future years and the volumes already committed to sale; the relative portions of PPL EnergyPlus' supplies committed to wholesale versus retail sales in future years; estimates of PPL EnergyPlus' future wholesale and retail pricing strategies for wholesale and retail sales; and estimates of future retail and wholesale prices actually agreed to by PPL EnergyPlus in past periods.

Aff. Cook at ¶ 11 (emphasis added).

14. 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.

15. The information described above consist of “material observations, data, and facts in the nature of projections” formulated by staff and consultants for PPL EnergyPlus “as to PPL EnergyPlus’ **future** financial results and condition with respect to existing wholesale and retail contracts.” *Id.* at pp. 4-5 (emphasis added).

16. According to Mr. Cook, “This information 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 EnergyPlus and its affiliates.” *Aff. Cook* at ¶¶ 4, 8 (NorthWestern “entered into a confidentiality agreement with PPL Corporation promising to protect the confidentiality of the information provided to NorthWestern.”).

17. Mr. Cook again asserts, “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”:

PPL EnergyPlus engages in extensive efforts to protect the confidentiality of information like that contained in Financial Models, CIM, and Management Presentation. Our wholesale and retail customers generally require PPL EnergyPlus to keep this type of specific contract information confidential. Also, under the Information Security policies of PPL Corporation and PPL EnergyPlus, PPL employees are required to keep this type of information secure, both physically and electronically, and accessible only to employees with the appropriate need to know such information.

Id. at ¶¶ 9-10; *see also* Or. 7323c at ¶ 7.

18. NorthWestern and PPL EnergyPlus again assert that public release of the information described above “would produce significant financial harm to PPL EnergyPlus” by:

decreasing future margins and revenues; potentially causing the increase of collateral or other credit that may be required by future counterparties; generally placing PPL EnergyPlus at an information disadvantage as compared to the competitors and customers it does business with and competes with every day; and harming the ability of PPL EnergyPlus to negotiate favorably with potential counterparties in future periods.

Aff. Cook at ¶ 12; *see also* Or. 7323c at ¶ 8.

19. Whereas NorthWestern and PPL EnergyPlus have shown that competitive advantage may be derived from the information described above about any period in the future, they have not shown that competitive advantage is derived from information about any period in the past, including “the period from late 2013 through” the present. *Aff. Cook* at ¶ 6.

CONCLUSIONS OF LAW

20. 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).

21. 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).

22. 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.”).

23. Except as provided in paragraph 19 of this Order, to the extent that the information described in NorthWestern’s Second Motion is different from what was protected in *Protective Order 7323c*, NorthWestern has made a *prima facie* showing that the information consists of trade secrets entitled to protection under constitutional due process requirements. *Supra* ¶¶ 10-19.

ORDER

IT IS HEREBY ORDERED THAT:

24. NorthWestern’s Second Motion is GRANTED IN PART and DENIED IN PART;

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

DONE AND DATED this 4th day of April, 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. 7323g
Order Action Date: April 4, 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