Service Date: July 29, 2005

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

* * * * *

IN THE MATTER Of the Petition	)	UTILITY DIVISION
of NorthWestern Energy for	)	
Amendment of ARM 38.2.5001,	)	DOCKET NO. N2005.6.96
5023 and 5024	)	ORDER NO. 6674

ORDER ON PETITION FOR AMENDMENT OF RULES

Background

1. On June 6, 2005 NorthWestern Energy (NWE) filed, pursuant to § 2-4-315, MCA, and ARM 38.2.101 (ARM 1.3.205), a petition for amendment of Public Service Commission (Commission) administrative rules 38.2.5001, 5023 and 5024. Section 2-4-315, MCA, requires the Commission within 60 days of filing, to either deny the petition in writing or "initiate rulemaking proceedings in accordance with 2-4-302 through 2-4-305." A decision to initiate rulemaking must also be in writing. On June 10, 2005 the Commission issued Notice of Petition for Amendment of Rules, Notice of Opportunity to Comment on Petition. The Commission indicated it must respond to the NWE petition by August 1, 2005, and invited interested persons (including NWE) to submit initial comments on the petition by June 28, 2005, and reply comments by July 12, 2005. Initial and reply comments and supporting documents were filed by NWE, PPL Montana, LLC (PPL), and Whitehall Wind, LLC, Yellowstone Energy Limited Partnership and Colstrip Energy Limited Partnership (jointly) (Whitehall Wind). No person requested an oral presentation or hearing on the petition, nor did the Commission schedule one on its own motion. The "record evidence" in this docket, per § 2-4-315, MCA, consists of the petition, comments, supporting documents, and other documents consulted by the Commission which may be referred to in this Order.

Summary of the Petition

2. The Rules NWE petitions to amend are part of Commission Procedural Rules, Protective Orders and Protection of Confidential Information, ARM 38.2.5001-5030 (protective order rules). The Commission adopted protective order rules to govern those instances where information required as part of the regulatory process is claimed confidential and produced only on issuance of a protective order. Among other things, the protective order rules describe the process and requirements for requesting and issuing a protective order; and contain the terms of Commission protective orders, including the rights and obligations of those subject to them.[1]

3. ARM 38.2.5023 describes who may have access to confidential information covered by a protective order, as well as how such access is accomplished.

> (1) Confidential information must be provided by the provider to legal counsel for the requesting party when legal counsel has signed a nondisclosure agreement agreeing to be bound by the terms of the protective order. Access to confidential information may be authorized by legal counsel to expert witnesses of the requesting party. Except as otherwise agreed to by the provider, the designated expert may not be an officer, director, or employee of any party, or an officer, director, employee, stockholder, or member of an association or corporation of which any party is a member or affiliate. Prior to giving access to an expert, legal counsel shall deliver a copy of the governing protective order and these rules to the expert and the expert shall sign a nondisclosure agreement. A copy of the nondisclosure agreement must be provided to the provider.

4. NWE contends that in a certain situation this restriction on the provision of protected information to legal counsel and particular experts does not or may not provide adequate protection. Specifically, NWE believes that "market sensitive information" related to a public utility "energy supply arrangement" should not be available to "market participants." To accomplish this NWE proposes to add a section to ARM 38.2.5023, as follows:

> A provider is not required to make available to employees, lawyers or expert witnesses of a market participant any market sensitive information that it either prepares or receives from a third party. This provision has no bearing on the ability of non-market participants to obtain access to materials of this type.

[1] The Commission first adopted protective order rules in 2000. The Commission issued protective orders prior to the adoption of administrative rules, each order containing discretely the terms and conditions.

5. Also, NWE proposes the following new definitions be added to ARM 38.2.5001:

> "Energy supply arrangement" means a contract or other arrangement between a public utility providing electricity or natural gas service and another entity under which the public utility considers, pursues or obtains a contract providing for energy delivery to its customers;
>
> "Market sensitive information" means trade secrets, reports, records and information requested or required as part of a regulatory proceeding which, if revealed, would place the regulated utility and its customers at an unfair business advantage. Such information includes but is not limited to confidential information supporting or relating to the energy supply procurement process such as: bid information of market participants, analysis of bid information, the detailed load data of default supply customers or the confidential information in existing or proposed supply contracts;
>
> "Market participant" means a person or entity, including a Qualified Facility, that engages in the purchase, sale or marketing of energy or capacity and/or offers to enter an energy supply arrangement;
>
> "Non-market participant" means a person or entity that is not a market participant and that is interested in the [e]ffect of the purchase, sale or marketing of energy or capacity and/or an energy supply arrangement, but which, as determined by the Commission, has no direct commercial interest[.]

6. In addition, NWE would qualify ARM 38.2.5024 by adding the following to the beginning of subsection (1): "Except as provided in 38.2.5023(2)[.]" This would prevent access to protected information by employee experts of "market participants."

7. NWE makes these rule change proposals because of its status as a public utility responsible for procuring energy from third party suppliers, and for securing Commission approval for such procurement. NWE procures energy through a competitive bidding process. According to NWE, the rule changes are necessary because, if competitive suppliers ("market participants") can access confidential information through the regulatory process, then the integrity of the competitive process will be undermined to the detriment of customers. In support, NWE submits an affidavit of Steven E. Lewis, an expert in energy procurement. NWE summarizes Mr. Lewis's points as follows:

> a) If electric suppliers are aware that their confidential bid information can be made available to other supply competitors, a very likely result will be that fewer bidders will participate in the future. This result would harm

> ratepayers; and
>
> b) If suppliers are allowed to scrutinize the bids of competitors, they will refine their own future bids in order to ensure they are offering to sell at a price that is no lower than necessary, or publication of bid information could lead to collusion and price fixing among bidders. Again, these results would harm customers.

Petition, p.5.

8. Also, NWE contends that the release of competitive bid information to potential bidders, in the context of frequent bid solicitations and a limited number of bidders, will effectively "create an open bid process." NWE argues that open bid processes are less efficient than sealed bid auctions and benefit bidders at the expense of customers. Perhaps the best statement of NWE's rationale for filing the petition is as follows: "NWE's customers are best served by well-constructed, well-documented, open procurement solicitations in which all bidders must compete on their own merits, not advantaged by proprietary information about their competitors mined from regulatory proceedings." Petition, p.7.

9. NWE contends that its concerns about the integrity of the competitive procurement process are shared by the Public Utilities Commissions of California and Colorado, and submitted documents from these commissions that purportedly are consistent with and support the petition. NWE further asserts that withholding information from market participants does not "violate the Constitution" and is in the public interest.

Summary of the Comments

Whitehall Wind

10. Whitehall Wind summarizes its own comments as follows: 1. NWE has not demonstrated that the current protective order rules are ineffective in preventing disclosure of sensitive information; 2. the proposed amendments violate the due process rights of market participants; 3. even if it were shown that current rules are ineffective, the proposed amendments are overbroad. Whitehall Wind also contends that decisions by the California and Colorado commissions do not support the NWE petition. It asserts that NWE's petition fails to provide a sufficient factual and legal basis for the proposed

rule changes, violates ARM 1.3.205 (and presumably, therefore, also § 2-4-315, MCA, and ARM 38.2.101), and should be denied.

PPL

11. PPL urges the Commission to either deny the petition, or to adopt a rule that allows access to all parties' "counsel, outside experts, and non-competitive duty personnel." PPL claims that denial of all market sensitive information to market participant parties would "restrict the quality of participation" of those parties and would "lead to due process violations."

12. PPL responds to what it labels "flawed assumptions" in the NWE petition. First, PPL posits that Commission rules "already establish significant protection against the potential misuse of market sensitive information by NorthWestern's competitors." Second, PPL challenges NWE's "insinuation" that market participant participation in the procurement review process is relatively unimportant. Rather, PPL claims that "[a]ctive participation by knowledgeable market participants helps develop a more robust public record on which the Commission can base its decisions." Third, PPL avers that NWE "fails to acknowledge" that implementation of its proposed rules could violate the due process rights of market participants. Finally, PPL criticizes NWE for not recognizing the severity of the proposed restrictions and the availability of less restrictive alternatives.

13. PPL also challenges NWE 1) that the Montana Consumer Counsel can adequately represent the interests of market participants; 2) that bidder concern for confidentiality justifies the proposed amendments; 3) that the Montana Rules of Professional Conduct for attorneys undermine the protection afforded by current protective order rules; 4) that current rules dampen bidding into future energy solicitations; 5) that current rules create an "open bid auction"; 6) that market participants disregard current protective order restrictions; and 7) that the California and Colorado experience supports the NWE petition.

Discussion and Decision

14. The Commission agrees with NWE that, given NWE's obligation as the default provider of energy under Montana law and Commission guidelines, 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. NWE is correct that disclosure of this information to the wrong persons could ultimately result in higher energy prices to customers. It appears that, at least generally, PPL and Whitehall agree with the concern for confidentiality that is the genesis of the NWE petition.

15. Despite sharing NWE's expressed reasons for filing the petition, the Commission declines to initiate the proposed rulemaking. First, the rule amendments NWE proposes would create a total ban on access to certain information by "market participant" parties to Commission proceedings. Other than an assurance that the proposed rules 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. In the absence of such an explanation the Commission is unwilling to adopt a rule that appears to violate the usual understandings of party rights and obligations.

16. NWE provides documents from both the California and Colorado Commissions to support its petition. While those documents reflect the basic concerns that spawned the petition, it appears that only the Colorado Commission has ever issued an order completely banning market participants from market sensitive information, and that order does not provide any legal justification for the action. This Commission will not judge the Colorado order (the context of which may in any event have been different from the situation in Montana), but the fact that it was issued is not sufficient support to propose a rule that would completely deny certain party access to protected market sensitive information.

17. Second, NWE appears to have jumped from recognizing the serious consequences of disclosure to proposing a complete ban, without stopping to consider whether there are reasonable alternatives. In other words, NWE has failed to justify the draconian solution - the death penalty - that it would impose by rule. In this regard the California experience is not helpful to the NWE petition. The following language from a California administrative law judge expresses this Commission's reaction to the NWE petition:

> It is indisputable, as PG&E and SDG&E [read: NWE] have pointed out, that proprietary, commercially sensitive and trade secret information (either the IOUs' own information or that of the bidders on their RFPs) that the IOUs provide to the Commission in connection with their procurement processes, cannot and should not be allowed to fall directly into the hands of any market participant, who could use that information to gain an advantage over other market participants or over the IOU conducting the procurement. However, it is not an irresolvable conundrum to accommodate both the interest of the IOUs and their bidders in confidentiality and the need for transparency to afford due process to market participants, especially those that have been unsuccessful in IOU procurement processes.

ALJ Ruling on San Diego Gas and Electric Company's Motion to Amend Protective Order, Rulemaking 01-10-024, December 1, 2003, pp. 9-10. The Ruling then goes on to discuss particular protective order language to resolve the "conundrum." This language is obviously not the only alternative to a complete ban, and maybe not the best, but it does reflect a serious effort to accommodate the interests of due process and confidentiality. Even assuming due process were not an obstacle, the Commission is unwilling to propose a ban before making similar efforts at accommodation in Montana.

Conclusions of Law

1. NWE is a public utility and default supplier subject to the regulatory jurisdiction of the Montana Public Service Commission. Title 69, MCA.

2. NWE is an interested person and may petition to amend Commission rules. § 2-4-315, MCA.

3. The Commission has complied with the requirements of § 2-4-315, MCA, in response to the NWE petition.

4. Based on the "record evidence" the Commission may lawfully deny the NWE petition.

Order

1. For the reasons discussed above the NWE Rulemaking Petition is denied.

2. To the extent that proceedings on any NWE docket have been delayed due to concern over certain party access to protected, or potentially protected information, the

Commission directs NWE to file as quickly as possible any necessary requests for protective orders, as further discussed below. Potentially affected dockets include D2003.7.86, D2004.6.96, D2005.6.103, D2005.5.87, D2005.5.88, and perhaps others. Staff is directed to meet with NWE and intervenors to discuss the schedules in these dockets, to discuss the extent to which schedules have been slowed due to confidentiality concerns and issues, and to consider how to resolve these issues and make sure these dockets are moving, or begin to move, on a reasonable schedule. Staff is directed to report to the Commission on these discussions by scheduling a work session no later than 14 days from the service date of this order.

3. Regarding any petitions for protective order that NWE files, referred to at Order paragraph 2 above, NWE may request terms and conditions that control party access, or certain party access, to protected information different from those terms and conditions contained in the Commission's protective order rules. 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.

4. While the Commission denies the NWE petition, it does, as explained, recognize that NWE's concern about certain access to confidential information is reasonable, and recognizes also that the access restrictions in the current rules may not be sufficient in the context of default supplier competitive energy solicitations. Therefore, the Commission directs its staff to research amendments to the protective order rules that would make the access restrictions adequate in the current context of energy procurement, to the extent the restrictions are not presently adequate.

5. Nothing in this Order constitutes a prejudgment by the Commission on any issue in any NWE request for protective order, including whether the information at issue may be lawfully protected, or whether the Commission's protective order rules should be waived or modified as can be requested pursuant to ARM 38.2.5002.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____
GREG JERGESON, Chairman

_____
BRAD MOLNAR, Vice Chairman, Voting to Dissent

_____
DOUG MOOD, Commissioner

_____
ROBERT H. RANEY, Commissioner

_____
THOMAS J. SCHNEIDER, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.