

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. 7392j
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 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 February 2, 2015, the Commission issued Data Request PSC-014, which requests a copy of the loans and guarantees indicated in Schedule 4.21(a).

4. On February 18, 2015, Western Water and Mountain Water (collectively, “Mountain Water”) filed *Responses to Montana Public Service Commission’s Data Requests (PSC-001 to PSC-027)*. Mountain Water objected to PSC-014, arguing that the request seeks information that is irrelevant and confidential.

5. On April 15, 2015, the Commission issued an *Order to Compel*, ordering Mountain Water to either file the information or seek a protective order. Or. 7392(c) p. 3 (Apr. 15, 2015).

6. On April 27, 2015, Mountain Water filed a *Motion for Reconsideration of Order to Compel*. On May 28, 2015, the Commission issued an *Order on Reconsideration* determining

that executive tax loan information is relevant and must be filed unredacted, or in the alternative, the parties may seek a protective order. Or. 7392(d) ¶ 11 (May 28, 2015).

7. On May 14, 2015, Mountain Water filed a *Motion for Protective Order (Motion)* seeking protection of the amount of loans provided by Western Water to six employees and the names of those employees.

8. On May 22, 2015, the City filed a Response to the *Motion*. On May 29, 2015, Mountain Water filed a Reply. On May 14, 2015, the Commission published notice of the Motion in its weekly agenda.

DISCUSSION, FINDINGS, & CONCLUSIONS

9. 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.*

10. 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.*

11. 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.

12. 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.

13. 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.

14. 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. *Missouliau v. Board of Regents*, 207 Mont. 513, 527, 675 P.2d 962, 970 (1983).

15. 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.

16. Pursuant to Admin. R. Mont. 38.2.5007(4)(a)(i), Mountain Water asserts that “[t]his matter has been discussed with the affected individuals, and none of the individuals wish to waive their right to maintain the privacy of this compensation information.” Aff. Robert Dove ¶ 6 (May 14, 2015).

17. 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 its *Motion*, Mountain Water asserts that the subject information has always been treated as confidential and it is not available to nor ascertainable by the public. Mot. at p. 4-5.

18. 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 (Feb. 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.*

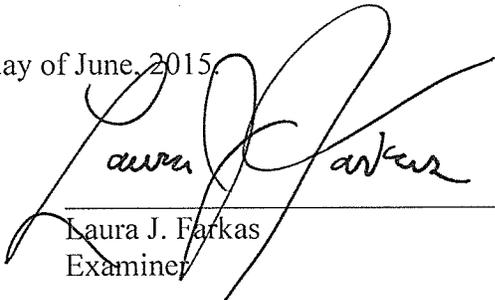
19. Finally, Mountain Water asserts that protecting the privacy of employee compensation information exceeds the merits of public disclosure. Mot. at p. 5. The Commission has found that “the individual right to the privacy of a salary clearly exceeds the public’s right to know it.” Or. 7385b at ¶ 26. Similar to a salary, the executive loans at issue are a type of compensation. Additionally, Mountain Water asserts that the subject information “relates to a form of compensation that will ultimately be repaid with interest and that is not being recovered through Mountain Water’s rates...” Mot. at p. 5. The public’s right to know is less compelling in a circumstance where the public’s rates are not affected.

ORDER

IT IS HEREBY ORDERED THAT:

1. Mountain Water’s *Motion for Protective Order* is GRANTED;
2. Mountain Water must provide the information within ten days of service of this *Order*; and
3. 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 16th 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. 7392j

Order Action Date: June 16, 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