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

IN THE MATTER OF NorthWestern Energy's	)	
2013 and 2014 Applications for (1) Approval of	)	REGULATORY DIVISION
Deferred Cost Account Balances for Electricity	)	
Supply, CU4 Variable Costs/Credits, DGGS	)	DOCKET NO. D2013.5.33
Variable Costs/Credits, Spion Variable	)	
Costs; and (2) Projected Electricity Supply Cost	)	DOCKET NO. D2014.5.46
Rates, CU4 Variable Rates, DGGS Variable	)	
Rates, and Spion Variable Rates	)	

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**NORTHWESTERN ENERGY'S MOTION FOR PROTECTIVE ORDER  
AND BRIEF IN SUPPORT**

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NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern"), submits to the Montana Public Service Commission ("Commission") this Motion for Protective Order and Brief in Support. NorthWestern 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 its motion, NorthWestern files the Affidavit of Michael J. Barnes (“Barnes Aff.”).

## **I. Introduction**

On May 31, 2013, NorthWestern filed its 2013 Application for Approval of (1) Deferred Cost Account Balances for Electricity Supply, Colstrip Unit #4 (“CU4”) Variable Costs/Credits, and Dave Gates Generating Station (“DGGS”) Variable Cost/Credits; and (2) Projected Electricity Supply Cost Rates, CU4 Variable Rates, DGGS Variable Rates, and Spion Kop Wind Generation Asset (“Spion”) Variable Rates with the Commission (“2013 Application”) (Docket No. D2013.5.33). On February 28, 2014, NorthWestern filed a Motion to Defer Proceedings and Consolidate this Docket with the 2014 Electricity Supply Tracker Docket (“Motion”). The Commission granted the Motion. *See* Notice of Commission Action served on May 12, 2014. On May 29, 2014, NorthWestern filed its 2014 Application for Approval of (1) Deferred Cost Account Balances for Electricity Supply, CU4 Variable Costs, DGGS Variable Costs/Credits and Spion Variable Costs; and (2) Projected Electricity Supply Cost Rates, CU4 Variable Rates, DGGS Variable Rates, and Spion Variable Rates with the Commission (“2014 Application”) (Docket No. D2014.5.46). On October 22, 2014, the Commission issued Procedural Order No. 7283b in the consolidated dockets.

On October 24, 2014, the Montana Consumer Counsel (“MCC”) served NorthWestern with 112 data requests in the consolidated dockets. Specifically, MCC-015 asked for all correspondence between NorthWestern and PPL Montana concerning the outage. Upon reviewing the correspondence in NorthWestern’s control responsive to Data Request MCC-015, NorthWestern came across an attachment to one email containing information considered to be trade secret regarding coal cost information for the coal delivered to Colstrip Units 3 and 4.

NorthWestern, the provider, seeks a protective order from the Commission to keep confidential this coal cost information.

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 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.

## **II. Contact Persons**

The contact persons regarding this motion and regarding the items to be protected are:

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## **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 is:

Details concerning coal quality and pricing (“Coal Cost Information”), which are found in the Amended and Restated Coal Supply Agreement dated August 24, 1998 between The Montana Power Company (now NorthWestern Energy), Puget Sound Energy, Inc.,

Portland General Electric Company, the Washington Water Power Company (now Avista), PacifiCorp and Western Energy Company (“Agreement”).

The Commission has protected the Coal Cost Information and specifically the Agreement in prior Commission dockets. The Commission granted protection for details regarding monthly coal costs including monthly commodity costs, transportation, royalty, and adjustments in a prior docket. *See* In the Matter of NorthWestern’s Application for Approval of Annual Avoided Cost Compliance Filing – Schedule QFLT-1, Combined Docket Nos. D2006.6.94, D2007.6.59, D2008.6.62, D2009.7.95, D2010.6.62, D2011.6.54, and D2012.6.65, Order No. 6753c (April 10, 2008). Additionally, the Commission previously protected those parts of the Agreement from public disclosure that discussed the Coal Cost Information. *See* In the Matter of NorthWestern’s Application for Approval of Colstrip Unit 4 as an Electricity Supply Resource, Docket No. D2008.6.69, Order No. 6925c, ¶ 5 (July 30, 2008).

#### **IV. Factual and Legal Bases for Protection**

For the item 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 identified information.

##### **A. 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) (internal quotation omitted).

Knowledge and data concerning details regarding the Coal Cost Information is communicated in writing and contained within the Agreement. As such, the Coal Cost Information is information as defined by the ARM discussed above.

**B. The information is in fact secret.**

*1. Trade Secret*

Section 69-3-105(2), MCA (2013), provides, “The commission may issue a protective order when necessary to preserve trade secrets, as defined in 30-14-402, or other information that must be protected under law, as required to carry out its regulatory functions.” Section 30-14-402(4), MCA (2013), 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.

The Coal Cost Information is in fact secret, and NorthWestern protects such information by whatever means available. Confidentiality of this type is standard industry practice. (Barnes Aff., ¶ 2). The secrecy of this information is maintained and it is not disclosed in any public forum nor is it otherwise available in other regulatory proceedings. Specific information regarding the details of monthly coal costs for which NorthWestern seeks a protective order is information that derives actual and potential independent economic value from not being generally known and represents legally protected property interests and trade secrets. These matters are discussed in more detail below.

## 2. Confidential Business Information

The Montana Supreme Court's decision in *Great Falls Tribune v. Montana Public Service Commission*, 2003 MT 359, ¶ 39, 319 Mont. 38, 82 P.3d 876, affirmed that there are two distinct categories under which "documents" may be withheld from public inspection: trade secrets or confidential proprietary information. In this case, confidential property information is also referred to as confidential business information.

Confidential business information has long been recognized as property. *See Great Falls Tribune*, 2003 MT at ¶ 81, Concurring Opinion of Justice Nelson (citing to *Carpenter v. United States*, 484 U.S. 19, 26, 108 S.Ct. 316, 320 (1987)). The United States Supreme Court in *Carpenter* also stated that "confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy." *Carpenter*, 484 U.S. at 26. Additionally, "valid contracts are 'property,' which cannot be taken without just compensation, whether obligor be private individual, municipality, state, or United States." *Great Falls Tribune*, 2003 MT at ¶ 81 (citing to *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843 (1934)).

In order to determine the available type of protections, one must first determine what type of information is being asked to be protected. *Great Falls Tribute*, 2003 MT at ¶ 82. With respect to confidential business information, "exclusivity is an important aspect." *Carpenter*, 484 U.S. at 26. In this pleading, NorthWestern seeks to protect information generated by a coal supplier, which is designed for the exclusive use of NorthWestern and the other parties to the Agreement.

NorthWestern's request for protection is not negated because the information for which protection is sought is not its own. The *Carpenter* case, and its importance to the *Great Falls Tribune* decision, compels the conclusion that the information that NorthWestern seeks to protect is the property of its owner. The *Carpenter* case involved information contained within an upcoming Wall Street Journal article that was likely to affect the subject company's stock price. The article was deemed to be the property of the Wall Street Journal that allowed it to exclusively use the information prior to publication. *Carpenter*, 484 U.S. at 26. In this case, the Agreement includes Coal Cost Information that has value to the coal supplier. NorthWestern has acquired this information through the course of its business in being a part owner of units at Colstrip. Given this relationship, the Coal Cost Information is confidential information that must be protected.

Finally, confidentiality of property rights extends to corporations. The Montana Supreme Court in *Great Falls Tribune* found that a

non-human corporate entity may enjoy confidentiality of its property interests under Montana Statutory law, such as the Uniform Trade Secrets Act, Title 30, Chapter 14, Part 4, or protection against the 'taking' of private property for public use without just compensation under the federal and state constitutions. Such cases implicate the due process and equal protection clauses of the state and federal constitutions and form the legal grounds through which non-human entities can seek protection of confidential information.

*Great Falls Tribune*, 2003 MT at ¶ 39. Administrative agencies must follow the constitutional requirements of due process. *Montana Power Co. v. Public Service Commission*, 206 Mont. 359, 368, 671 P.2d 604, 609 (1983). The Montana Constitution guarantees equal protection of the laws and due process to all persons. Mont. Const. Art. II, §§ 4 and 17. Corporations are "included in the term 'person.'" *Montana Power Co.*, 206 Mont. at 384.

As set forth herein, release of the Coal Cost Information could harm the coal supplier's ability to conduct its business and receive competitive prices for its commodity. As stated, the Coal Cost Information to be protected consists of specific contract economic terms submitted to NorthWestern with an expectation of confidentiality and/or non-disclosure. Confidentiality of this type of information is standard industry practice. (Barnes Aff., ¶ 2). As such, the information to be protected is a legally protected property interest of the supplying party, which NorthWestern is obligated to protect.

**C. The information is subject to efforts reasonable under the circumstances to maintain its secrecy.**

Acting under normal industry standard protocol, NorthWestern protects the Coal Cost Information by whatever means available to it. (Barnes Aff., ¶ 4). This includes the use of standard industry confidentiality clauses in contracts. Utilities commonly utilize contractual language requiring that a protective order be obtained before this information is provided in a regulatory proceeding. The Agreement contains such language. Only persons with a "need to know" have access to the Coal Cost Information; it is treated as confidential information by NorthWestern employees and is kept in specific secure locations. *Id.*

After issuance of a protective order from this Commission, NorthWestern will maintain the secrecy of the information to be protected. *Id.* For docket purposes, the protected information will be placed on yellow paper and maintained in a secure location with access limited to those NorthWestern employees who have a "need to know" based upon NorthWestern's internal controls. *Id.* The information to be protected is destroyed if it becomes dated or otherwise irrelevant. *Id.* This information is currently held only by NorthWestern, other parties to the contract and the supplier. Because NorthWestern continues to maintain the Coal Cost

Information's secrecy, the Coal Cost Information retains its status as trade secret. *See* § 30-14-402(4), MCA.

**D. 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. No public documents exist which could reveal the information to be protected by any means whatsoever. A person or entity could not reasonably ascertain this information through a public source. (Barnes Aff., ¶ 4).

**E. 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 Barnes Affidavit, the supplier derives economic and operational value by virtue of this information not being generally available. (Barnes Aff., ¶ 5). If the information to be protected were to be disclosed, other suppliers seeking to bid on coal supply at Colstrip plants would gain an advantage over the current supplier in the future. Disclosure of this information will provide suppliers access to prices charged by other suppliers, which may lead to an upward pressure on prices, thereby enabling new suppliers to adjust their bids to beat the competitor by offering a bid that is not necessarily the lowest bid that could be submitted. If competitors know the pricing strategies of other competitors, future coal bids would likely be distorted. Coal suppliers compete to sell their products in various markets.

As indicators of coal suppliers' bidding strategies and of pricing proposals, the information to be protected has actual and potential economic value to the supplier. *Id.* Therefore, the information to be protected has independent economic value aside from its secrecy.

V. Conclusion

The Commission has previously protected the Coal Cost Information found in the Agreement as trade secret. *See* In the Matter of NorthWestern's Application for Approval of Colstrip Unit 4 as an Electricity Supply Resource, Docket No. D2008.6.69, Order No. 6925c, ¶ 5 (July 30, 2008). For all the reasons stated herein, NorthWestern respectfully requests the Commission grant this Motion for a Protective Order to govern the use and disclosure of the Coal Cost Information.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of November 2014.

NORTHWESTERN ENERGY

By:   
Sarah Norcott  
Al Brogan

Attorneys for NorthWestern Energy

DEPARTMENT OF PUBLIC SERVICE REGULATION  
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**Affidavit of Michael J. Barnes**

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

I, Michael J. Barnes, being first sworn upon oath, depose and say:

1. I am the Manager of Montana Production Operations at NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern"). My responsibilities include oversight and management of NorthWestern's interest in Colstrip Unit 4. I also have responsibility for contract administration and origination associated with NorthWestern's ownership interest in Colstrip Unit 4 and its generation output. This is primarily accomplished through participation on two committees, the Project Committee and Mine Operating Committee. I have personal knowledge of the facts stated herein. Any opinions expressed herein are based upon my experience and expertise.

2. Itemized coal cost information is market-based information including specific contract terms submitted to NorthWestern with an expectation of confidentiality and/or non-disclosure. Confidentiality of this type of information is standard industry practice. Release of this information could competitively disadvantage the coal supplier and Colstrip Unit 4.

3. The Coal Cost Information described in NorthWestern's Motion for Protective Order are derived from the Amended and Restated Coal Supply Agreement dated August 24, 1998 between The Montana Power Company (now NorthWestern Energy), Puget Sound Energy, Inc., Portland General Electric Company, the Washington Water Power Company (now Avista), PacifiCorp and Western Energy Company ("Agreement"). The Agreement contains a confidentiality provision which contractually binds NorthWestern to keep certain information related to the agreement strictly confidential. The contract also requires notice prior to any compulsory disclosure so that the other parties might try to obtain protective orders.

4. NorthWestern and/or the coal supplier protect confidential information by whatever means available to them. This information is kept at NorthWestern in specific secure locations and is accessible only by designated individuals. After issuance of a protective order from this Commission, NorthWestern will continue to maintain the secrecy of the information to be protected. For docket purposes, the protected information will be placed on yellow paper and maintained in a secure location with access limited to those NorthWestern employees who have a "need to know" based upon NorthWestern's internal controls. The information to be protected is destroyed if it becomes dated or otherwise irrelevant. This information is currently held only by NorthWestern, other parties to the contract and the supplier. No one could reasonably ascertain this information through a public source.

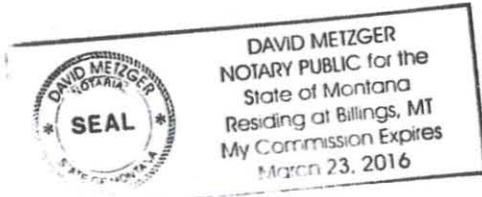
5. As indicators of coal supplier's bidding strategies and of pricing proposals, the information to be protected has actual and potential economic value to the supplier. Thus, the supplier derives economic and operational value by virtue of this information remaining confidential.

DATED this 21<sup>ST</sup> day of November 2014.



Michael J. Barnes

SUBSCRIBED AND SWORN TO BEFORE me this 21 day of November 2014.





Print or Type Name: David METZGER  
Notary Public for the State of Montana

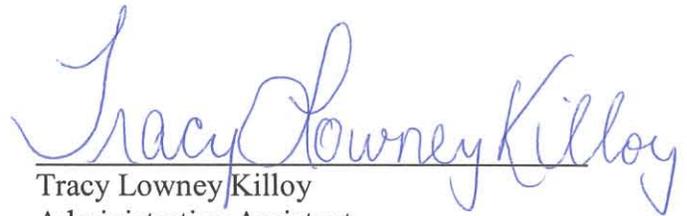
Residing at Billings, Montana

My Commission Expires: 3-23-2016

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of NorthWestern Energy's Motion for Protective Order and Brief in Support in Docket Nos. D2013.5.33/D2014.5.46 has been hand delivered to the Montana Public Service Commission and to the Montana Consumer Counsel this date. It will be e-filed on the PSC website, emailed to counsel of record, and served on the most recent service list by mailing a copy thereof by first class mail, postage prepaid.

Date: November 21, 2014

A handwritten signature in blue ink that reads "Tracy Lowney Killoy". The signature is written in a cursive style with a horizontal line drawn across the middle of the text.

Tracy Lowney Killoy  
Administrative Assistant  
Regulatory Affairs

Docket No. D2013.5.33/D2014.6.46  
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