

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

IN THE MATTER OF NorthWestern )  
Energy's 2012-2013 Electricity Supply ) REGULATORY DIVISION  
Tracker ) DOCKET NO. D2013.5.33  
)  
IN THE MATTER OF NorthWestern ) DOCKET NO. D2014.5.46  
Energy's 2013-2014 Electricity Supply ) ORDER NO. 7283d  
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 Montana 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, 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. On October 22, 2014, the Commission issued *Procedural Order 7283b*, which established 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.

5. On October 24, 2014, the MCC served Data Request MCC-015, which asked NorthWestern to provide:

[A]ll memos, correspondence, and any documentation within NWE possession and/or control in relation to the outage [at Colstrip Unit 4], from the day the outage occurred to the present, including all communications concerning the outage between NWE and [PPL Montana, LLC], any and all communications with the company that performed the scheduled maintenance, and any communications with any insurance companies regardless of whom such company was insuring[.]

In its response to MCC-015 filed on November 14, NorthWestern noted that “one email and its attachments are not being produced because they contain information that NorthWestern considers to be confidential, trade secret information,” and “NorthWestern will file a motion for protective order regarding this information next week.”

6. On November 21, 2014, NorthWestern filed a *Motion for Protective Order and Brief in Support* (Motion) which noted, “Upon reviewing the correspondence in [its] 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.” Mot. p. (Nov. 21, 2014).

7. On November 26, 2014, the Commission published notice of the Motion in its weekly agenda.

### FINDINGS OF FACT

8. NorthWestern seeks to protect as trade secret certain “[d]etails concerning coal quality and pricing” found in the Amended and Restated Coal Supply Agreement dated August 24, 1998 related to its interest in Colstrip Unit 4. Mot. p. 3 (Nov. 21, 2014); *see also* Aff. Michael J. Barnes ¶ 2 (Nov. 21, 2014) (“Itemized coal cost information is market-based information including specific contract terms submitted to NorthWestern with an expectation of confidentiality”); *see* Or. 6925c, Dkt. D2008.6.69 (July 29, 2008); *see also* NorthWestern Mot. for Protective Or., Dkt. D2006.9.94, Attachment 1 (Oct. 10, 2007).

9. NorthWestern has considered that the Commission is a public agency and that there is a presumption of access to documents in the Commission’s possession. Mot. at p. 3.

10. Michael J. Barnes, NorthWestern’s Manager of Montana Production Operations, is responsible “for contract administration and origination associated with NorthWestern's ownership interest in Colstrip Unit 4 and its generation output.” Aff. Barnes at ¶ 1.

11. Mr. Barnes asserts that the coal quality and pricing information is only held by the parties to the contract: “No one could reasonably ascertain this information through a public source.” *Id.* at ¶ 4.

12. Mr. Barnes also asserts that NorthWestern and the coal supplier “protect confidential information by whatever means available to them” by keeping it “in specific secure locations and is accessible only by designated individuals.” *Id.*

13. According to Mr. Barnes, “the supplier derives economic and operational value by virtue of this information remaining confidential” because it reveals the “coal supplier’s bidding strategies and . . . pricing proposals.” *Id.* at ¶ 5. Northwestern asserts:

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.

Mot. at p. 9.

### CONCLUSIONS OF LAW

14. 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).

15. 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) (2015).

16. 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.”).

17. NorthWestern has made a *prima facie* showing that the coal quality and pricing information it seeks to protect consists of secret information, subject to reasonable efforts to maintain its secrecy and not readily ascertainable by proper means, from which competitive advantage is derived. *Supra* ¶¶ 9-13.

### ORDER

IT IS HEREBY ORDERED THAT:

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

19. 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 20th 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. 7283d  
Order Action Date: January 20, 2015

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:  
\_\_\_\_\_  
\_\_\_\_\_  
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\_\_\_\_\_  
Employer

\_\_\_\_\_  
Party Represented