

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. 7392i
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 May 27, 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 regarding Park Central Basin’s and Apple Valley’s historical and projected financial performance:

- Information regarding the existing market and growth opportunities for Park Central Basin and Apply Valley;

- Information regarding Park Central Basin's water sourcing strategy/water rebalancing plan; and
- Details regarding planned capital investment for Apple Valley.

Mot. for Protective Order p. 3 (May 27, 2015).

5. On May 28, 2015, the Commission published notice of the Motion in its weekly agenda. On June 3, 2015, the City filed a Response Brief in opposition to this Motion. In light of Commission Order 7392f and in the interest of judicial economy, the city rescinded its opposition to the Motion on June 9, 2015. *See* City Supplement Response (June 9, 2015).

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. Christopher Schilling (May 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 the 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 p. 5*. Mountain Water also states “prior to providing the [Confidential Information Memorandum] and Management Presentation in response to discovery in California, the portions of the documents containing the Confidential Information were redacted entirely.” *Id.*

14. Mountain Water asserts that its information is not readily ascertainable by proper means. *Id. at p. 6*.

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 this information derives independent economic value or a competitive advantage from its secrecy in light of the “Town of Apple Valley’s intent to condemn Park Water’s utility operations in Apple Valley.” *Mot. at p. 6*. “It is commercially valuable because it contains information regarding Park Central Basin’s and Apple Valley’s

historical and projected financial performance, information regarding the existing utility market surrounding Park Central Basin and Apple Valley and an assessment of opportunities for growth for those utilities, information regarding Park Central Basin's water sourcing strategy/water rebalancing plan, and details regarding planned capital investment for Apple Valley." Aff. Schilling at ¶ 5.

17. The Commission reiterates its earlier conclusion in this docket that identification of a specific competitor gives further credence to finding a piece of information derives independent economic value or a competitive advantage from its secrecy. Or. 7392f ¶ 16 (June 5, 2015). The Commission has previously granted protection to this type of information in the context of a Mountain Water sale and transfer docket. *Id.* at ¶ 21; 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).

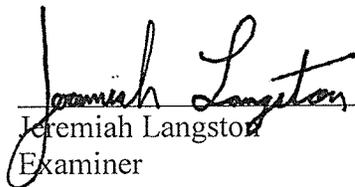
18. Mountain Water has stated facts supporting a *prima facie* finding the information derives independent economic value from its secrecy. *See Great Falls Tribune*, ¶ 56. Therefore, the Commission grants Mountain Water's Motion for Protective Order.

ORDER

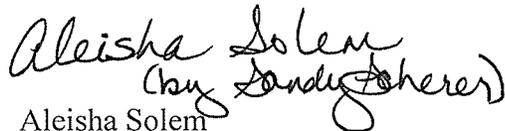
THEREFORE, based upon the foregoing, it is HEREBY ORDERED as follows:

19. Mountain Water's Motion for Protective Order is GRANTED in its entirety.

DONE AND DATED this 11th 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. 7392i

Order Action Date: June 11, 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