

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

IN THE MATTER OF the Joint Application of ) REGULATORY DIVISION  
Liberty Utilities Co., Liberty WWH, Inc., )  
Western Water Holdings, LLC, and Mountain ) DOCKET NO. D2014.12.99  
Water Company for Approval of a Sale and ) ORDER NO. 7392f  
Transfer of Stock )

**PROTECTIVE ORDER**

**PROCEDURAL HISTORY**

1. On December 15, 2014, Liberty Utilities Co., Liberty WWH, Inc., Western Water Holdings, LLC and Mountain Water Company ( collectively, “Mountain Water”) filed a *Joint Application for Approval of Sale and Transfer of Stock* with the Montana Public Service Commission (“Commission”).

2. The Commission issued a *Notice of Application and Intervention Deadline* on December 23, 2014, and granted intervention to Montana Consumer Counsel, Clark Fork Coalition, City of Missoula (“City”), and the Employees of Mountain Water Company, on January 27, 2015.

3. On April 2, 2015, the Commission issued Data Request PSC-028(b) requesting the Confidential Information Memorandum referenced in Wells Fargo’s initial contact letter to prospective bidders regarding the sale and transfer at question in this Docket. The Commission also issued PSC-029(b) requesting all management presentations that were provided to bidders as part of the second round in the transaction process.

4. On April 21, 2015, Western Water and Mountain Water (collectively, “Mountain Water”) filed a *Motion for Protective Order and Brief in Support* (Motion) for the following types of information contained in the Confidential Information Memorandum and Management Presentation:<sup>1</sup>

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<sup>1</sup> Please note that on May 27, 2015, Western Water and Mountain Water filed a separate Motion for Protective Order concerning these same documents for information related to Park Central Basin and Apple Valley. That Motion will be ruled on in a separate order to be issued in the near future.

- Western Water’s analysis of the current market for investment in privately-owned water utilities, including comparisons against publicly traded utilities;
- Western Water’s analysis of Park Water and its subsidiaries as a potential prospect for acquisition in the privately-owned water utility investment market;
- Western Water’s analysis, from an investment perspective, of the California and Montana regulatory environments for privately-owned water utilities;
- Western Water’s analysis, from an investment perspective, of the opportunities for growth within the privately-owned water utility industry within Park Water Company’s areas of operation;
- Certain operational and financial information regarding Park Water’s subsidiaries; and
- The key assumptions underlying Western Water’s analysis and forecasts.

Mot. for Protective Order p. 3 (Apr. 21, 2015).

5. On April 28, 2015, the City filed a Response Brief to this Motion. On May 8, 2015, Mountain Water filed a Reply Brief. On May 14, 2015, the Commission published notice of the Motion in its weekly agenda.

#### **DISCUSSION, ANALYSIS, FINDINGS & CONCLUSIONS**

6. The Montana Supreme Court has articulated the standard the Commission is held to in evaluating protective orders:

[A] non-human entity seeking protective orders or other protective measures for materials filed with a regulating governmental agency, such as the PSC, must support its claim of confidentiality by filing a supporting affidavit making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements. The claimant's showing must be more than conclusory. It must be specific enough for the PSC, any objecting parties, and reviewing authorities to clearly understand the nature and basis of the public utility's claims to the right of confidentiality.

*Great Falls Tribune v. Mont. PSC*, 2003 MT 359, ¶ 56, 319 Mont. 38, 89 P.3d 876 (emphasis added). The Commission may protect information that is deemed trade secret. *Id.* at ¶ 62.

7. Trade secret is defined as:

[I]nformation or computer software, including a formula, pattern, compilation, program, device, method, technique, or process 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.

Mont. Code Ann. § 30-14-402 (2013). The Commission has implemented these constitutional and statutory requirements through its own administrative rules concerning protective orders.

See Admin. R. Mont. 38.2.5001-5030.

8. A party requesting a protective order based on trade secret must demonstrate:

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

Admin. R. Mont. 38.2.5007(4)(b).

9. Mountain Water provided a supporting Affidavit with its Motion, as required by Admin. R. Mont. 38.2.5007(3)(c). Aff. Robert Dove (Apr. 21, 2015).

10. In its Motion, Mountain Water states that it has "considered that the Commission is a public agency and that there is a presumption of access to documents and information in the Commission's possession." Mot. at p. 2.

11. In its Motion, Mountain Water states that the material for which protection is sought is information. *Id.* at p. 4; *see also* Admin. R. Mont. 38.2.5001(3) (defining information).

12. Mountain Water asserts that all of information in question contains information that is secret. *Id.* at pp. 4-5.

13. Mountain Water claims all the information in question is subject to reasonable efforts to maintain its secrecy. In its Motion, Mountain Water states that it required third-parties with access to the Confidential Information Memorandum and Management Presentation "to execute a Confidentiality Agreement, which included the obligation to keep strictly confidential the information contained in the [Confidential Information Memorandum] and Management Presentation." *Id.* at pp. 5-6.

14. Mountain Water asserts that its information is not readily ascertainable by proper means. *Id.* at p. 5.

15. The final factor at issue in the trade secret analysis is whether the information that Mountain Water is seeking to protect derives independent economic value or a competitive advantage from its secrecy.

16. Mountain Water argues that its upstream parent company, Carlyle Infrastructure Partners, L.P. (“Carlyle”), operates in the highly competitive alternative investment management sector. Mot. at p. 6. Mountain Water argues public disclosure of Carlyle’s financial and operational information could be used as an economic advantage to competitors in other similar projects. *Id.* at p. 7. Often in this independent economic value analysis, an entity seeking protection will identify a nondescript competitor. In this instance, Mountain Water has identified a real and specific competitor in the Town of Apple Valley, which may attempt to condemn Park Water’s water utility operations in the Apple Valley. *Id.*

17. The City makes two primary arguments why Mountain Water’s Motion for Protective Order should be denied. First, the City argues that the Confidential Information Memorandum and Management Presentation “were ostensible prepared for the benefit of the public trust—the sale of the Missoula water system.” Response Brief at p. 10 (Apr. 28, 2015). Second, the City argues that most of the sought protection of these documents concerns inputs and products of sensitive analyses—not the models themselves—which should not be considered trade secret. *Id.* at pp. 10-11.

18. With regards to why these documents were prepared, the asset in question is certainly clothed in the public interest. *Great N. Utils. Co. v. Public Serv. Comm'n*, 88 Mont. 180, 205, 293 P.294 (1930) (quoting *Munn v. Ill.*, 94 U.S. 113, 126 (U.S. 1877)). However, it does not follow that these documents were necessarily created for the public’s benefit. In fact, the titles of both documents, Confidential Information Memorandum and Management Presentation, indicate they were produced for internal company uses. Further, the content of these documents is consistent with the Movant’s claims that these documents were used to inform management’s and the board’s decisions in selling the water system. The Commission declines to find that these documents “were ostensible prepared for the benefit of the public trust—the sale of the Missoula water system.” Response Brief at p. 10

19. With regards to protecting the inputs and products of Mountain Water’s analyses, the Commission has previously protected these types of information in sensitive analytics situations. In *Order 7323d*, the Commission protected “[o]utputs from PA Consulting’s analysis and modelling [and] inputs for Consulting’s analysis and modelling.” In the Matter of the Application of NorthWestern Energy for Hydro Assets Purchase, Dkt. No. D2013.12.85 ¶ 5 (Jan. 24, 2014). This information was also used in NorthWestern Energy’s Confidential Information

Memorandum. The Commission found this information derived independent economic value from its secrecy.

20. Additionally, the standard applied to motions for protective order is whether the movant has made a “*prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements.” *Great Falls Tribune*, ¶ 56. Mountain Water has stated facts supporting a *prima facie* finding the information derives independent economic value from its secrecy. *Supra* ¶ 16. Under this standard, the Commission will not speculate whether the information is potentially subject to reverse engineering as suggested by the City. Reply Brief at p. 11.

21. Finally, the Commission has previously protected this type of information in the context of a Mountain Water sale and transfer docket. The Commission granted protection of that information because:

[T]he Memo could be used by competitors and future acquisition targets to gain an economic advantage through the insights they could gain into how Carlyle views its investment options, the metrics Carlyle relies upon to decide whether or not to make an investment, the prices Carlyle is willing to pay for an investment, and the process Carlyle uses before making an investment

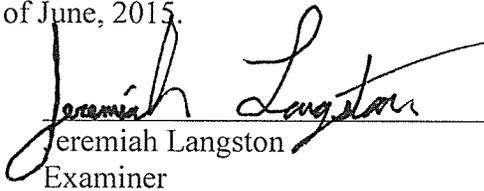
In the Matter of Application for Approval of Sale and Transfer of Stock in Park Water Company, Dkt. No. D2011.1.8, Or. 7149a ¶ 30 (Jun. 24, 2011). Therefore, the Commission grants Mountain Water’s Motion for Protective Order.

#### ORDER

THEREFORE, based upon the foregoing, it is HEREBY ORDERED as follows:

22. Mountain Water’s Motion for Protective Order is GRANTED in its entirety.

DONE AND DATED this 5<sup>th</sup> day of June, 2015.

  
Jeremiah Langston  
Examiner

ATTEST:

  
Aleisha Solem  
Commission Secretary  
(SEAL)

Protective Orders and Protection of Confidential Information

**Nondisclosure Agreement**

(7-26-00)

ARM 38.2.5012

Docket Nos. D2014.12.99, Order No. 7392f

Order Action Date: June 5, 2015

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.

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Typed or Printed Name

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Signature

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Date of Signature

Business Address:

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\_\_\_\_\_  
Employer

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Party Represented