

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

IN THE MATTER OF the Petition of)	REGULATORY DIVISION
NorthWestern Energy for a Waiver from the)	
CREP Purchase Obligation for 2015 and for a)	DOCKET NO. D2016.4.33
Declaratory Ruling Regarding the Administrative)	ORDER NO. 7578a
Penalty)	
)	
IN THE MATTER OF the Petition of)	DOCKET NO. D2017.8.65
NorthWestern Energy for a Waiver from)	
Compliance with the CREP for 2016)	

ORDER GRANTING PROTECTIVE ORDERS

PROCEDURAL HISTORY

1. On December 20, 2016, NorthWestern Corporation, doing business as NorthWestern Energy (“NWE”), filed a consolidated petition for waiver from the CREP Purchase Obligation for 2015, and for a declaratory ruling regarding the administrative penalty with the Montana Public Service Commission (“Commission”). On August 18, 2017, NWE filed a petition for waiver from the CREP Purchase Obligation for 2016. On October 24, 2017, the Commission voted to consolidate NWE’s two petitions.

2. On October 25, 2017, the Commission issued a Notice of Application and Intervention Deadline, establishing November 17, 2017 as the deadline to intervene with NorthWestern’s Petition. On November 9, 2017, the Montana Consumer Counsel, and on November 17, 2017, the Montana Environmental Information Center and NW Energy Coalition filed Petitions for Intervention (collectively, “Intervenors”), which the Commission subsequently granted. On November 29, 2017, the Commission issued a Procedural Order that, among other things, established the procedures for requesting Commission protection of sensitive information.

3. On January 4, 2018, the Commission received two motions for protective orders from NWE. Both motions request protective orders pursuant to Mont. Admin. R. 38.2.5001–5031 (2017), to protect asserted trade secrets from public disclosure in response to PSC-001a and

MEIC-009b for the 2015 CREP Request for Proposals (“RFP”), and MEIC-009c for the 2016 CREP RFP. Mots. at 2. Specifically, the responses contain four general categories of information received from ten developers in the 2015 CREP RFP, and nine developers in the 2016 CREP RFP: (1) wind data and associated meteorological data; (2) development agreements with site landowners, including lease agreements and royalty agreements; (3) environmental impacts and attributes related to these projects; and (4) financial data and turbine contract terms, including capital costs and pro forma financials.

4. The Commission noticed the Motions in its weekly agenda for the week beginning January 8, 2018. The Commission did not receive any public comment regarding the Motions, and on January 10, 2018, granted NWE’s Motions.

DISCUSSION, FINDINGS, CONCLUSIONS

5. The Montana Constitution requires that Commission records and proceedings are publicly available. Mont. Const. Art. II, §§ 8–9. However, the Commission may protect sensitive information, “when necessary to preserve trade secrets . . . or other information that must be protected under law.” Mont. Code Ann. § 69-3-105(2) (2015).

6. The Montana Supreme Court has articulated standards for evaluating Commission protective orders:

[A] non-human entity seeking protective orders or other protective measures for materials filed with a regulating governmental agency, such as the PSC, 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. The claimant's showing must be more than conclusory. It must be specific enough for the PSC, any objecting parties, and reviewing authorities to clearly understand the nature and basis of the public utility's claims to the right of confidentiality.

Great Falls Tribune v. Mont. Pub. Serv. Comm’n, 2003 MT 359, ¶ 56, 319 Mont. 38, 89 P.3d 876.

7. The Commission has codified these authorities with a regulatory procedure that includes both procedural and substantive requirements. Procedurally, a motion for a protective order must include:

- (a) an identification of the person, including contact information (phone number and e-mail address) to whom communications from commission staff, parties, and interested persons may be made;

- (b) a complete and specific nonconfidential identification, description, and explanation of the information, item by item or by category of items which are alike, of all information for which protection is requested, suitable for meaningful use in testimony, arguments, public discussion, orders, and the public record;
- (c) a complete and specific factual basis, supported by affidavit of a qualified person, that supports the claim of confidential information; and
- (d) a complete and specific legal analysis, explaining why the information is confidential information.

Mont. Admin. R. 38.2.5007(3)(a)–(d).

8. Substantively, a motion for a protective order must establish—by thorough legal and factual examination—that the information sought to be protected is either a trade secret or otherwise legally protectable. Mont. Admin. R. 38.2.5007(2). Establishing a *prima facie* showing of trade secret confidentiality includes the following:

- (a) prior to requesting a protective order, the provider has considered that the commission is a public agency and that there is a constitutional presumption of access to documents and information in the commission's possession;
- (b) the claimed trade secret material is information;
- (c) the information is secret;
- (d) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy;
- (e) the secret information is not readily ascertainable by proper means; and
- (f) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy.

Mont. Admin. R. 38.2.5007(4)(b)(i)–(vi).

9. The Commission finds that NWE has met the procedural burden as required by Mont. Admin. R. 38.2.5007(3). NWE has provided: appropriate contact information (Mots. at 2, 9); a sufficient description of the information sought to be protected (*Id.* at 3–5); qualified affidavits that support the confidentiality of the information (*Affidavits of Bleau J. LaFave* (Jan. 4, 2018)); and a sufficient complete legal analysis as to why the information should be protected. (Mots. at 3–5).

10. The Commission also finds that NWE has established a substantive *prima facie* showing of trade secret confidentiality as required by Mont. Admin. R. 38.2.5007(4)(b). The motions state: NWE 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” (Mots. at 1–2); that the material for which protection is sought is information (*Id.* at 3–4; Affs. ¶¶ 3–4); all of the information in question contains secret information (Mots. at 4; Affs. ¶¶ 2, 4); the

information is not readily ascertainable by proper means and is subject to reasonable efforts to maintain its secrecy (*Id.*).

11. The final issue to analyze in trade secret confidentiality is whether the information that NWE is seeking to protect derives independent economic value or a competitive advantage from its secrecy.

12. NWE states that the information contained in the 2015 and 2016 CREP RFPs derive independent economic value as trade secrets. The RFP information contains a variety of developer-submitted information which partly informs “how they developed their ultimate offer price in a competitive solicitation.” Mots. ¶ 3. NWE also states that the Commission should grant the motions as the Commission has previously protected similar information in the past. *See In re NWE’s 2013 CREP Waiver*, Dkt. D2013.10.77, Protective Orders 7334a-f (Sept. 4, 2014).

13. The Commission finds that NWE’s responses regarding the 2015 and 2016 CREP RFPs derive independent economic value, due to the general competitive nature of RFPs and the inherent value of competitor information contained within each proposal. RFP proposals are typically submitted in a quasi-confidential, competitive bidding process, where winning bids are selected based on the predetermined criteria set out by the RFP. *See generally In Re NWE’s 2016 CREP Waiver*, Dkt. D2017.8.65, Testimony of S.E. Lewis Exhibit_(SEL-2) & Exhibit_(SEL-6). If the RFP proposals were not protected, developers could utilize the disclosed information to outbid competitors in subsequent RFPs, by more effectively tailoring their bids to satisfy NWE’s evaluation criteria. This establishes clear independent economic value in maintaining the confidentiality of developer bidding information. Commission practice reinforces this finding, as the Commission has protected similar information in prior NWE CREP Waiver dockets. *See In re NWE’s 2013 CREP Waiver*, Dkt. D2013.10.77, Protective Orders 7334a-f (Sept. 4, 2014).

14. However, the independent economic value of future CREP RFP proposals is eroded by the fact that only a small fraction of the developers that submitted proposals actually requested confidentiality of their proposals, and that there has not been a winning CREP proposal in several years. *See Affidavits of Bleau J. LaFave* ¶ 2 (Jan. 4, 2018) (stating that only two of ten developers requested protection of their bidding information for the 2015 CREP RFP, and apparently none of the nine developers did for the 2016 CREP RFP). If developers believed their bids contained information with sufficient economic value, then presumably the developers would request that NWE keep the information confidential, especially after NWE asked

developers if they deemed any of their proposals contained trade secret information requiring protection. *Id.* Yet few did. That developers are not requesting protection of their proposals, and that no bids were in fact successful, does not prevent a Commission finding that the bids contain independent economic value for protection order purposes. However it does weigh against such a finding.

15. The Commission finds – based on the procedural and substantive discussion of the Motions – that NWE’s Motions regarding its responses to PSC-001a, MEIC-009b, and MEIC-009c satisfies the Commission’s protective order requirements.

ORDER

IT IS ORDERED:

16. NWE’s Motion’s are GRANTED regarding NWE’s response to PSC-001a, MEIC-009b, and MEIC-009c.

17. Information submitted in accordance with this Order will be treated as “confidential information” pursuant to Mont. Admin. R. 38.2.5001–5031 (2018).

18. NWE must produce the information consistent with this Order by January 12, 2018.

DONE AND DATED this 10th day of January, 2018.



Zachary T. Rogala
Examiner

ATTEST:



Rhonda J. Simmons
Commission Secretary

(SEAL)



Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

Mont. Admin. R. 38.2.5012

Docket Nos. D2016.4.33 & D2017.8.65, Order No. 7578a

Order Action Date: January 10, 2018

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 Mont. Admin. R. 38.2.5001–38.2.5030 (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 Mont. Admin. R. 38.2.5001–38.2.5030 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