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

IN THE MATTER OF NorthWestern)	
Energy's Petition for a Waiver from)	REGULATORY DIVISION
Compliance with the Community Renewable)	
Energy Project Purchase Obligation for)	DOCKET NO. D2016.4.33
Calendar Years 2015 and 2016)	DOCKET NO. D2017.8.65

**NorthWestern Energy's Motion for and Brief in Support
of a Protective Order for 2016 CREP Bid Responses**

NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern"), following a thorough legal and factual examination, has determined that the specific items or categories of like items identified below are confidential trade secret information as defined in the Uniform Trade Secrets Act, Mont. Code Ann. §§ 30-14-401, *et seq* (the "Act"). NorthWestern respectfully moves the Montana Public Service Commission ("Commission") to grant a protective order pursuant to its administrative rules, ARM 38.2.5001, *et seq* ("Motion"). It integrates with its Motion its brief in support of the Motion. It concurrently files in support of the Motion the Affidavit of Bleau J. LaFave.

NorthWestern has considered that the Commission is a public agency and there is a presumption of public access to documents and information in the Commission's possession.

NorthWestern understands it has the burden of demonstrating that the identified items or categories of information are confidential trade secret information.

NorthWestern provides in this Motion and the supporting Affidavit of Bleau J. LaFave a *prima facie* showing that the following described confidential business information submitted by respondents to NorthWestern's 2016 Request for Proposals ("RFP") for Community Renewable Energy Projects ("CREP") constitutes trade secrets as defined by law and is entitled to protection against public disclosure under a Commission-issued protective order. NorthWestern has been asked to provide copies of all materials received in response to the 2016 CREP RFP in Data Request MEIC-009c in this docket.

CONTACT PERSON

The contact person regarding this motion and regarding the items to be protected is:

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IDENTIFICATION OF CONFIDENTIAL INFORMATION

A complete and specific non-confidential identification of the categories of confidential business information for which protection is being sought as a trade secret is:

1. Site-specific wind data and associated meteorological data prepared or acquired by CREP developers for their projects.
2. Landowner development agreements, including leaseholds and royalty agreements, under which the CREP developers located and developed their projects.
3. Turbine contract terms, including not only price but warranty and service agreements.
4. Financial data, such as cost of capital or pro forma financials.

5. Environmental Impacts and Attributes related to these projects.

NorthWestern has standing to protect the confidential business information submitted to it by the developers responding to the 2016 CREP RFP in order to protect itself from possible lawsuit by the developers. *Belth v. Bennett*, 227 Mont. 341, 345, 740 P.2d 638 (1987); *Montana Human Rights Commission v. City of Billings*, 199 Mont. 434, 649 P.2d. 1283 (1982).

FACTUAL AND LEGAL BASES FOR PROTECTION

The information which NorthWestern seeks to protect against public disclosure in this docket is protectable as the developers' trade secrets. The term "trade secret" has been statutorily defined in the Act, § 30-14-401(4), MCA. The Commission's Administrative Rule ARM 38.2.5007 requires the movant for a protective order to establish the required statutory elements. Subsection (4)(b) of the rule specifies the elements which must be established to make the required *prima facie* showing for a protective order.

ARM 38.2.5007(4)(b)(ii), (iii), and (iv) specify that the confidential business information be "information" which is in fact secret. The term "information" is extremely broad. "There is virtually no category of confidential information that cannot, as long as the information is protected from disclosure to the public, constitute a trade secret." Thomas J. Collin, *Determining Whether Information is a Trade Secret Under Ohio Law*, 19 U. Tol. L. Rev, 543, 545 (1988); *US WEST Communications v. Office of Consumer Advocate*, 498 N.W. 2d 711, 714 (Iowa, 1993). The Affidavit of Bleau J. LaFave details the efforts of NorthWestern to maintain the confidentiality of the developers' trade secrets.

ARM 38.2.5007(4)(b)(v) specifies that the confidential information cannot be "readily ascertainable" by proper means. In other words, a compilation of publicly available information can be a trade secret if "the duplication or acquisition of the alleged trade secret information

requires substantial investment of time, expense, or effort.” *Amoco Production Co. v. Laird*, 622 N.E. 912, 919 (Ind. 1993). The developers’ confidential business information which NorthWestern seeks to protect against public disclosure in this Motion is information developed or gathered by them for the unique purpose of creating economic value for their proposed projects. As explained in the Affidavit of Bleau J. LaFave, NorthWestern obtained access to the developers’ confidential business information under a general confidentiality provision in the 2016 CREP RFP.

ARM 38.2.5007(4)(b)(vi) specifies that the confidential information to be protected must derive independent economic advantage, or competitive advantage, from its secrecy. The Commission’s administrative rule recognizes that the language of the Act has been interpreted to carry forward the common law requirement of competitive advantage. *Electro-Craft Corporation v. Controlled Motion*, 332 N.W. 2d. 890, 900 (Minn. 1983). The Affidavit of Bleau J. LaFave explains how the developers obtain economic advantage by maintaining the confidentiality of the information at issue.

The Commission has issued protective orders for similar types of information in other dockets. *See* Docket No. D2015.2.18, Order No. 7395a; *see also* Docket No. D2015.3.27, Order No. 7416a. Prior to that, the Commission thoroughly examined the claims of CREP developers that the information for which NorthWestern seeks a protective order in this Motion is a trade secret entitled to protection against public disclosure under a Commission-issued protective order. In Docket No. D2013.10.77, the Commission appointed a hearings examiner to review the claims of CREP developers that the kinds of information for which NorthWestern seeks a protective order in this Motion in fact constituted a trade secret entitled to protection. In a series of protective orders issued in that docket, the Commission uniformly held that the information

was a trade secret and entitled to protection. *See* Docket No. D2013.10.77, Orders 7334a through 7334f. This Motion seeks protection of those same categories of information.

SUMMARY AND REQUEST FOR RELIEF

NorthWestern has made a *prima facie* showing that the information is a trade secret entitled to protection under a Commission-issued protective order. NorthWestern respectfully requests the issuance of a protective order protecting against public disclosure the information described in the section labeled Identification of Confidential Information.

Respectfully submitted this 4th day of January 2018.


Sarah Norcott
Attorney for NorthWestern Energy

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**AFFIDAVIT OF
Bleau J. LaFave**

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF MINNEHAHA)

Bleau J. LaFave, being first duly sworn upon his oath, deposes and says:

1. I am employed by NorthWestern Energy ("NorthWestern") as Director Long Term Resources. In that capacity, I worked on the issuance of the May 27, 2016 Request for Proposals of Community Renewable Energy Projects ("2016 CREP RFP") and was involved in the evaluation of the CREP proposals that we received in response to the 2016 CREP RFP. I am personally knowledgeable about the 2016 CREP RFP and the proposals NorthWestern received in response.

2. Nine developers submitted proposals for ten different proposed projects in response to the 2016 CREP RFP. NorthWestern has not publicly disclosed the information that the developers contend, or have contended, is their confidential, trade secret business information, which they submitted in support of their respective offers.

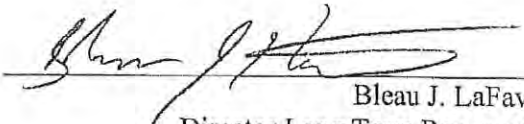
3. The developer-provided information for which NorthWestern seeks protection as a trade secret falls into four general categories: (1) wind data and associated meteorological data; (2) development agreements with site landowners, including lease agreements and royalty agreements; (3) turbine contract terms, including not only price but warranty and service agreements; and (4) financial data, including capital costs and pro forma financials. One developer also informed NorthWestern that information regarding environmental impacts and attributes related to its proposed projects was trade secret information requiring protection. The developers contend, or have contended, that this information has significant economic value to them, as without it, they would have had no ability to respond meaningfully to NorthWestern's 2016 CREP RFP, and the information determines, at least in part, how they developed their ultimate offer price in a competitive solicitation.

4. The 2016 CREP RFP contains a confidentiality provision, Section 10.2, under which NorthWestern agrees not to publicly disclose the confidential business information submitted to it by respondents in support of their responses to the 2016 CREP RFP. Exhibit SEL-6, pg 21 in Docket No. D2017.8.65. In accordance with that agreement, NorthWestern does not publicly disclose the confidential business information submitted by the respondents and limits its internal distribution and use of the information to those NorthWestern employees and consultants charged with responsibilities relative to the 2016 CREP RFP.

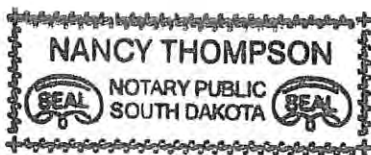
5. The Commission granted NorthWestern's similar motions for protection in other Commission dockets. *See* Docket No. D2015.2.18, Order No. 7395a; *see also* Docket No. D2015.3.27, Order No. 7416a. And previously, the Commission thoroughly considered similar claims of confidentiality by respondents to CREP requests for proposals in Commission Docket No. D2013.10.77. In that docket, the Commission assigned a hearings examiner to consider the assertions by several CREP developers that the categories of information described in ¶ 3 of this Affidavit qualified as trade secret information entitled to protection against public disclosure by a Commission-issued protective order. The categories of information described in ¶ 3 of this Affidavit were uniformly held to constitute protectable trade secrets. *See* Order Nos. 7334a through 7334f, Docket No. D2013.10.77.

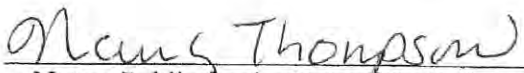
FURTHER AFFIANT SAYETH NOT.

Executed this 4 day of January, 2018.


Bleau J. LaFave
Director Long Term Resources

SUBSCRIBED AND SWORN TO before me this 4 day of January, 2018.




Nancy Thompson
Notary Public for the State of South Dakota
Residing at Sioux Falls, South Dakota
My Commission expires: 3/20/18

CERTIFICATE OF SERVICE

I hereby certify that NorthWestern Energy's Motion for and Brief in Support of a Protective Order for 2016 CREP Bid Responses in Consolidated Docket Nos. D2016.4.33/D2017.8.65 has been hand delivered to the Montana Public Service Commission (MPSC) and the Montana Consumer Counsel this date. It has also been e-filed on the MPSC's website, emailed to counsel of record, and mailed by First Class Mail to the remainder of the Service List.

Date: January 4, 2018



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