Service Date: November 18, 2005

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

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IN THE MATTER OF NORTHWESTERN ENERGY, Application for Approval of 2003 Avoided Cost Compliance Filing -- Schedules QFLT-1 and STPP-1	))))	UTILITY DIVISION DOCKET NO. D2003.7.86 ORDER NO. 6501d
IN THE MATTER OF NORTHWESTERN ENERGY, Application for Approval of 2004 Avoided Cost Compliance Filing -- Schedules QFLT-1 and STPP-1	))))	UTILITY DIVISION DOCKET NO. D2004.6.96 ORDER NO. 6501d
IN THE MATTER OF NORTHWESTERN ENERGY, Application for Approval of 2005 Avoided Cost Compliance Filing -- Schedules QFLT-1 and STPP-1	))))	UTILITY DIVISION DOCKET NO. D2005.6.103 ORDER NO. 6501d

PROTECTIVE ORDER

On October 5, 2005, NorthWestern Energy (NWE) filed before the Public Service Commission (PSC) a motion for protective order to govern certain information expected to be filed in the above-entitled consolidated dockets. NWE's motion is proper in form and includes the elements required in a motion for protective order before the PSC.

NWE states that it has done a thorough legal and factual examination and has determined the specific items or categories of like items identified are trade secrets or otherwise legally protectible. *ARM 38.2.5007(2)*. NWE states that it has considered that the PSC is a public agency and that there is a presumption of access to documents and information in the PSC's possession. *ARM 38.2.5007(4)(b)(i)*. NWE states that it understands it has the burden of demonstrating that the identified items are confidential information and that it must, within its motion, establish a prima facie showing of confidentiality, factually and legally, and make clear the basis for the claim of confidentiality. *ARM 38.2.5007(3)*. NWE names a contact person regarding the motion and regarding the items to be protected. *ARM 38.2.5007(3)(a)*. NWE has

included a complete and specific non-confidential identification of the items or categories of items for which it seeks protection. *ARM 38.2.5007(3)(b)*. For each item or category of like items NWE has supplied what it believes is 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. *ARM 38.2.5007(3)(c)*. NWE has included an affidavit that NWE suggests supports the facts, is by a person qualified on the subject matter, and supports the claim of confidentiality of the identified information. *ARM 38.2.5007(3)(c)*. NWE states it has explained, in detail, for each item or category of like items, including thorough facts and legal analysis as it relates in general and in specific, proper application of the element of trade secret. *ARM 38.2.5007(3)(d)*. NWE's motion has been noticed in accordance with ARM 38.2.5007(8).

NWE requests protection of eight categories of information: (1) detailed monthly costs associated with electric supply and supporting invoices, contracts, and projections; (2) detailed monthly volumes associated with electric supply and supporting invoices, contracts, and projections; (3) location of delivery associated with electric supply and supporting invoices, contracts, and projections; (4) identity of request for proposal (RFP) respondents and negotiators; (5) prices associated with RFPs and negotiations; (6) volumes associated with RFPs and negotiations; (7) location of delivery associated with RFPs and negotiations; and (8) NWE evaluation of RFPs and negotiators.

The PSC has recently protected the identified information (1) through (3) in NWE's 2005 electric cost tracker, PSC Docket No. D2005.5.88, Order No. 6682a, September 16, 2005, with a qualification that aggregate information regarding monthly costs and monthly volumes are not trade secret. The PSC determines that NWE has shown good and sufficient cause in fact and law that the information (1) through (8) for which protection is requested is entitled to protection from uncontrolled disclosure, pursuant to § 69-3-105, MCA (PSC authority to issue protective orders), as trade secret, with the same qualification related to aggregate cost and volume information.

In accordance with § 30-14-402, MCA (statutory definition of trade secret), PSC rule ARM 38.2.5007(4)(b) identifies the elements of trade secret as: (a) the items or categories identified are information; (b) the information is in fact secret; (c) the information is subject to efforts reasonable under the circumstances to maintain its secrecy; (d) the information is not readily ascertainable by proper means; and (e) the information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy. NWE has made the required demonstration that these elements exist for each of the categories of information for which NWE requests protection. The PSC grants NWE's request for protection of the identified information as trade secret and hereby orders that information submitted in accordance with this order be treated as "confidential information" under the terms of this order and PSC protective order rules, ARM 38.2.5001 through 38.2.5030.

NWE also argues the information should be protected as "confidential business information." NWE argues that there are two distinct bases for withholding information from public disclosure -- trade secret and confidential business information. NWE argues this distinction is recognized in *Great Falls Tribune v. Montana Public Service Commission*, 319 Mont. 38, 50 (2003), which provides that nothing in Article II, Section 9 (right to know), requires disclosure of trade secrets and other confidential proprietary information where protected elsewhere by constitution or statute. It appears that NWE is making this argument because the confidential business information basis for protection may expand the sphere of protectible information, may be more easily administered in protection of information owned by others, and is accompanied by case law that, at least arguably, supports more restrictive protective orders. NWE has made a *prima facie* case for trade secret protection of the categories of information identified by NWE. The PSC does not see a compelling need to consider additional protection of the information as confidential business information.

NWE also requests special terms and conditions relating to access to protected information by market participants and waiver of rules that might conflict with the special terms

and conditions. Special terms and conditions are allowed in PSC protective orders. *ARM 38.2.5002(3)*. Waiver of rules is allowed in PSC protective orders. *ARM 38.2.5002(2)*. NWE argues the special terms and conditions will protect consumers, prevent damage to the procurement process, prevent adverse supply cost increases, protect the default supplier, protect the information, avoid collusion or price fixing, encourage bidders, and protect suppliers. NWE argues the PSC's decision on these special terms and conditions may have a significant bearing on energy supplier decisions to participate in NWE's procurement processes. NWE argues a PSC decision to approve special terms and conditions related to individuals who will be able to review confidential information will support clear and compelling customer interests in preserving and promoting competition.

NWE's special terms and conditions focus on limiting access to confidential information by "market participants." In NWE's proposal "market participants" are persons who engage in the purchase, sale, or marketing of energy or capacity or otherwise offer to enter an energy supply agreement. Market participants can designate what NWE refers to as a "market participant representative" to view the confidential information. In NWE's proposal a "market participant representative" includes: a market participant employee who is not a market participant, does not provide consulting services to a market participant, and does not directly supervise an employee who is or does; or is an attorney, paralegal, expert, or employee of an expert retained by a market participant who is not engaged in or provide legal or expert consulting on market participation. Access by a market participant representative would require a specialized non-disclosure non-use agreement.

In a NWE petition for PSC protective order rule amendments, PSC Docket No. N2005.6.96, Order No. 6674, July 29, 2005, the PSC agreed with NWE that, given NWE's obligation as the default provider of energy and in the context of the procurement of energy by means of competitive sealed bid solicitations as a method to meet that obligation it is crucial that "market sensitive information" not be available to persons who could use the information to

undermine the effectiveness and integrity of the competitive solicitation process. The PSC declined to initiate the proposed rulemaking, determining that other than an assurance that the proposed rules (total ban) would be lawful, NWE provided no legal analysis or authority to explain how such a complete ban on party access could survive a due process challenge. The PSC allowed that NWE could request terms and conditions that control party access, or certain party access, to protected information different from those terms and conditions contained in the PSC's protective order rules, including that any such requests should be made pursuant to ARM 38.2.5002 and contain the good cause discussion and proposed language required by that rule.

Intervenors Two Dot Wind and White Hall Wind object to NWE's request for special terms and conditions. These intervenors argue NWE has not provided a legal basis or factual basis for the requested special terms and conditions, does not provide the required clear showing of good cause for waiver, and has failed to identify the specific rules for which NWE requests waiver. More importantly these intervenors argue the restrictions proposed by NWE would impose a legally unreasonable, if not insurmountable, barrier and a substantial impediment to market participants in obtaining experienced legal counsel and experience expert assistance, all being a violation of due process rights of market participants.

NWE's present "market participant" proposal is not a total ban to access. Nevertheless, the PSC determines that NWE has not provided a sufficient legal basis or factual basis for the requested special terms and conditions. The restrictions proposed by NWE could impose legally unreasonable barriers to market participant participation in these consolidated PSC proceedings (*e.g.*, barriers to obtaining experienced legal counsel and experienced expert assistance). Such barriers could result in a violation of due process rights of market participants. Under such circumstances NWE has not demonstrated sufficient support and good cause for the proposed market-participant special terms and conditions. The PSC denies NWE's request for special terms and conditions.

Done and dated this 31st day of October, 2005, by a vote of 5 to 0 granting protection on the basis of trade secret and 4 to 1 denying special terms and conditions, Commissioner Molnar dissenting.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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GREG JERGESON, Chairman

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BRAD MOLNAR, Vice-Chairman
(voting to dissent on issue of special terms)

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DOUG MOOD, Commissioner

_____
ROBERT H. RANEY, Commissioner

_____
THOMAS J. SCHNEIDER, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)

NOTE: There is no reconsideration of the granting of a protective order. There is a procedure to challenge the provider's claim of confidentiality. See ARM 38.2.5008.

Montana Public Service Commission

Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

(7-26-00)

ARM 38.2.5012

Docket No. D2003.7.86, Order No. 6501d
Order Action Date: October 31, 2005

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