

E. Lars Phillips  
Maxine C. Sugarman  
Earthjustice  
P.O. Box 4743  
Bozeman, MT 59772-4743  
(406) 586-9699  
laphillips@earthjustice.org  
msugarman@earthjustice.org

*Attorneys for Butte Watchdogs for Social and Environmental Justice, Climate Smart Missoula, Helena Interfaith Climate Advocates, Honor the Earth, Montana Environmental Information Center, Montana Public Interest Research Group, and NW Energy Coalition*

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

IN RE COMMISSION  
INVESTIGATION OF MONTANA  
RESOURCE ADEQUACY AND RISK  
PROFILE

Docket No. 2022.09.087

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**MOTION CHALLENGING PROTECTIVE ORDER 8040  
AND  
SUPPORTING MEMORANDUM**

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**MOTION**

Pursuant to Montana Administrative Rule 38.2.5008(3), Butte Watchdogs for Social and Environmental Justice, Climate Smart Missoula, Helena Interfaith Climate Advocates, Honor the Earth, Montana Environmental Information Center, Montana Public Interest Research Group, and NW Energy Coalition (collectively,

the “Public Interest Groups”) file this Motion to challenge Protective Order 8040, issued by the Montana Public Service Commission on December 2, 2025, allowing NorthWestern Corporation d/b/a NorthWestern Energy (“NorthWestern”) to shield the utility’s letters of intent with three data center developers from public view. Dkt. No. 2022.09.087, Index #41, Protective Order 8040 (Dec. 2, 2025).

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## SUPPORTING MEMORANDUM

Allowing NorthWestern to make secret deals with data center developers harms the public and could shift costs to residential ratepayers.<sup>1</sup> NorthWestern is not just another private company, it is an investor-owned, monopoly, public utility that most Montanans have no choice but to buy electricity from. It should be harder, not easier, for such a company to hide information from the public. Reflexively issuing a protective order based on unsubstantiated trade secret claims, as the Commission did here, creates barriers to participation, hides the costs of deals with data centers, and allows decisions that will impact ratepayers to be made behind closed doors.

The Public Interest Groups have a right to access unredacted copies of letters of intent between NorthWestern and data center developers, and the Commission's decision to shield those letters from public view through Protective Order 8040 was unlawful. The Commission acted outside its statutory authority by issuing Protective Order 8040 without sufficient evidence to determine that the now-protected information qualified as a trade secret. As a result, the Commission granted NorthWestern's motion in violation of its own rules. The Commission also failed to weigh NorthWestern's claimed need for trade secret protection against the merits of public disclosure and Protective Order 8040 will not withstand

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<sup>1</sup> See Eliza Martin & Ari Peskoe, Harv. L. Sch. Env't & Energy L. Program, *Extracting Profits from the Public: How Utility Ratepayers Are Paying for Big Tech's Power*, at 10–14 (Mar. 2025) (submitted as Ex. 1).

constitutional scrutiny. The Commission should order the public disclosure of NorthWestern's letters of intent with data center developers.

## **PARTIES**

### **Butte Watchdogs for Social and Environmental Justice**

3310 Hannibal Street

Butte, MT 59701

(406) 360-0345

*Represented by Earthjustice*

Butte Watchdogs for Social and Environmental Justice is a small non-profit organization dedicated to advancing the cause of social and environmental justice for the people of Butte-Silver Bow, Montana, and the state of Montana. Butte Watchdogs believes in social and environmental justice that is rooted in transparency, accountability, and morality. The organization demands quality, timely, and science-based solutions. Butte Watchdogs has approximately 500 supporters. The organization began engaging on data center issues in April 2025, when Sabey Data Center Properties LLC sought to purchase 606 acres from the Butte-Silver Bow County Commission. Since then, its supporters have become increasingly concerned about the lack of transparency and opportunities for public participation in governmental review of data center agreements. Butte Watchdogs' supporters believe that Montanans' constitutional Right to Know is infringed if the Commission allows NorthWestern to shield its letters of intent with data center developers from the public.

**Climate Smart Missoula**

P.O. Box 8945

Missoula, MT 59807

(406) 926-2847

*Represented by Earthjustice*

Climate Smart Missoula is a community-based nonprofit organization with a mission to build and accelerate climate solutions for Missoula and beyond through collaborative programs, advocacy, and catalyzing climate leadership. The organization works alongside local government and other partners to develop policies and implement programs to reduce greenhouse gas emissions and reach the community's goal of 100 percent clean electricity by 2030 for the Missoula urban area, which was jointly adopted by the City of Missoula and Missoula County in 2019. Climate Smart Missoula's efforts help reduce fossil fuel use in the state, while also strengthening climate resiliency and adaptation, with a focus on human and environmental health. The organization's advocacy to transition to 100 percent clean electricity hinges on affordable electricity rates, which are at risk of further rising if data centers come onto the grid in Montana. Climate Smart Missoula would like to make sure that all NorthWestern customers can participate in the Commission's decisions regarding NorthWestern's demand and generation. The

organization's advocacy hinges on public access to NorthWestern's current agreements with data center developers.

**Helena Interfaith Climate Advocates**

32 Hill Brothers Road  
Clancy, MT 59634  
(406) 459-8561

*Represented by Earthjustice*

Helena Interfaith Climate Advocates (“HICA”) is comprised of members of twelve Helena congregations committed to acting against threats to our environment. HICA’s actions derive from concerns as people of faith for the well-being of all Montanans currently and those of future generations. Its members are customers of NorthWestern. The organization was founded in 2022 around Earth Day in an effort to build community among members of different faiths who all have an interest in taking care of the planet. HICA has organized climate circles to build community in discussing issues relating to climate change and clean energy. HICA has also engaged in advocacy before the State Legislature and the Commission to advance issues related to energy affordability and decreasing our reliance on fossil fuels in a reasonable and deliberate manner. The organization and its members are concerned about data centers impacting affordability and deepening our state’s reliance on Colstrip. Its members are particularly concerned about low-income ratepayers and believe that access to affordable electricity is a basic need that needs to be protected. Openness and honesty are central to HICA’s mission. HICA’s members are concerned that through the Commission’s protective orders, Montanans are being denied the right to know about decisions that impact them,

which limits the effectiveness of their participation in proceedings before the Commission.

**Honor the Earth**

P.O. Box 1531

Lame Deer, MT 59043

(406) 740-1508

*Represented by Earthjustice*

Honor the Earth is an Indigenous-led organization fighting to dismantle settler-colonialism, racial capitalism, white supremacy, and imperialism. The organization is creating a world where Indigenous sovereignty is recognized, respected, and upheld. It is working to create a future where communities thrive with honor, abundance, and in right relationship with Mother Earth. It does this by investing in its communities through campaigns, research, training, reclaiming narratives, and providing capacity support in service of all land and life. Honor the Earth is based in Lame Deer, Montana, within NorthWestern's service territory. The organization is concerned about the material and physical impacts of artificial intelligence on Indigenous lands and rural communities, including the disproportionate effects on Indigenous, Black, and Brown communities across the country. Honor the Earth is particularly concerned about any efforts to expand NorthWestern's reliance on Colstrip. The organization is concerned that NorthWestern and data center developers are racing to build these large load data centers without tribal or local community consent, at the cost of water, health, land, and energy bills. Beginning in October 2025, Honor the Earth objected to NorthWestern's unsupported attempt to keep the public in the dark about agreements the utility has made with data center developers. The organization's

advocacy is currently limited by its lack of access to information about NorthWestern's agreements with data center developers in the region.

**Montana Environmental Information Center**

P.O. Box 1184  
Helena, MT 59624  
(406) 443-2520  
*Represented by Earthjustice*

Montana Environmental Information Center ("MEIC") is a non-profit environmental advocacy organization founded in 1973 by Montanans concerned with protecting and restoring Montana's natural environment. MEIC has members who are NorthWestern customers, and its office in Helena is within NorthWestern's service territory. MEIC plays an active role in promoting Montana clean energy projects and policies, including advocating for the expansion of responsible, renewable energy and energy efficiency; and supporting policies that insulate energy consumers from fuel price risk. MEIC has been engaged in advocacy before the Commission for decades through rate cases, integrated resource plans, rulemaking, cost-recovery dockets, and other petitions. MEIC and its members are concerned that data centers will result in more water and air pollution; force existing customers to subsidize the costs associated with bringing data centers onto the grid, making their utility bills unaffordable; and jeopardize the reliability of the system for all ratepayers. MEIC and its members are concerned about attempts to limit Montanans' constitutional Right to Know. MEIC and its members are actively engaged in proceedings before the Commission, including NorthWestern's forthcoming docket for the utility's Integrated Resource Plan. Additional details

regarding MEIC's interests are described further in the attached Declaration of Anne Hedges. Hedges Decl. (submitted as Ex. 2).<sup>2</sup>

**Montana Public Interest Research Group**

1820 West Lincoln Street, Suite 3  
Bozeman, MT 59715  
(406) 243-2908  
*Represented by Earthjustice*

Montana Public Interest Research Group (“MontPIRG”) is a student-led nonpartisan organization dedicated to nurturing the next generation of civic leaders, advocating for community issues, and defending the environment. For forty-five years, MontPIRG has represented the entire student population at the University of Montana and Montana State University. Additionally, the organization has a Board of Directors composed of twelve university students, and each semester it enrolls twenty-five students in robust civic engagement internships. Nearly all MontPIRG’s members are NorthWestern Energy customers. MontPIRG’s members are concerned about the environmental degradation and rising electricity costs associated with data centers. As students, MontPIRG’s members are particularly worried that the enormous demand from data centers will increase the burden on residential customers to cover the expenses incurred by data

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<sup>2</sup> The Public Interest Groups have standing to assert this Motion under Mont. Admin. R. 38.2.5008(3). Those that have not submitted accompanying declarations will provide the same at the Commission’s request. All of the Public Interest Groups have members and supporters who are captive retail electric customers in NorthWestern Energy’s service territory. The Public Interest Groups have participated in Commission proceedings to advocate for just and reasonable electric rates for existing ratepayers and clarity with respect to NorthWestern’s provision of electricity supply service to large load data centers. *See, e.g.*, Dkt. No. 2025.11.084, Index #1, 33; Dkt. No. 2022.09.087, Index #24, 35. The Public Interest Groups assert that their constitutional Right to Know is infringed by the Commission’s protective order shielding NorthWestern’s Letters of Intent with data center developers. The Public Interest Groups demonstrate a concrete and particularized injury: lack of access to information relevant to their advocacy.

centers in the state. MontPIRG members worry that if data centers are permitted to come onto the power grid in Montana before the Commission defines the rules, it will cause lasting and potentially irreparable damage to the environment and negatively impact Montana residents. MontPIRG students deserve the experiential learning opportunity to engage meaningfully in discussions, debates, forecasts, projections, and issues that arise from the data center proposals. Their experiential learning opportunities, their voices, and their futures, hinge on the Commission honoring Montana students' constitutional Right to Know and the Commission allowing meaningful public participation in upcoming proceedings.

**NW Energy Coalition**

811 First Avenue, Suite 305

Seattle, WA 98104

(406) 461-6632

*Represented by Earthjustice*

NW Energy Coalition (“NWECC”) is a non-profit organization whose primary purpose is to promote an energy future that is clean, reliable, affordable, and equitable. NWECC has approximately 100 member organizations—including environmental, civic, and human service organizations, unions, utilities, and businesses—as well as individual members throughout Montana, Oregon, Washington, Idaho, and British Columbia. NWECC has eleven Montana-based organizational members, among them organizations that promote clean energy, advance sustainable solutions to reduce poverty, and help Montanans obtain low-income energy assistance. NWECC has members and staff who are NorthWestern customers. One of NWECC’s chief strategic priorities is to grow programs that make energy services affordable and equitable for all customers through advocacy in

utility and regulatory proceedings. NWECE's members are concerned that the costs associated with data centers will be shifted to NorthWestern's existing ratepayers. A core part of NWECE's mission is to ensure that citizens have the opportunity to weigh in and have their voices heard in matters of public policy and regulatory decisions. The protective order related to NorthWestern's letters of intent to supply energy services to data centers inhibits the ability of NWECE members to accurately analyze the full costs, revenue, and other details associated with supplying energy to data centers, and thus limits members' ability to fully participate in the regulatory process. Additional details regarding NWECE's interests are described further in the attached Declaration of Derek Goldman. Goldman Decl. (submitted as Ex. 3).

## **STATEMENT OF FACTS**

NorthWestern is Montana's largest public utility and serves approximately 413,400 electric customers within its approximately 107,600 square mile service area. NorthWestern Energy, *2024 Annual Report*, at 13 (submitted as Ex. 4). Approximately ninety-eight percent of the utility's electric customers are captive residential and small commercial customers—customers required to purchase electricity from NorthWestern. *NorthWestern Energy's Montana Integrated Resource Plan 2023*, at 30–31 [hereinafter *NorthWestern 2023 IRP*] (submitted as Ex. 5).

### **I. NorthWestern's Letters of Intent with Data Center Developers**

NorthWestern has entered into letters of intent to provide electricity supply service to three data center developers in Montana: Atlas Power Group LLC ("Atlas"); Sabey Data Center Properties LLC ("Sabey"); and Quantica

Infrastructure, LLC (“Quantica”). *See* Dkt. No. 2022.09.087, Index #43, Redacted Letters of Intent (Dec. 30, 2025) (collectively the “Letters of Intent”). NorthWestern began announcing the Letters of Intent in December 2024. *See* Press Release, NorthWestern Energy, NorthWestern Energy Announces Agreement with Data Center Developer in Montana (Dec. 17, 2024) (submitted as Ex. 6); Press Release, NorthWestern Energy, NorthWestern Energy to Supply Power for Butte, Montana Data Center Atlas Power Group (Dec. 19, 2024) (submitted as Ex. 7); Press Release, NorthWestern Energy, NorthWestern Energy Signs Letter of Intent to Serve Quantica Infrastructure’s Montana Data Center Development (July 30, 2025) (submitted as Ex. 8).

## **II. The Commission’s September 2025 Information Request**

On September 3, 2025, the Montana Public Service Commission requested certain documents and information from NorthWestern about the utility’s plans to serve large load data centers. Dkt. No. 2022.09.087, Index #28, Letter from Mont. Pub. Serv. Comm’n to Charles Lane, Dir. of Reg. Affs., NorthWestern Energy, at 2 (Sep. 3, 2025). The Commission’s request for information noted that these documents were needed not only to “inform the Commission’s oversight responsibilities,” but also to ensure NorthWestern’s compliance with Mont. Code Ann. § 69-8-201(1). *Id.*, at 2–3. In relevant part, the Commission requested “[c]opies of all letters of intent, memoranda of understanding, agreements in principle, term sheets, draft contracts or agreements, and executed contracts and agreements between NorthWestern and any of the entities referenced in the press releases described [in the Commission’s letter].” *Id.*, at 3.

NorthWestern responded to the Commission on September 17, 2025, and refused to provide the public with access to the Letters of Intent. *See* Dkt. No. 2022.09.087, Index #29, Letter from Charles Lane, Dir. of Reg. Affs., NorthWestern Energy to Mont. Pub. Serv. Comm’n, at 2 (Sep. 17, 2025). Instead, NorthWestern indicated that it would “submit copies of the requested of letters of intent under a protective order to ensure appropriate confidentiality.”<sup>3</sup> *Id.*

### III. NorthWestern’s Motion for Protective Order

NorthWestern filed a motion for a protective order concurrently with its response to the Commission’s request for information. Dkt. No. 2022.09.087, Index #30, NorthWestern Energy Mot. for Protective Order (Sep. 17, 2025) [hereinafter Mot. for Protective Order]. NorthWestern requested a protective order on the grounds that the Letters of Intent contained confidential trade secret information entitled to protection because keeping the information contained within the Letters of Intent secret has “independent economic value” and impacts the utility’s “competitive advantage.” *See id.*, at 4–5.<sup>4</sup>

NorthWestern claimed that it had kept the Letters of Intent “secret” through confidentiality terms, limited physical access, and non-disclosure agreements, and argued that the information contained within the Letters of Intent was not “readily

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<sup>3</sup> NorthWestern also claimed not to “have any memorandums of understanding, agreements in principle, term sheets, or executed contracts with any of the [three data center developers].” Dkt. No. 2022.09.087, Index #29, Letter from Charles Lane, Dir. of Reg. Affs., NorthWestern Energy to Mont. Pub. Serv. Comm’n, at 2 (Sep. 17, 2025).

<sup>4</sup> In its request, NorthWestern acknowledged the applicable definition of “trade secret” information under the Montana’s Uniform Trade Secrets Act, and that there is a “constitutional presumption of access to documents and information in the Commission’s possession.” Mot. for Protective Order, at 2–3.

ascertainable.” *Id.*, at 3–4. NorthWestern also claimed that it derived independent economic value and a competitive advantage from keeping the Letters of Intent secret for the same reasons, *i.e.*, because they included a confidentiality term, were subject to non-disclosure agreements, and needed to be kept secret to ensure that NorthWestern obtained reasonable contractual terms. *Id.*, at 4–5.

For evidentiary support, NorthWestern submitted the Affidavit of Bleau J. LaFave. *See* Dkt. No. 2022.09.087, Index #30, Attach. A, Aff. of Bleau J. LaFave (Sep. 16, 2025) [hereinafter LaFave Aff.]. The LaFave Affidavit presented almost exclusively the same arguments to prove the existence of trade secrets, *i.e.*, non-disclosure agreements, confidentiality terms, and NorthWestern’s efforts to keep the information secret. *Id.*

NorthWestern did not identify—in any manner—the information that it sought to shield from the public. NorthWestern did not describe the contents of the Letters of Intent, nor provide any other explanation of the information that it was asking the Commission to determine qualified as trade secret. *See* Mot. for Protective Order, at 1–5.

In response, Montana Environmental Information Center, Honor the Earth, and NW Energy Coalition submitted a letter objecting to the requested protective order and pointing out various deficiencies in the utility’s Motion, including the lack of supporting information provided by NorthWestern as required by the Commission’s rules. Dkt. No. 2022.09.087, Index #31, Letter from MEIC, NWECC, Honor the Earth to Mont. Pub. Serv. Comm’n (Oct. 15, 2025).

On November 3, 2025, NorthWestern submitted a reply in support of its Motion for Protective Order reiterating its trade secret arguments. Dkt. No. 2022.09.087, Index #38, NorthWestern Reply in Support of Mot. for Protective Order (Nov. 3, 2025). The utility also promised to make “a public filing concerning future service to these types of customers before the end of the year,”—it did not—and argued that the Letters of Intent should be kept secret because they were subject to “ongoing negotiations” and “not uniform.” *Id.*, at 2, 4.<sup>5</sup>

#### **IV. Protective Order 8040**

On December 2, 2025, the Commission granted NorthWestern’s request for a protective order. Dkt. No. 2022.09.087, Index #41, Protective Order 8040 (Dec. 2, 2025) [hereinafter Protective Order 8040]. The Commission first found that “NorthWestern [had] met its procedural burden under Montana Administrative Rule 38.2.5007(3).” *Id.*, ¶ 16. The Commission then concluded that NorthWestern’s Motion contained “a sufficient description of the information sought to be protected,” “a sufficient factual basis,” and “a sufficient legal analysis as to why the information should be protected.” *See id.* The Commission did not describe, in any manner, the now-protected information other than to note that said information was included in the Letters of Intent.

Second, the Commission found that NorthWestern met its burden “to establish a substantive prima facie case of trade secret confidentiality for the

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<sup>5</sup> On November 25, 2025, Montana Environmental Information Center, Honor the Earth, and NW Energy Coalition filed a comment responding to NorthWestern’s Reply and reiterating a request that the Commission deny NorthWestern’s request for a protective order. Dkt. No. 2022,09.087, Index #39, Letter from MEIC, NWECC, Honor the Earth to Mont. Pub. Serv. Comm’n (Nov. 25, 2025).

proprietary information in the [Letters of Intent]” in accordance with Mont. Admin. R. 38.2.5007(4)(b). *Id.*, ¶ 17. The Commission concluded that the information in NorthWestern’s Letters of Intent was “secret” because NorthWestern had protective measures in place to maintain secrecy and had not provided the Letters of Intent to any third parties. *Id.*, ¶ 20. The Commission did not address the fact that NorthWestern had previously publicly disclosed at least some of the information contained within the Letters of Intent on several occasions. The Commission also concluded that the Letters of Intent contained information that “derives independent economic value or competitive advantage from its secrecy” based on NorthWestern’s argument that limiting knowledge of the negotiated terms allowed NorthWestern to obtain “reasonable contractual terms tailored to each potential customer” and NorthWestern’s assertion that the Letters of Intent contained non-disclosure agreements. *Id.*, ¶ 21.

Because the Commission found that NorthWestern met both its procedural and substantive burdens, the Commission granted NorthWestern’s request for a protective order for “[t]he proprietary [Letter of Intent] information.” *Id.*, ¶¶ 23–24. Protective Order 8040 does not describe, in any way, the “proprietary” information contained within the Letters of Intent.<sup>6</sup>

On December 30, 2025, NorthWestern filed heavily redacted versions of the Letters of Intent with the Commission. Dkt. No. 2022.09.087, Index #43, Redacted

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<sup>6</sup> The Order included a “Universal Nondisclosure Agreement” required to “receive or access information protected by [the] Order.” Dkt. No. 2022.09.087, Index #41, Protective Order 8040, ¶ 28 (Dec. 2, 2025).

Letters of Intent (Dec. 30, 2025). The publicly available, redacted versions of the Letters of Intent revealed that NorthWestern chose to redact different information for each of the three data center developers and demonstrates that the utility has not consistently identified the information it claims to be trade secret. *See id.*

With respect to the letter of intent for Atlas, NorthWestern partially redacted the proposal, and entirely redacted sections regarding definitive agreements, fees and expenses, conditions and approvals, non-binding agreements, governing law, and contact information for the signatories to the letter. *See id.* The term sheet for Atlas includes partial redactions for the delivery point and quantity, and complete redactions for the structure, designated network resources, network upgrades, and contingencies. *See id.*

The letter of intent for Quantica includes partial redactions of the proposal, and complete redactions for definitive agreements, fees and expenses, conditions and approvals, non-binding and non-exclusive terms, governing law, and the signatories to the letter. *See id.* The term sheet for Quantica includes complete redactions for the structure, quantity, delivery point, rates, resource adequacy, contingencies, and additional terms.

For NorthWestern's letter of intent with Sabey, the utility partially redacted information regarding the proposal, and completely redacted information related to definitive agreements, fees and expenses, conditions and approvals, non-binding agreements, governing law, and the signatories to the letter. *See id.* The term sheet for Sabey redacts the structure, designated network resources, delivery points,

network upgrades, delivery start date, rate, and contingencies, and some information related to quantity. *See id.*

## **V. NorthWestern’s Public Disclosures About Electricity Supply Service to Data Centers**

NorthWestern has publicly disclosed information about its engagement with data center developers in Montana and, as a result of those public disclosures, at least some of the information now shielded from public view by Protective Order 8040 is publicly available.

In July 2025, NorthWestern disclosed the expected load and start date of its provision of electricity supply service to Sabey, Atlas, and Quantica. NorthWestern Energy, *Second Quarter Earnings Webcast*, at 21 (July 31, 2025) (submitted as Ex. 9). NorthWestern indicated that it planned to meet Sabey’s expected 50-megawatt initial load beginning in mid-2027, with expected growth to 250 megawatts. *Id.* NorthWestern also confirmed that it expected to meet Atlas Power’s 75 megawatts load beginning in January 2026, with expected growth to 150 megawatts. *Id.* Finally, NorthWestern stated that it expected to serve Quantica’s 175 megawatts load beginning in 2028, with phased growth to 500 megawatts by 2030. *Id.* NorthWestern reiterated these plans in October 2025, NorthWestern Energy, *Third Quarter Earnings Webinar*, at 19 (Oct. 30, 2025) (submitted as Ex. 10), and again in February 2026, NorthWestern Energy, *2025 Year-End Earnings Webinar*, at 18 (Feb. 12, 2026) (submitted as Ex. 11).

NorthWestern’s term sheets with the data center developers, however, redacted quantity and delivery start information for Quantica, and delivery start

date information for Sabey—the same information the utility has publicly disclosed at least three times over the past year. *See* Dkt. No. 2022.09.087, Index #43, Redacted Letters of Intent (Dec. 30, 2025).

## ARGUMENT

Protective Order 8040 shields from public view essential information about a public utility’s plans to provide electricity supply service to data centers. This secrecy negatively impacts the public’s ability to meaningfully engage with the utility’s plans for resource adequacy and prevents the public from advocating against rising costs for existing ratepayers.

Although the Commission may issue protective orders, it must do so within the bounds of its statutory and regulatory authority and in line with the requirements of Montana’s Constitution. “If the public is to have any ability to know and understand how its government is exercising its remaining control over the utilities, then individuals and organizations must have access to information that is filed by these utilities with government agencies, including the [Commission].” *Great Falls Trib. v. Mont. Pub. Serv. Comm’n*, 2003 MT 359, ¶ 71, 319 Mont. 38, 82 P.3d 876 (Nelson, J. concurring).

The Commission had no factual or legal basis to shield NorthWestern’s Letters of Intent from public view and exceeded its statutory authority in classifying the confidential information as a trade secret. Further, the circumstances here demonstrate that the Commission has “unconstitutionally shifted the initial burden of proof to the public to challenge a public utility’s claims of confidentiality.” *Great Falls Trib.*, ¶ 55.

**I. The Commission Exceeded Its Statutory Authority by Issuing Protective Order 8040**

The Commission acted beyond its statutory authority when it issued a protective order shielding NorthWestern’s Letters of Intent from public view. There is a general presumption that information from public utilities in the Commission’s possession is available to the public. Mont Code Ann. § 69-3-105(1). At the same time, the Commission has the authority to, in part, “issue a protective order when necessary to preserve trade secrets.” *Id.* § 69-3-105(2).

The Commission, however, is not free to create its own definition of what constitutes a trade secret. The plain language of Mont. Code Ann. § 69-3-105(2) requires that information meet the definition of trade secret under Montana’s Uniform Trade Secrets Act (“UTSA”) if it is to be shielded from public view as a “trade secret” by the Commission. The UTSA defines a “trade secret” as information 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.” *Id.* § 30-14-402(4).

The Commission is constrained by the provisions of Title 69 and cannot exercise any power not expressly granted to it by the Legislature. *Mont. Power Co. v. Mont. Pub. Serv. Comm’n*, 206 Mont. 359, 371, 671 P.2d 604, 611 (Mont. 1983) (citing *Great Northern Utilities Co. v. Public Service Comm’n.*, 88 Mont. 180, 203, 293 P. 294, 298 (Mont. 1930)); *see also* Mont. Code Ann. § 69-3-103. For that reason,

if information does not qualify as a trade secret under the UTSA, then the Commission cannot shield it from public view on the grounds that it qualifies as a trade secret. For that same reason, the Commission’s regulatory definition of a “trade secret” in Mont. Admin. R. 38.2.5007(4)(b)(vi) cannot depart from the statutory definition provided by Mont. Code Ann. § 30-14-402(4). Against this backdrop, the Commission’s specific findings supporting its trade secret determination are contrary to law and unsupported by the record.<sup>7</sup>

First, the Commission improperly concluded that trade secret protection was appropriate because the Letters of Intent were subject to a non-disclosure agreement prohibiting NorthWestern from disclosing confidential information. *See* Protective Order 8040, ¶ 21. The existence of a non-disclosure agreement is not relevant to the Commission’s determination of whether the underlying information is itself a trade secret. *See generally AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966, 974 (8th Cir. 2011). Nor did the Commission find that the existence of a non-disclosure agreement results in “independent economic value, actual or potential,” Mont. Code Ann. § 30-14-402(4)(a), and there is no support for such a finding in the record.

Further, conflating the existence of a non-disclosure agreement with a finding of independent economic value is a slippery slope. The Commission has implicitly adopted the position that any information is entitled to trade secret

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<sup>7</sup> The record here includes the following filings in Docket No. 2022.09.087: Index #28, Index #29, Index #30, Index #31–34, Index #37, Index #38, Index #39–40, Index #41, Index #43.

protection as long as private parties agree to shield information from public view. That cannot be the rule. Such a standard violates the Right to Know by functionally allowing any entity to shield any information shared with any other entity from public disclosure simply through mutual agreement. *See* Mont. Const., art. II, § 9; *see also infra* Part III.

Second, the Commission deviated from the statutory definition of a trade secret under the UTSA when it concluded that “limiting knowledge of [the] negotiated terms to just the parties involved at this stage enables NorthWestern to obtain the most reasonable contractual terms tailored to each potential customer.” *See* Protective Order 8040, ¶ 21. Protective Order 8040 contains no finding connecting the referenced “reasonable contractual terms” with “independent economic value” to NorthWestern, and the record does not support such a finding, either.

Third, the Commission acted beyond its statutory authority when it concluded that trade secret protection was appropriate to “ensure protection for [NorthWestern’s] customers and the specific rates and charges they may pay for service from NorthWestern.” *See id.* Yet again, Protective Order 8040 does not contain any finding demonstrating that NorthWestern’s asserted need to protect data center developers results in “independent economic value,” and the record is silent on that point, too.

In sum, the Commission made no findings that support the conclusion that the Letters of Intent contain trade secrets with the requirements of Mont. Code

Ann. § 30-14-402(4). As a result, the Commission exceeded its statutory authority by issuing Protective Order 8040.

## **II. Protective Order 8040 Violates the Text and Spirit of the Commission's Rules**

The Commission's decision to issue Protective Order 8040 is contrary not only to the text of the agency's regulations governing protective orders, but the spirit of those rules as well. *See Mont. Env't Info. Ctr. v. Mont. Dep't of Env't Quality*, 2019 MT 213, ¶ 23, 397 Mont. 161, 451 P.3d 493 ("An agency's interpretation of its regulation that is plainly inconsistent with the spirit of the rule is not lawful."). Prior to issuing a protective order, the Commission must ensure that a request to keep certain information confidential meets certain requirements, Mont. Admin. R. 38.2.5007(5): the party requesting a protective order "must make a prima facie showing of confidentiality," Mont. Admin. R. 38.2.5007(3), and, if a trade secret is the claimed basis for the protective order, the requesting party must meet additional requirements, including proving the information has been kept secret and the existence of independent economic value, Mont. Admin. R. 38.2.5007(4)(b).

First, the Commission erred in finding that NorthWestern established confidentiality. The Commission granted NorthWestern's request without: (1) the utility disclosing sufficient information to allow for meaningful public engagement, as required by Mont. Admin. R. 38.2.5007(3)(b); (2) the utility providing a factual basis in support of its claimed need for trade secret protection, as required by Mont. Admin. R. 38.2.5007(3)(c); and (3) the utility providing a legal basis to establish that

the information contained within the Letters of Intent was entitled to trade secret protection, as required by Mont. Admin. R. 38.2.5007(3)(d).

Second, the Commission granted NorthWestern's request without acknowledging that at least some of the information contained in the Letters of Intent is readily ascertainable, and therefore not subject to trade secret protection under Mont. Admin. R. 38.2.5007(4)(b)(v), and without the utility providing evidence that it either gains a "competitive advantage" from keeping the information secret or that the information "derives independent economic value from its secrecy," as required by Mont. Admin. R. 38.2.5007(4)(b)(vi).

As demonstrated by these errors, the Commission incorrectly concluded that NorthWestern's Motion complied with the administrative rules governing issuance of protective orders and allowed NorthWestern to shield the Letters of Intent from public view without the factual or legal basis to do so.

**A. Protective Order 8040 does not account for NorthWestern's failure to demonstrate the information in the Letters of Intent is confidential.**

The Commission's rules imposed specific obligations on NorthWestern, as the party requesting a protective order, to make "a prima facie showing of confidentiality." *See* Mont. Admin. R. 38.2.5007(3). NorthWestern was required to provide a complete and specific description of the allegedly confidential information sufficient not only for the Commission's review, but also to allow for meaningful public discussion and provide the public with adequate notice of the issue. Mont. Admin. R. 38.2.5007(3)(b). NorthWestern was also required to provide "a complete and specific factual basis" supported by sworn testimony, demonstrating why the

information is confidential. Mont. Admin. R. 38.2.5007(3)(c). Additionally, NorthWestern was required to provide “a complete and specific legal analysis, explaining why the information is confidential.” Mont. Admin. R. 38.2.5007(3)(d). NorthWestern failed to meet any of these requirements and the Commission erred in its conclusion that the utility made a prima facie showing of confidentiality.

1. Protective Order 8040 does not adequately identify the underlying confidential information that NorthWestern sought to protect.

NorthWestern’s request for a protective order and supporting evidence are devoid of any description as to the information contained within the Letters of Intent. As a result, at the time Protective Order 8040 was granted, there was no record basis for the Commission to identify confidential information in the Letters of Intent. This result is fundamentally inconsistent with the spirit and text of Mont. Admin. R. 38.2.5007(3)(b), which required NorthWestern to provide “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.” Mont. Admin. R. 38.2.5007(3)(b).

To be clear, NorthWestern placed the Commission in this position. *See* Mot. for Protective Order, at 3–5. NorthWestern does not identify, describe, or explain the allegedly confidential information contained within the Letters of Intent. Instead, NorthWestern simply states that the Letters of Intent contain confidential information. *Id.*, at 1–5. This approach renders NorthWestern’s request completely

opaque and in violation of the regulatory requirement imposed by Mont. Admin. R. 38.2.5007(3)(b). There can be no “meaningful” public discussion or argument if the public is not provided with any description or explanation of the allegedly confidential information.

The Commission did not provide a sufficient description of the now-protected information in Protective Order 8040, either. The Commission found that NorthWestern established “a substantive prima facie case of trade secret confidentiality for the proprietary information in the [Letters of Intent],” but neither NorthWestern nor the Commission further described that “proprietary information.” Protective Order 8040, ¶ 17. The Montana Supreme Court rejected a similar approach in *Great Falls Tribune*. There, the Court held that accepting at face value a utility’s conclusory assertion of confidentiality violates Article II, Section 9, of Montana’s Constitution. *Great Falls Tribune*, ¶¶ 54–57; *see infra* Part III.

The Public Interest Groups have been prejudiced by the Commission’s decision to issue Protective Order 8040 without identifying, in any manner, what information has been designated a “trade secret.” Without any description of the purportedly trade secret information in the record at the time Protective Order 8040 was issued, the Public Interest Groups were entirely precluded from meaningfully engaging with the now-protected information. Because the Public Interest Groups cannot determine what information has been protected by Protective Order 8040,

they have been deprived of the ability to fully challenge that designation before the Commission.

2. Protective Order 8040 does not contain sufficient factual findings to establish that confidentiality was appropriate due to the presence of trade secrets.

The Commission issued Protective Order 8040 without making sufficient factual findings that the Letters of Intent contain trade secrets to support a conclusion that confidentiality was appropriate. Indeed, the Commission could not have made any such finding because NorthWestern failed to provide a factual basis sufficient to support such a finding in its Motion. NorthWestern was required, by rule, to submit “a complete and specific factual basis, supported by affidavit of a qualified person, that supports the claim of confidential information.” Mont. Admin. R. 38.2.5007(3)(c). The utility failed to do so.

The LaFave Affidavit—the only evidence offered by NorthWestern to establish the required factual basis—falls well short of meeting the evidentiary burden imposed by Mont. Admin. R. 38.2.5007(3)(c). The LaFave Affidavit does not describe, in any manner, the factual basis for the premise that the Letters of Intent contain confidential information. Instead, the LaFave Affidavit recites NorthWestern’s efforts to keep the information contained within the Letters of Intent secret. *See* LaFave Aff., ¶¶ 2–5.

NorthWestern’s deficient request for a protective order placed the Commission in a position where it could not make a factual finding sufficient to demonstrate that trade secret protection is warranted. NorthWestern’s failure to

meet the regulatory requirements of Mont. Admin. R. 38.2.5007(3)(c) renders Protective Order 8040 invalid.<sup>8</sup>

3. Protective Order 8040 does not contain a sufficient legal analysis of confidential information to support trade secret protection.

The Commission issued Protective Order 8040 without an adequate legal basis to conclude that the information contained within the Letters of Intent qualified as trade secret and resulted in a prima facie showing of confidentiality. And again, NorthWestern's failure to properly support its request for a protective order placed the Commission in this position. NorthWestern was required to provide a "complete and specific legal analysis, explaining why the information is confidential information." Mont. Admin. R. 38.2.5007(3)(d). The utility failed to do so.

NorthWestern's pleadings are devoid of any citation to any legal authority supporting its contention that the information contained within the Letters of Intent should be protected from public disclosure. That failure is unsurprising because providing legal authority for the utility's attempt to shield this information from the public would require, at some level, disclosing the information it seeks to keep secret.

The legal authority NorthWestern did cite does not support the utility's request. For example, NorthWestern cited to a Protective Order issued in November

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<sup>8</sup> Additionally, even if the Commission's existing findings of fact could be construed as sufficient to support trade secret protection, here, the lack of factual support offered by NorthWestern demonstrates that any such finding lacks record support.

2024 during a rate case, Docket No. 2024.05.053, to claim that the utility “has not publicly provided specific information about its customers.” *See* Mot. for Protective Order, at 4. The undersigned is unable to locate the Protective Order 7968d in Docket No. 2024.05.053 that NorthWestern relies on. However, even if NorthWestern did “historically” keep information about specific customers secret, this argument ignores the fact that the utility has publicly disclosed information at issue in Protective Order 8040 multiple times within the past year. In fact, NorthWestern has continuously referenced those data center customers in multiple forums, including press releases, financial disclosures, and public filings with this Commission. *See, e.g., supra* Factual Background Part V.

The authority NorthWestern relied on in its reply brief offers no support either. NorthWestern cites *In re Ronan Telephone*, but, in that case, the Ronan Telephone Company (“RTC”) specifically described why it gained a competitive advantage from keeping the underlying information secret. *In re Ronan Tel.*, Dkt. No. N2011.2.17, Index #5, Order No. 7168, at ¶¶ 8–9 (Mont. Pub. Serv. Comm’n Aug. 23, 2011). RTC identified its competitors, and explained that the underlying information derived economic value because it was “inextricably interrelated with RTC’s analysis of market conditions, product profit margins, costs, and business strategies.” *In re Ronan Tel.*, Dkt. No. N2011.2.17, Index #2, Ronan Tel. Co.’s Mot. for Term Protective Order, at 8–9 (Mont. Pub. Serv. Comm’n Feb. 22, 2011). Additionally, RTC provided an affidavit from the President of the company provided additional detail supporting that assertion, including noting that if RTC’s

“competitors could gain access to the [trade secret information], they would immediately know the customer-specific services and rate bundles provided by RTC, and exactly what rates for which services would lure that customer away from RTC.” *In re Ronan Tel.*, Dkt. No. N2011.2.17, Index #1, Ronan Aff. of Rosa Tougas in Support of Term Protective Order, at 3–4 (Mont. Pub. Serv. Comm’n Feb. 22, 2011). NorthWestern has made no such showing here.

NorthWestern also relies on a recent order issued by the Commission allowing NorthWestern to keep certain information secret in the Wildfire Mitigation Plan docket for the premise that individualized and negotiated contract terms constitute trade secrets. Dkt. No. 2022.09.087, Index #38, NorthWestern Reply in Support of Mot. for Protective Order, at 3 (Nov. 3, 2025) (citing *In re NorthWestern Energy*, Dkt. No. 2025.08.059, Index #8, Order No. 8033 (Sep. 30, 2025)). There, NorthWestern submitted evidence of at least some connection between the need for secrecy regarding contractual terms and the independent economic value gained by the utility, *see generally* Dkt. No. 2025.08.059, Index #3, Mot. for Protective Order, at 7 (Aug. 25, 2025). Here, NorthWestern ignores that the redacted Letters of Intent reveal that the Letters of Intent all contain the same categories of information. NorthWestern also ignores that the record is silent as to any individualized or negotiated contract terms between NorthWestern and Atlas, Sabey, or Quantica. More importantly, though, NorthWestern ignores the fact that it submitted more support for its Motion for Protective Order in the Wildfire Mitigation Plan docket than it has here.

Finally, NorthWestern cites to a protective order issued at the request of Montana-Dakota Utilities for the premise that a utility may obtain a protective order to “preserve the confidentiality of third-party property in a utility’s possession.” Dkt. No. 2022.09.087, Index #38, NorthWestern Reply in Support of Mot. for Protective Order, at 3 (Nov. 3, 2025) (citing *In re Montana-Dakota Utilities*, Dkt. No. D2018.1.6, Index #16, Order No. 7592a (June 8, 2018)). But the “third-party property” at issue in that protective order was information subject to copyright protection, *In re Montana-Dakota Utilities*, Dkt. No. D2018.1.6, Index #16, Order No. 7592a at 3–4, which NorthWestern has not relied on here.

NorthWestern’s failure to make the required prima facie showing of confidentiality through “a complete and specific legal analysis” describing why the information in its Letters of Intent with data center developers qualifies as a trade secret, resulted in the Commission’s failure to provide an adequate legal basis for Protective Order 8040. *See* Mont. Admin. R. 38.2.5007(3)(d).

**B. Protective Order 8040 ignores NorthWestern’s failure to properly support its request for trade secret protection.**

NorthWestern sought a protective order on the grounds that the Letters of Intent contain trade secrets which, under the Commission’s rules, required the utility to make a specific factual and legal showing. In part, NorthWestern was required to prove that the “information is secret,” Mont. Admin. R. 38.2.5007(4)(b)(iii), and “the secret information is not readily ascertainable by proper means,” Mont. Admin. R. 38.2.5007(4)(b)(v). NorthWestern was also required to prove that “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)(vi). NorthWestern did not provide sufficient evidence to meet either of these requirements.

1. At least some of the information in NorthWestern’s Letters of Intent is readily ascertainable.

The record before the Commission at the time Protective Order 8040 was issued demonstrated that at least some of the now-protected information was not “secret” and was “readily ascertainable by proper means.” Mont. Admin. R.

38.2.5007(4)(b)(iii), (v). Before requesting a protective order, NorthWestern publicly disclosed information about Atlas, Sabey, and Quantica. The record establishes that at least some of the information NorthWestern is now concealing pursuant to Protective Order 8040 is readily ascertainable.

For example, it is readily ascertainable from NorthWestern’s disclosures on multiple occasions that the utility intends to serve Quantica’s 175-megawatt demand beginning in 2028, with growth to 500 megawatts by 2030. *See* Ex. 9, *Second Quarter Earnings Webcast*, at 21; Ex. 10, *Third Quarter Earnings Webinar*, at 19; Ex. 11, *2025 Year-End Earnings Webinar*, at 18. The load quantity information for Quantica, however, is shielded from public view in the redacted Letters of Intent filed. *See* Dkt. No. 2022.09.087, Index #43, Redacted Letters of Intent (Dec. 30, 2025). Similarly, NorthWestern redacted all information relating to the start date of its provision of electricity supply service to Sabey and Quantica, *see id.*, despite publicly disclosing that information on multiple occasions, *see* Ex. 9,

*Second Quarter Earnings Webcast*, at 21; Ex. 10, *Third Quarter Earnings Webinar*, at 19; Ex. 11, *2025 Year-End Earnings Webinar*, at 18.

NorthWestern’s public disclosure of information that the Commission has now-protected as trade secret and shielded from the public demonstrates that the Commission’s decision to issue Protective Order 8040 was contrary to Mont. Admin. R. 38.2.5007(4)(b)(iii) and Mont. Admin. R. 38.2.5007(4)(b)(v) because the information is not secret and is readily ascertainable.

2. Protective Order 8040 does not explain how NorthWestern derives independent economic value or competitive advantage from shielding the Letters of Intent from the public.

To lawfully withhold NorthWestern’s Letters of Intent with data center developers from public disclosure, the Commission’s rules also required NorthWestern to prove that 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)(vi). The record, however, contradicts the Commission’s finding that NorthWestern meets either of these requirements. *See* Mot. for Protective Order, at 4–5; Protective Order 8040, ¶ 21.

NorthWestern’s only evidence relevant to whether the Letters of Intent contain information resulting in independent economic value or competitive advantage to the utility—the LaFave Affidavit—contradicts the utility’s request for trade secret protection. The only relevant statement from the LaFave Affidavit is a single, equivocating sentence that “[m]aking the provisions of the [Letters of Intent] public would violate the NDAs and *could* put the parties at a competitive disadvantage.” LaFave Aff., ¶ 3 (emphasis added). This is insufficient; the

Commission’s rules specifically require affirmative proof that a “competitive advantage *is* derived from” keeping the information secret. Mont. Admin. R. 38.2.5007(4)(b)(vi) (emphasis added).<sup>9</sup>

The Commission cannot supplant its own findings for the sworn statements of NorthWestern’s own witness. *See* Mont. Admin. R. 38.2.5007(3). The LaFave Affidavit does not contain any statement establishing the existence of trade secrets within the Letters of Intent. *See* LaFave Aff. The LaFave Affidavit does not describe the information to be protected, explain why the utility derives “independent economic value” from keeping the information secret, or spell out how the utility derives competitive advantage from keeping the information secret. *See id.* On the record before the Commission, there is no basis for the conclusion that the Letters of Intent contain trade secrets within the meaning of Mont. Admin. R. 38.2.5007(4)(b).<sup>10</sup>

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<sup>9</sup> Notably absent from the LaFave Affidavit is any support for the premise that the information contained within the Letters of Intent “derives independent economic value from its secrecy.” Mont. Admin. R. 38.2.5007(4)(b)(vi).

<sup>10</sup> NorthWestern’s inconsistent and contradictory treatment of the alleged confidential information contained within the Letters of Intent is, by itself, enough to rebut NorthWestern’s trade secret claim. NorthWestern claimed that “the potential size of [the data centers] energy requirements[] is substantively different than the specific terms and conditions reflected in the [Letters of Intent.]” Dkt. No. 2022.09.087, Index #38, NorthWestern’s Reply in Support of Mot. for Protective Order, at 4 (Nov. 3, 2025). And yet, at the same time, NorthWestern has refused to fully disclose information about the quantity of electricity supply service in the redacted Letters of Intent. Further, NorthWestern partially disclosed information relating to the quantity of service that the utility intends to provide to Sabey and Atlas, but redacted all information about the quantity of service it intends to provide to Quantica. *See* Dkt. No. 2022.09.087, Index #43, Redacted Letters of Intent (Dec. 30, 2025). Similarly, NorthWestern disclosed the “Delivery Start Date” for Atlas, but redacted that information for Sabey, and redacted a relevant attachment related to delivery start date for Quantica. *Id.* And, NorthWestern partially disclosed the Delivery Point for Atlas but redacted that information for Sabey and Quantica. *Id.*

### **III. The Commission’s Decision to Issue Protective Order 8040 Violates the Public Interest Groups’ Right to Know.**

The Commission’s decision to shield the Letters of Intent from public disclosure through Protective Order 8040 is fundamentally inconsistent with the Public Interest Groups’ Right to Know guaranteed by Article II, Section 9, of the Montana State Constitution.

#### **A. The Letters of Intent are subject to the Right to Know.**

Under the Right to Know, information in the possession of the government must be open to public inspection if: (1) the “political subdivision against whom enforcement is sought” is subject to the Right to Know and (2) the documents in question are “documents of public bodies’ subject to public inspection.” *O’Neill v. Gianforte*, 2025 MT 2, ¶ 12, 420 Mont. 125, 561 P.3d 1018 (quoting *Becky v. Butte-Silver Bow Sch. Dist. No. 1*, 274 Mont. 131, 136, 906 P.2d 193, 196 (Mont. 1995)).

Here, both elements are met. As a political agency, the Commission is subject to the Right to Know. *See* Protective Order 8040, ¶ 9 (citing Mont. Const., art. II, §§ 8–9); *see also id.*, ¶ 18. Further, the Letters of Intent are documents of public bodies and within the possession of the Commission and are subject to public inspection. *See id.*, ¶ 19.

#### **B. An exception to the Right to Know does not apply.**

Because the Letters of Intent are subject to the Right to Know, the Commission was required to publicly disclose the Letters of Intent unless NorthWestern proved, first, the existence of a privacy interest or an applicable preexisting legal privilege and, second, that said interest or privilege outweighs the

merits of public disclosure. *O'Neill*, ¶ 13 (citing *Nelson v. City of Billings*, 2018 MT 36, ¶¶ 15, 20, 390 Mont. 290, 412 P.3d 1058). NorthWestern failed to meet either requirement.

First, NorthWestern did not establish that a preexisting legal privilege—here, the trade secret protections afforded by Mont. Code Ann. § 30-14-402(4)—applied to the Letters of Intent.<sup>11</sup> Second, the Commission failed to apply the required balancing analysis to determine whether NorthWestern’s claimed need for trade secret protection clearly exceeded the merits of public disclosure.

1. No preexisting legal privilege applies to the Letters of Intent.

To shield the Letters of Intent from disclosure pursuant to Montana’s Right to Know, the Commission was required to find that trade secret protections constitute a “preexisting legal privilege . . . protected by statute or common law at the time of [the Constitution’s] adoption . . . necessary for the integrity of government.” *O'Neill*, ¶ 13 (quoting *Nelson*, ¶¶ 15, 20); *see also Nelson*, ¶ 33.

Protective Order 8040 is silent as to why trade secret protection is necessary for the “integrity of government.” *See generally* Protective Order 8040. In the absence of such a finding, the Commission violated the Right to Know by allowing NorthWestern to shield the Letters of Intent from public disclosure through issuance of Protective Order 8040.

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<sup>11</sup> NorthWestern does not, and could not, claim that the information is protected from disclosure pursuant to the privacy interest exception to the Right to Know. *O'Neill*, ¶ 12; *see Great Falls Trib.*, ¶ 39 (holding that non-human entities do not enjoy privacy rights under the right of privacy provision of the Montana Constitution).

But even assuming *arguendo* the Commission had made such a finding and that protecting trade secrets under Mont Code Ann. § 69-3-105 constitutes a “preexisting legal privilege,” trade secret protections do not apply here. *See infra* Parts I–II. There is no factual basis for the Commission’s finding that the Letters of Intent qualified as a trade secret, particularly in light of the equivocation in the LaFave Affidavit that public disclosure of the Letters of Intent “*could* put the parties at a competitive disadvantage,” and the utility’s inconsistent identification of allegedly trade secret information. *See* LaFave Aff., ¶ 3 (emphasis added); *see supra* note 10. And, as a result, there is no basis for the Commission to conclude that a preexisting legal privilege applies to shield the Letters of Intent from the public disclosure required by the Right to Know.

2. The Commission failed to balance NorthWestern’s claimed need for trade secret protection against merits of public disclosure.

Even assuming NorthWestern had proven that trade secret protection under Mont. Code Ann. § 69-3-105 constituted a preexisting legal privilege applicable here, Protective Order 8040 would still violate the Constitution because the Commission failed to balance NorthWestern’s interest against the merits of public disclosure.

It is not enough to find only that a preexisting legal privilege applies, as the Commission did here. Instead, the Commission must also determine whether the “claimed privilege in a given document is sufficient to keep that document from public disclosure.” *Nelson*, ¶ 33. This required balancing analysis applies to all claims of privilege adverse to the Right to Know. *See O’Neill*, ¶ 25 (affirming that

*Nelson* “laid out the process for determining whether a document otherwise subject to Article II, Section 9, may be shielded from disclosure by a claim of privilege”).

The Commission did not conduct any balancing analysis and made no finding weighing the merits of public disclosure against NorthWestern’s request for trade secret protection in Protective Order 8040. *See* Protective Order 8040, ¶¶ 17–22. For that reason, shielding the Letters of Intent from public view through Protective Order 8040 violates the Right to Know.

#### **IV. The Protective Order Statute, and the Commission’s Implementing Rule, are Unconstitutional as Applied**

To the extent that the Commission’s decision to issue Protective Order 8040 is consistent with the governing statute and administrative rule, the record demonstrates that, as applied here, both the underlying statute allowing the Commission to issue protective orders, Mont. Code Ann. § 69-3-105(2), and the Commission’s implementing rule, Mont. Admin. R. 38.2.5007(4)(b), violate the Public Interest Groups’ Right to Know under Article II, Section 9, of Montana’s Constitution.

##### **A. Under the facts and circumstances present here, the statute allowing the Commission to issue protective orders to preserve trade secrets is unconstitutional.**

A statute is unconstitutional as applied in a particular case where application of the statute violates a party’s rights. *Bd. of Regents of Higher Educ. v. State by & through Knudsen*, 2022 MT 128, ¶ 11, 409 Mont. 96, 512 P.3d 748. As demonstrated by the record here, Mont. Code Ann. § 69-3-105(2) violates the Right to Know guaranteed by Mont. Const., art. II, § 9, because the statute does not require the

Commission to balance a utility's claimed need for trade secret protection against the merits of public disclosure in violation of the Public Interest Groups' Right to Know.

The text of Mont. Code Ann. § 69-3-105(2) allows the Commission to “issue a protective order when necessary to preserve trade secrets, as defined in [Mont. Code Ann. § 30-14-402], or other information that must be protected under law, as required to carry out its regulatory functions.” Mont. Code Ann. § 69-3-105(2). The statute fails to impose any obligation on the Commission to balance the need for trade secret protection against the public's constitutional Right to Know. This is impermissible. The Right to Know acts as a “prohibition upon legislative power, rather than a grant of power.” *Bd. of Regents of Higher Educ.*, ¶ 11. For that reason, the statute that allows the Commission to issue protective orders, Mont. Code Ann. § 69-3-105(2), cannot withstand constitutional scrutiny if it is applied in a manner that allows the Commission to issue a protective order without accounting for the Right to Know, *Great Falls Trib.*, ¶ 55.

The record demonstrates that Mont. Code Ann. § 69-3-105(2) is unconstitutional as applied because the Commission issued Protective Order 8040 without balancing the public's Right to Know against NorthWestern's need for trade secret protections. *See* Protective Order 8040 ¶¶ 17–22.

**B. The Commission's Rule governing issuance of protective orders is unconstitutional as applied.**

Under the facts and circumstances of this case, Mont. Admin. R. 38.2.5007(4)(b) violates Mont. Const., art. II, § 9, because it does not require the

Commission to weigh a utility's claimed need for trade secret protections against the merits of public disclosure before shielding the underlying information from public view.

A regulation is invalid if it permits government action that conflicts with Montana's Constitution. *See Citizens for a Better Flathead v. Bd. of Cnty. Commissioners of Flathead Cnty. by & through Lauman*, 2016 MT 256, ¶ 60, 385 Mont. 156, 381 P.3d 555. Again, the Right to Know cannot be overcome in the absence of a decision that the "claimed privilege in a given document is sufficient to keep that document from public disclosure." *Nelson*, ¶ 33. Instead of imposing that balancing analysis, Mont. Admin. R. 38.2.5007(4)(b) requires only that "prior to requesting a protective order, the [party requesting the protective order] 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." Mont. Admin. R. 38.2.5007(4)(b)(i).

There is no express requirement in the Commission's rules imposing an independent obligation on the Commission to engage in the constitutionality required balancing test. Instead, the Commission's rules impermissibly allow the Commission to rely on the fact that a utility has "considered" the constitutional presumption of access to information, rather than requiring the Commission itself to weigh that constitutional presumption against the claimed need for confidentiality. *See* Mont. Admin. R. 38.2.5007(6) ("Prior to issuing a protective

order the commission will review the demonstrations made pursuant to (4) and (5), and may question a provider on those demonstrations.”).

The record here reveals Mont. Admin. R. 38.2.5007(4)(b)’s incompatibility with the constitutional Right to Know. The Commission’s only reference to the Right to Know in Protective Order 8040 is contained within a single paragraph, where the Commission noted that “there is a constitutional presumption of access to documents and information in the Commission’s possession.” Protective Order 8040, ¶ 18. It cannot be disputed that the Letters of Intent are within the Commission’s possession. Dkt. No. 2022.09.097, Index #43, Redacted Letters of Intent (Dec. 30, 2025). But Protective Order 8040 is devoid of any balancing analysis and any finding that NorthWestern’s claimed need for trade secret protection outweighs the merits of public disclosure. *See* Protective Order 8040, ¶¶ 17–22.

Because Mont. Admin. R. 38.2.5007(4)(b) allows NorthWestern to designate information as confidential and shield that information from public view without first determining that confidentiality outweighs merits of public disclosure, the regulation creates “an unconstitutional presumption of confidentiality.” *See Great Falls Trib.*, ¶ 51. This process improperly places the burden on the public to object to protective orders issued by the Commission to determine whether the public’s Right to Know overrides the utility’s claimed need for confidentiality. *See id.*, ¶ 54.

## CONCLUSION

There are numerous flaws in the Commission’s decision to shield NorthWestern’s Letters of Intent from public view through Protective Order 8040. There are no findings in the record that could support the conclusion that the

Letters of Intent qualify as trade secrets under Mont. Code Ann. § 30-14-402(4). Similarly, there was no factual or legal basis for the Commission to conclude that the requirements imposed by the Commission's administrative rules governing issuance of protective orders were met here. The Commission's decision to issue Protective Order 8040 without describing or identifying the now-protective information renders the Commission's decision completely opaque and prevents the Public Interest Groups from mounting a full challenge to the Commission's conclusion that NorthWestern's Letters of Intent contained information that qualified as trade secret. Further, the Commission failed to acknowledge that at least some of the now-protected information had already been publicly disclosed by NorthWestern, rendering Protective Order 8040 invalid on its face. Taken together, these failings demonstrate that both the underlying statute, Mont. Code Ann. § 69-3-105(2), and the Commission's implementing rule, Mont. Admin. R. 38.2.5007(4)(b), are unconstitutional as applied.

### **RELIEF SOUGHT**

For the reasons stated in this Motion and Supporting Memorandum, the Public Interest Groups seek the following relief:

1. A determination by the Commission that NorthWestern has not met its burden to prove that the information contained within the Letters of Intent qualifies as a trade secret within the meaning of Mont. Code Ann. § 30-14-402(4);
2. A determination by the Commission that the information contained within the Letters of Intent should not be protected from public disclosure;

3. A determination by the Commission that NorthWestern must file unredacted copies of the Letters of Intent in Docket No. 2022.09.087, making them publicly available following the reasonable period established by the Commission in accordance with Mont. Admin. R. 38.2.5008(3)(b); and,

4. That the Commission issue all orders necessary to grant the relief requested by the Public Interest Groups, as well as any further relief as the Commission deems appropriate.

Respectfully submitted this 11th day of March, 2026.



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E. Lars Phillips  
Maxine C. Sugarman  
Earthjustice  
P.O. Box 4743  
Bozeman, MT 59772-4743  
(406) 586-9699  
laphillips@earthjustice.org  
msugarman@earthjustice.org

*Attorneys for Butte Watchdogs  
for Social and Environmental  
Justice, Climate Smart  
Missoula, Helena Interfaith  
Climate Advocates, Honor the  
Earth, Montana Environmental  
Information Center, Montana  
Public Interest Research Group,  
and NW Energy Coalition*

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and accurate copies of the foregoing document, including exhibits, were sent to the following entity by U.S. Mail:

NorthWestern Corporation  
c/o C T CORPORATION SYSTEM  
3011 American Away  
Missoula, MT 59808

Sara Norcott  
NorthWestern Energy  
208 N. Montana Ave., Suite 200  
Helena, MT 59601

A courtesy copy of this motion was provided to NorthWestern's counsel via email to [sarah.norcott@northwestern.com](mailto:sarah.norcott@northwestern.com).

DATED this 11th day of March, 2026.



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E. Lars Phillips

## INDEX OF EXHIBITS

Exhibit 1: Martin & Peskoe, Extracting Profits from the Public

Exhibit 2: A. Hedges Declaration

Exhibit 3: D. Goldman Declaration

Exhibit 4: NWE 2024 Annual Report

Exhibit 5: NWE 2023 IRP

Exhibit 6: NWE December 17, 2024 Press Release

Exhibit 7: NWE December 19, 2024 Press Release

Exhibit 8: NWE July 30, 2025 Press Release

Exhibit 9: NWE Second Quarter Earnings Webcast

Exhibit 10: NWE Third Quarter Earnings Webinar

Exhibit 11: NWE 2025 Year End Earnings Webinar