

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

IN THE MATTER OF NorthWestern Energy's )  
Application for Approval to Purchase and ) REGULATORY DIVISION  
Operate PPL Montana's Hydroelectric )  
Facilities, for Approval of Inclusion of ) DOCKET NO. D2013.12.85  
Generation Asset and Cost of Service in )  
Electricity Supply Rates, for Approval of )  
Issuance of Securities to Complete the )  
Purchase, and for Related Relief )

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**NorthWestern Energy's Motion for Protective Order of  
Confidential Contract Information Provided in Responses to Data Requests  
MCC-202 and PSC-130 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 ("Motion"). 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 Charles S. Baker ("Baker Aff.").

**I. Introduction**

On December 20, 2013, NorthWestern filed its Application in the above-captioned docket requesting various approvals necessary to effectuate the purchase and operation of PPL Montana, LLC's ("PPLM") hydroelectric facilities. NorthWestern received data requests from the Commission and the Montana Consumer Counsel ("MCC"), among other interested parties. In Data Requests PSC-130 and MCC-202, the Commission and the MCC requested documents that

had been provided by PPLM to NorthWestern in an online data room during the course of negotiations of the proposed transaction. NorthWestern objected to providing certain requested documents, including extremely large contracts between PPLM and contractors because they would be burdensome to produce and irrelevant to the proceeding. On April 11, 2014, the Commission overruled NorthWestern's objection and directed NorthWestern to provide the contracts. However, as described in detail below, several of the contracts contain confidential technical information and pricing details ("Confidential Contract Information"). This information was provided by PPLM to NorthWestern during the course of negotiations of the proposed transaction on condition that NorthWestern would protect the confidentiality of the information. Therefore, NorthWestern hereby files this Motion to protect certain Confidential Contract Information.

Pursuant to ARM 38.2.5007, 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 that it has the burden of demonstrating that the identified information is confidential information and that it must, with this Motion, establish a *prima facie* showing of confidentiality, factually and legally, and make clear the basis for the claim of confidentiality. As explained and demonstrated herein, NorthWestern has overcome the presumption that the public should have unrestricted access to the identified information and has established a *prima facie* showing of confidentiality, both factually and legally.

## **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**

The following is a complete and specific non-confidential identification, item by item or category of like items, of the Confidential Contract Information for which protection is being sought:

- References to technical information in the contracts on the pages identified below including descriptions of the contractor's scope of work for the design, manufacture, construction, and/or installation of equipment at PPLM's hydroelectric generation facilities; details of contractor's bids; engineering and design details of construction and installation techniques and equipment; technical drawings; and descriptions of the operational capacity and other features of generation and transmission equipment to be designed, manufactured, and/or installed.
- References to pricing information in the contracts on the pages identified below including rates for labor, materials, services.

The technical and pricing information appears on the following pages of each document:

Data Room Document No.	Pages with Technical and/or Pricing Information
11.3.2.2	1-32
11.3.2.3	8-11, 19, 138-964
11.3.2.4	1-2, 10-128, 130-131, 220-232, 244-270
11.3.2.5	79-158, 198-204, 207-208, 211, 296-637
11.3.2.6	1, 7, 11, 12, 56-277. 290-295
11.3.2.8	79-95, 121, 127, 133, 136-137, 206-425
11.3.2.9	2-4, 9-16
11.3.3.2	29-50, 63-94, 98-99
11.3.3.4	34-106, 111-117, 123, 128
16.11.3.3.2	34-106, 111-117, 123, 128, 130, 131

Document 11.3.2.3 is responsive to both PSC-130 and MCC-202.

Documents 11.3.3.2, 11.3.3.4, and 16.11.3.3.2 are responsive to PSC-130 only.

Documents 11.3.2.2 and 11.3.2.4 through 11.3.2.9 are responsive to MCC-202 only.

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

In support of this motion for protection of the Confidential Contract Information 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. The Baker Affidavit supports the facts and is attached as required by ARM 38.2.5007(3)(c). Mr. Baker is a person qualified on the subject matter, and his affidavit supports the claims of confidentiality of the identified information.

**A. The identified material is information.**

“Information” is defined to include “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). The Confidential Contract Information constitutes material observations, data, and facts in the nature of individually negotiated, bilateral written contracts between PPLM and contractors. Baker Aff. ¶ 2.

**B. The identified information constitutes trade secrets.**

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, MCA (2013) defines a trade secret as:

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 Confidential Contract Information in fact constitutes trade secrets. It is not available anywhere publicly and is considered extremely sensitive. Baker Aff. ¶ 6. The Confidential Contract Information is required to be kept secure, both physically and electronically, under the Information Security policies of PPL

Corporation and PPLM. *Id.* ¶ 7. The Confidential Contract 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 Contract Information. *Id.* As such, NorthWestern is obligated to protect the Confidential Contract Information from public disclosure.

There is independent economic value derived from the Confidential Contract Information being kept secret. As discussed in more detail in Section IV.E below, the Confidential Contract Information contains competitively sensitive and proprietary information that if released to the public could be used to the economic detriment of PPLM by competitors and contractors. See Baker Aff. ¶¶ 9-11. Disclosure of the Confidential Contract Information could also harm consumers by increasing costs to PPLM. *Id.* ¶ 10.

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

Pursuant to the Information Security policies of PPL Corporation and PPLM, PPL employees are required to keep the type of information contained in the Confidential Contract Information secure. Baker Aff. ¶ 7. The Confidential Contract Information is accessible only to designated employees on a need-to-know basis. *Id.* PPLM revealed the Confidential Contract Information to NorthWestern on condition that NorthWestern enter into a confidentiality agreement and agree not to disclose the Confidential Contract Information. *Id.*

After issuance of a protective order from this Commission, PPLM will maintain the secrecy of the Confidential Contract Information pursuant to its

internal controls and policies governing protection of confidential information. *Id.* NorthWestern is obligated to maintain the secrecy of the Confidential Contract Information pursuant to its confidentiality agreement. *Id.* Because the secrecy of the Confidential Contract Information will continue to be maintained, the Confidential Contract Information will keep its status as trade secrets. See § 30-14-402(4), MCA (2013).

**D. The identified information is not readily ascertainable by proper means.**

The Confidential Contract Information for which NorthWestern requests protected treatment is not within the public domain, and is not readily ascertainable by any other person or entity, other than the contractual counterparty. Baker Aff. ¶ 8. No public documents exist which could reveal the information to be protected by any means whatsoever. *Id.* No one could reasonably ascertain this information through a public source. *Id.*

**E. The identified information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy.**

ARM 38.2.5007(4)(b)(vi) states that the secret information must derive independent economic value or competitive advantage from its secrecy. As described by Mr. Baker, competitors could obtain economic advantage by disclosure of the Confidential Contract Information to the detriment of PPLM. The Confidential Contract Information provides valuable and detailed technical information regarding, *inter alia*, proprietary design and operation information for PPL's hydroelectric generation facilities that PPLM paid contractors to develop and execute. Baker Aff. ¶ 9. If released it would give competitors and potential

competitors free access and insight on design and operational features of PPLM's facilities. *Id.* Competitors could also use the Confidential Contract Information to discern operational limitations or maintenance requirements that may affect the amount of supply PPLM may have available at any particular time. *Id.* Competitors could then take advantage of this information to capitalize on PPLM's need to purchase electricity from the market to cover its electricity commitments while its own generation assets are offline. *Id.*

The public release of the Confidential Contract Information would also affect PPLM's ability to solicit competitive bids from contractors. *Id.* ¶ 10. If released, potential contractors would be able to see amounts for labor, services, and materials that PPLM has previously contracted for and escalate their bids based on PPLM's prior valuations and agreement. *Id.* If PPLM is unable to solicit competitive bids from contractors, consumers may be harmed and competition lessened by increasing the costs to PPLM for capital expenditures, operation and maintenance. *Id.* Release of the detailed price information could also affect PPLM's ability to manage and negotiate costs of other contractors in the future. *Id.* Also, the public disclosure of the detailed technical information developed by a contractor may adversely impact PPLM's relationship with the contractor and result in competitive harm to PPLM. *Id.*

The release of the Confidential Contract Information would thus produce significant financial harm to PPLM by placing it at a competitive disadvantage because it would not have access to similar information from its competitors and contractors. *Id.* ¶ 11. The competitive disadvantage from the informational

asymmetry would harm that ability to negotiate favorably with potential counterparties in future periods. *Id.* Thus, the information in the Confidential Contract Information has substantial independent economic value to PPLM, which value would be adversely impacted by the public release of such information.

## V. Conclusion

The Commission has previously protected information that would allow competitors to gain an economic advantage if publicly disclosed. See *e.g.*, *In re NorthWestern Energy*, Docket No. D2009.9.129, Order No. 7046c (Mar. 9, 2010); *In re Westech Energy Corporation*, Docket No. D2006.7.108, Order No. 6774d (Aug. 24, 2009). 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 Confidential Contract Information.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of April 2014

NORTHWESTERN ENERGY

By: 

Al Brogan  
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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 )  
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AFFIDAVIT OF CHARLES S. BAKER

STATE OF MONTANA )  
 ) SS.  
COUNTY OF YELLOWSTONE )

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Before me, the undersigned notary public, personally appeared Charles S. Baker, 303 North Broadway, Suite 400, Billings, MT 59101, to me known or proven, who being duly sworn according to law, doth depose and say:

1. I am Controller for PPL Montana, LLC ("PPL Montana") and am responsible for strategy and oversight of PPL Montana's budgeting, financial planning, and financial reporting. I am familiar with, and have personal knowledge of, the matters set forth in this affidavit.

2. On December 20, 2013, NorthWestern Corporation, d/b/a NorthWestern Energy ("NorthWestern") filed its Application in the above-captioned docket to acquire certain hydroelectric generation facilities of PPL Montana. Numerous Data Requests were served on NorthWestern thereafter. Data Requests PSC-130 and MCC-202 requested a series of documents provided to NorthWestern by PPL Montana in an online data room during the course of negotiations of the proposed transaction. As part

of its response to Data Requests PSC-130 and MCC-202, NorthWestern is providing copies of several individually negotiated, bilateral contracts between PPL Montana and contractors which include detailed information on the technical specifications, operational capacity, and design of certain hydroelectric facilities to be acquired ("Technical Information") and pricing and bid information from the contractors ("Pricing Information"). It is PPL Montana's understanding that the responses to the data requests are public.

3. The Technical and Pricing Information appear on the following pages of each contract:

Data Room Document No.	Pages with Technical and/or Pricing Information
11.3.2.2	1-32
11.3.2.3	8-11, 19, 138-964
11.3.2.4	1-2, 10-128, 130-131, 220-232, 244-270
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11.3.3.4	34-106, 111-117, 123, 128
16.11.3.3.2	34-106, 111-117, 123, 128, 130, 131

4. During the negotiation of the proposed transaction, PPL Montana provided to NorthWestern this Technical and Pricing Information on the basis that NorthWestern had entered into a confidentiality agreement with PPL Corporation promising to protect the confidentiality of the information.

5. The Technical Information for which protection is sought contains detailed information prepared by contractors and PPL Montana about the scope of work for the design, manufacture, construction, and/or installation of equipment at certain hydroelectric facilities to be acquired. The Technical Information includes specific

details of the contractor's bids, including, among other details, (1) intricate explanations of the scope of work, (2) engineering and design details of construction and installation techniques and equipment, including technical drawings and schematics, and (3) comprehensive descriptions of the operational capacity and features of generation and transmission equipment to be designed, manufactured, and/or installed. The Pricing Information contains itemized prices from contractor's bids, including specific rates for labor and the cost of materials and services. The Technical and Pricing Information is also included in change orders appended to certain contracts. The Pricing Information in the change orders contains detailed costs, invoices, and receipts from contractors, some of which identify personal information of contractor's employees, such as salary information and social security numbers. The change orders also reflect negotiated prices agreed upon between PPL Montana and contractors.

6. The Technical and Pricing Information constitutes trade secrets, 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.

7. 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. Even after the issuance of a protective order from this Commission, PPL Montana will continue to maintain the secrecy of the type of information for which protection is sought pursuant to its applicable Information Security controls and policies.

8. Thus, the information for which protection is sought is not within the public domain, nor is it readily ascertainable by any other person or entity, other than the contractor which is also party to the contract. No public documents exist which could reveal this information by any means. Further, no one could reasonably ascertain this information by accessing any publicly available information.

9. If the Technical and Pricing Information was released publicly, it could be used to the economic detriment of PPL Montana. Disclosure of the information would give competitors and potential competitors free access to detailed proprietary design and operation information for which PPL Montana has contracted and paid contractors.

Competitors and potential competitors could use this insight on the design and operation of the hydroelectric facilities to minimize their costs by working from the Technical Information already developed by PPL Montana and its contractors. Competitors and potential competitors could also use the information to discern operational limitations or maintenance requirements that may affect the amount of supply PPL Montana has available for sale at a particular time. Competitors could then take advantage of this information to position their own assets 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. Such harms will be magnified if the transaction contemplated in this proceeding does not close, and competitors are given access to substantial information about the design and operation of PPL Montana's generation facilities.

10. The public release of the information for which protection is sought would also affect PPL Montana's ability to solicit competitive bids from contractors and manage contractor costs. If released, contractors that submit bids to PPL Montana would be able to see past rates that PPL Montana has agreed to for labor or particular services or materials. Contractors may then escalate their bids to provide labor, services, and materials to PPL Montana based on their knowledge of PPL Montana past valuation and agreement. Any effect on PPL Montana's ability to solicit competitive bids from contractors could potentially harm consumers by increasing the costs to PPL Montana for capital expenditures, operation, and maintenance. The Pricing Information contained in the change orders appended to the contracts also reveals information regarding PPL Montana's practices for reviewing and authorizing contract rate increases, which if released to potential contractors, could affect PPL Montana's ability to manage costs of future projects. Additionally, the Technical and Pricing Information reflects the considerable effort and time of contractors to develop precisely engineered designs, detailed descriptions of construction and installation methods, and cost estimates. Release of this information may negatively impact PPL Montana's relationship with the contractors resulting in competitive harm.



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of NorthWestern Energy's Motion for Protective Order of Confidential Contract Information provided in Responses to Data Requests MCC-202 and PSC-130 and Brief in Support in Docket No. D2013.12.85 has been hand delivered to The Montana Public Service Commission and The Montana Consumer Counsel. A copy has been e-filed on the MPSC website. It will be mailed to the most recent service list in this Docket by first class mail. It will also be emailed to the counsel of record.

Date: April 22, 2014



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**Docket No D2013.12.85**  
**Hydro Assets Purchase**  
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