

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

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|---------------------------------------|---|-----------------------|
| IN THE MATTER OF NorthWestern |) | REGULATORY DIVISION |
| Energy's 2012-2013 Electricity Supply |) | |
| Tracker |) | DOCKET NO. D2013.5.33 |
| |) | |
| IN THE MATTER OF NorthWestern |) | DOCKET NO. D2014.5.46 |
| Energy's 2013-2014 Electricity Supply |) | ORDER NO. 7283c |
| Tracker |) | |

PROTECTIVE ORDER

PROCEDURAL HISTORY

1. NorthWestern Corporation, doing business as NorthWestern Energy (NorthWestern), filed its 2012-2013 Electricity Supply Tracker on May 31, 2013. The Public Service Commission (Commission) granted *Interim Order 7283* on June 18, and issued a *Notice of Application and Intervention Deadline* on June 19, 2013.

2. NorthWestern filed its 2013-2014 Electricity Supply Tracker on May 29, 2014. *See Notice of Commn. Action*, Dkt. D2013.5.33 (May 12, 2014) (consolidating the trackers). The Commission issued a *Notice of Application and Intervention Deadline* on May 31, and *Interim Order 7283a* on June 17, 2014.

3. The Human Resource Council District XI, Montana Consumer Counsel (MCC), Montana Environmental Information Center (MEIC), Natural Resources Defense Council, and Sierra Club are parties to this proceeding. *See Notice of Commn. Action*, Dkt. D2013.5.33 (Aug. 20, 2014).

4. Discovery has been active in these Dockets for several months. The MEIC and Sierra Club served *Data Requests MEIC-001 through MEIC-011* on NorthWestern on September 29, and *Data Requests MEIC-012 through MEIC-032* on October 7, 2014.

5. On October 22, 2014, the Commission issued *Procedural Order 7283b*, which established specific deadlines for data requests and provided, "If a data request asks for trade

secret information, the responding party must file a motion for a protective order . . . no later than the deadline to respond to the data request.” Or. 7283b ¶ 10.

6. On October 24, the MCC served *Data Requests MCC-001 through MCC-112*, to which NorthWestern filed initial responses on November 7 and 14. On November 21, the MCC filed a *Motion to Compel Responses to Data Requests*. NorthWestern filed a *Response to the MCC’s Motion to Compel* on November 26, and an *Additional Response* on December 3. The MCC filed a *Reply in Support of Motion to Compel Responses to Data Requests* on December 5, and NorthWestern filed a *Motion to Strike the MCC’s Reply in Support of Motion to Compel* on December 8, 2014.

7. Also on December 8, the MEIC and Sierra Club filed a *Motion to Compel Responses to Data Requests*, specifically seeking responses to MEIC-001, MEIC-002, MEIC-003, MEIC-006, MEIC-008, MEIC-009, MEIC-012, MEIC-013, MEIC-014, and MEIC-017.

8. On December 9, the Commission partly granted the MCC’s *Motion to Compel* and set a deadline for the submission of any pending motions for protective orders.

9. On December 12, NorthWestern filed a *Response to the MEIC and Sierra Club’s Motion to Compel*, in which it noted “that this matter had already been resolved by the Commission,” and asserted that it had not answered the Data Requests at issue because “they involve information that Siemens plans to protect.”

10. On December 19, 2014, Siemens Energy, Inc. (SEI) filed a *Motion to Intervene*, a *Motion for Protective Order and Brief in Support*, and the *Affidavit of John P. Musone*. On December 26, 2014, the MEIC and Sierra Club filed a *Response to SEI’s Motion to Intervene and Motion for Protective Order* reserving the right to challenge the treatment of information as trade secret once it is produced and reviewed by counsel.

11. On December 31, 2014, the Commission published notice of SEI’s *Motion for Protective Order* in its weekly agenda.

FINDINGS OF FACT

12. After Colstrip Unit 4 (CU4) was damaged and taken offline in July 2013, NorthWestern contracted with SEI for consulting and repair services. Aff. John P. Musone ¶ 3 (Dec. 22, 2014). “As part of these services, SEI provided confidential, proprietary information to NorthWestern. . . . in many forms, including emails, photographs, and other reports.” *Id.*

13. SEI seeks to protect documents that “describe the repair process and pricing SEI charges its customers, in this case NorthWestern, for its consulting expertise and repair services,” including documents that “detail the manner in which SEI approaches the situations like that at issue in this matter, and the actions taken and planned to be taken on a daily basis, including technical information,” as well as “photographs of SEI’s processes, set up, equipment, and personnel” (CU4 Repair Documents). *Id.* Specifically, SEI seeks to protect:

- 144 emails and attachments with NorthWestern personnel, discussing the costs and repair process, daily repair reports and timeline information, technical aspects of SEI’s services, and other confidential information (as indicated in NorthWestern’s responses to various data requests);
- the Root Cause Analysis;
- Information in presentations, which NorthWestern has redacted in yellow (as stated in NorthWestern’s responses to data request MEIC-003);
- Milestone completion dates (as redacted in NorthWestern’s response to MEIC-012);
- July 13, 2013 owners meeting minutes approving the repair plan (as indicated in NorthWestern’s response to MEIC-006 and 014); and
- Shift repair reports (as indicated in NorthWestern’s response to MEIC-006 and 017).

Id.

14. SEI claims a legally protectable interest in the CU4 Repair Documents, and that the “sole purpose for intervention” is to protect this information. Mot. to Intervene p. 4 (Dec. 22, 2014). The Data Requests asking for this information were issued well after the intervention deadline, and SEI took action “[u]pon learning of the potential for disclosure of its trade secrets.” *Id.* Granting late intervention to SEI will not delay this matter or prejudice another party. *Id.*

15. SEI has considered that the Commission is a public agency and that there is a presumption of access to documents in the Commission’s possession. Aff. Musone ¶ 5.

16. According to John P. Musone, SEI’s Assistant Secretary and Associate Chief Intellectual Property Counsel for its parent Siemens Corporation, the CU4 Repair Documents are “not within the public domain” or readily ascertainable by proper means:

SEI does not share or disclose the [CU4 Repair Documents]. SEI protects the secrecy of the information by entering into Non-Disclosure and/or Confidentiality Agreements with its customers, including NorthWestern. Only SEI employees and representatives with a direct need to know are authorized to access the Information

and hard copies of the Information are marked as confidential and destroyed when no longer needed.

Id. at ¶¶ 8-9.

17. Mr. Musone asserts that SEI “has adopted reasonable measures to maintain the secrecy of its trade secrets:”

securing its business offices and facilities with private fences and borders restricting access via key pads requiring individual access codes, locking main building doors, locking file cabinets, password-protecting computer files, using automated e-mail encryption, and locking portable computers. SEI also shreds confidential documents that are no longer in use.

Id. at ¶ 10. SEI also requires its employees to complete “instruction modules covering, *inter alia*, protection of corporate confidential information and the importance of maintaining the secrecy of SEI’s trade secrets,” as well as “routine security programs and checks directed by company security officers to ensure that the security measures are being followed.” *Id.* at ¶ 8.

18. According to Mr. Musone, “Siemens has developed the technical expertise contained in the [CU4 Repair Documents]” through its own innovation, investment and experience in the “highly competitive” electrical generating industry:

Public disclosure of the [CU4 Repair Documents] would provide a windfall shortcut for SEI’s competitors. SEI’s competitors would obtain the benefit of this Confidential Information, without making the substantial investments, spending time, or acquiring the knowledge and experience necessary to innovate. As a result, SEI would be at a severe disadvantage. Disclosure would also allow SEI’s competitors to learn of the capabilities and limits of SEI’s technology, as well as its pricing and approach to the issues at the Colstrip power plant. This would provide SEI’s competitors a strategic advantage in competing against SEI and obtaining contracts with existing and potential SEI customers.

Moreover, disclosure of the [CU4 Repair Documents] would give present and future potential customers of SEI a distinct negotiating advantage, based on knowledge of SEI’s negotiations and business dealings with NorthWestern.

Id. at ¶¶ 11-13.

CONCLUSIONS OF LAW

19. A person may petition to intervene after the intervention deadline set forth in a procedural order “for good cause shown.” Admin. R. Mont. 38.2.2403 (2014). An entity seeking late intervention must “file a petition to intervene setting forth: (1) The general position that it intends to take; (2) a legally protectable interest directly affected by this proceeding;

(3) whether late intervention would delay the proceeding or prejudice another party; and (4) good cause for not having filed a timely petition.” Or. 7283b ¶ 6 (Oct. 22, 2014); *supra* ¶ 13.

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) (2013).

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. SEI has made a *prima facie* showing that the CU4 Repair Documents contain secret information, subject to reasonable efforts to maintain its secrecy and not readily ascertainable by proper means, from which SEI derives competitive advantage. *Supra* ¶¶ 15-18.

ORDER

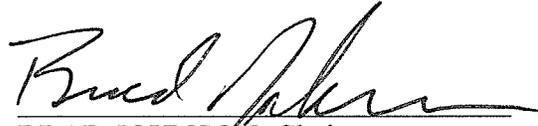
IT IS HEREBY ORDERED THAT:

24. SEI’s *Motion to Intervene* is GRANTED;
25. SEI’s *Motion for Protective Order* is GRANTED; and

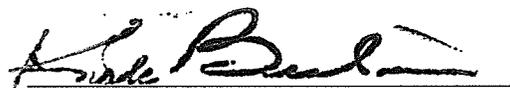
26. Information submitted in accordance with this Order be treated as confidential pursuant to Title 38, Subchapter 50 of the Administrative Rules of Montana.

DONE AND DATED this 13th day of January, 2015 by a vote of 5 to 0.

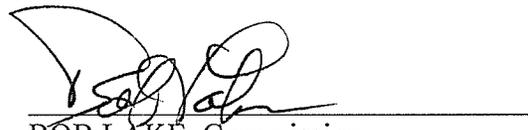
BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION


BRAD JOHNSON, Chairman


TRAVIS KAVULLA, Vice Chairman


KIRK BUSHMAN, Commissioner


ROGER KOOPMAN, Commissioner


BOB LAKE, Commissioner

ATTEST:



Aleisha Solem
Commission Secretary

(SEAL)

Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

(7-26-00)

ARM 38.2.5012

Docket Nos. D2013.5.33 & D2014.5.46, Order No. 7283c
Order Action Date: January 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