

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. 7392g
Transfer of Stock)

PROTECTIVE ORDER

PROCEDURAL HISTORY

1. On December 15, 2014, Liberty Utilities Co. (Liberty Utilities), Liberty WWH, Inc. (Liberty WWH), Western Water Holdings, LLC (Western Water), and Mountain Water Company (Mountain Water) (collectively, “Joint Applicants”) 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 the Montana Consumer Counsel, Clark Fork Coalition, City of Missoula, and the Employees of Mountain Water Company, on January 27, 2015.

3. On February 2, 2015, the Commission issued Data Request PSC-015, which requires Western Water and Mountain Water to produce information that contains individual employee information, including salary.

4. On February 18, 2015, Western Water and Mountain Water filed *Responses to Montana Public Service Commission’s Data Requests*, objecting to PSC-015, stating that the information is irrelevant to the proceeding and confidential. Nonetheless, Western Water and Mountain Water identified and provided responsive documents, with individual employee information redacted.

5. On April 15, 2015, the Commission issued *Order 7392c*, compelling Western Water and Mountain Water to file the information in its unredacted form or seek a protective order.

6. On April 27, 2015, Western Water and Mountain Water filed a *Motion for Protective Order* to prevent public disclosure of the subject information. The information that Western Water and Mountain Water seeks to protect includes an employee base salary, as well as the number of units granted in a number of employee Class B Unit Agreements. Mot. for Protective Order p. 3. (Apr. 24, 2015). On May 14, 2015, the Commission published notice of the *Motion* in its weekly agenda. On May 4, 2015, the City filed a Response objecting to Western Water and Mountain Water's request. On May 8, 2015, Western Water and Mountain Water filed a Reply.

DISCUSSION, FINDINGS, & CONCLUSIONS

7. A corporation seeking a protective order for materials filed with a regulating governmental agency must support its claim of confidentiality by filing a supporting affidavit and making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements. *Great Falls Tribune v. Montana Pub. Serv. Comm'n*, 2003 MT 359, ¶ 56, 319 Mont. 38, 82 P.3d 876. The claimant's showing must be more than conclusory. *Id.* It must be specific enough for the Commission, any objecting parties, and reviewing authorities to clearly understand the nature and basis of the claims to the right of confidentiality. *Id.*

8. The Commission has implemented the court's ruling through amendment or repeal of administrative rules concerning protective orders. *See Admin. R. Mont. 38.2.5001 – 5030.*

9. Montana's right to privacy states "[t]he right to individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. Art. II, § 9.

10. If a constitutionally protected privacy interest does exist, this right must be reconciled with the public's right to know. *Billings Gazette v. City of Billings*, 2013 MT 334, ¶ 14, 372 Mont. 409, 313 P.3d 129. The public's right to know is articulated thus:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except

in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Mont. Const. art. II, § 9.

11. In recognition of the constitutional requirement to balance these two rights, the Commission established Admin. R. Mont. 38.2.5007(4)(a), which sets forth the elements for protection of individual privacy information:

- (i) the provider has made a reasonable effort to contact the individual to ascertain whether the individual waives the right to privacy for the information at issue;
- (ii) the individuals with potential privacy interests have actual, subjective expectations of privacy in the information at issue;
- (iii) society recognizes such expectations of privacy as reasonable; and
- (iv) the demand of individual privacy clearly exceeds the merits of public disclosure.

12. Admin. R. Mont. 38.2.5007(4)(a) is consistent with case law concerning an individual's right to privacy and the public's right to know in the Montana Constitution. *Missoulian v. Board of Regents*, 207 Mont. 513, 527, 675 P.2d 962, 970 (1983).

13. To determine whether a person has a constitutionally protected privacy interest, a two-prong test is applied. First, whether the person has a subjective or actual expectation of privacy. Second, whether society is willing to recognize that expectation as reasonable. *Montana Human Rights Div. v. Billings*, 199 Mont. 434, 442, 649 P.2d 1283, 1288 (1982). If these steps are met, the next inquiry is whether the demand of individual privacy clearly exceeds the merits of public disclosure. Mont. Const., art. II, § 9.

14. Pursuant to Admin. R. Mont. 38.2.5007(4)(a)(i), Mountain Water and Western Water assert that they made reasonable efforts to contact the employees whose information is at issue, "and these employees do not waive their rights to individual privacy in their compensation information." Mot. at p. 4.

15. Regarding step two of the four part test, the Commission must determine whether the employee has a reasonable expectation of privacy by examining the public availability of the information at issue. "Actual expectation of privacy is necessarily a question of fact that requires a determination of whether the individual whose privacy is at issue had notice of possible disclosure." *Billings Gazette*, ¶ 18. To the extent the subject information is available through other means, an actual, subjective expectation of privacy does not exist. In their Motion, the

parties assert that the subject information has always been treated as confidential and it is not available to nor ascertainable by the public. Mot. at p. 4.

16. Pursuant to part three of the four part test, the parties assert that society recognizes an expectation of privacy for compensation information. Mot. at p. 5. The Commission has previously determined that notwithstanding the public nature of manager and officer positions in a public utility, “reasonable expectations of privacy are not determined by mere job status and people do not automatically waive their right to privacy by accepting a job position.” Or. 7385b, Dkt. N2014.2.21, ¶ 19 (February 9, 2015). The Commission reiterates its prior determination that “society is presently willing to recognize a privacy expectation as reasonable for regulated utility employees.” *Id.*

17. Finally, the parties assert that protecting the privacy of employee compensation information exceeds the merits of public disclosure. Mot. at p. 5. The Commission has found that “the individual right to the privacy of a salary clearly exceeds the public’s right to know it.” Or. 7385b at ¶ 26. The Commission is not persuaded to reverse course. The City has argued that “[t]he public has a right and irrefutable interest in knowing how their rates will be affected in light of the Class B Unit payouts...” Response p. 8 (May 4, 2015). However, Mountain Water and Western Water have stated that payments under Class B Unit agreements will not be paid using revenue from Mountain Water’s rates. Reply p. 6 (May 8, 2015). The public’s right to know is less compelling in a circumstance where their rates are not impacted.

ORDER

IT IS HEREBY ORDERED THAT:

18. Mountain Water and Western Water's *Motion for Protective Order* is GRANTED;
19. Mountain Water and Western Water must provide the information within ten days of service of this Order; and
20. Information submitted in accordance with this Order will be treated as confidential pursuant to Title 38, Subchapter 50 of the Administrative Rules of Montana.

DONE AND DATED this 5th day of June, 2015.


Laura J. Farkas
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. 7392g

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.

Typed or Printed Name

Signature

Date of Signature

Business Address:

Employer

Party Represented