

Service Date: July 27, 2015

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. 73921
Transfer of Stock)	

ORDER GRANTING IN PART AND DENYING IN PART
LIBERTY'S MOTION FOR A PROTECTIVE ORDER

PROCEDURAL HISTORY

1. On December 15, 2014, Liberty Utilities Co., Liberty WWH, Inc., (“Liberty”), Western Water Holdings, LLC and Mountain Water Company (“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 the Montana Consumer Counsel (“MCC”), 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-033(b) requesting the financial analysis done by Liberty in conjunction with its due diligence, including but not limited to projected financial results. On April 20, 2015, the MCC issued Data Request MCC-010, seeking the same information. The City also requested Liberty’s financial analysis in Data Request CITY-031, on April 22, 2015.
4. On April 21, 2015, Liberty submitted its *Responses to Data Requests PSC-028 through PSC-038*.
5. On May 4, 2015, Liberty submitted its *Responses to Data Requests MCC-001 through MCC-018*.

6. On May 4, 2015, Liberty filed its *Responses to Data Requests CITY-001 through CITY-031*.

7. On May 8, 2015, the MCC filed its initial *Motion to Compel a Response to MCC-010*. Liberty filed a *Response to the MCC's initial Motion to Compel MCC-010*. Citing Commission Order No. 7932e and a hope to facilitate resumption of the procedural schedule, Liberty provided Supplemental Responses to PSC-033(b), MCC-010, and CITY-031 on June 10, 2015. *See* Or. 7392e, ¶ 11 (Jun. 3, 2015).

8. On June 10, 2015, Liberty subsequently filed a *Motion for Protective Order and Brief in Support* for the following types of information:

- Liberty's due diligence materials and financial model that it relied upon in submitting its bid to merge with and acquire the stock of Western Water Holdings, LLC.
- Excerpts of minutes from Algonquin Power and Utilities Board meetings on August 14, 2014, September 4, 2014, and September 15, 2014.
- Liberty's 2012 and 2013 United States income tax returns.

Mot. for Protective Order p. 3-4 (June 10, 2015). On June 11, 2015 the Commission published notice of the Motion in its weekly agenda.

9. On June 16, 2015, the City filed its *Response to Liberty's Motion for a Protective Order*. On June 24, 2015, the MCC filed its *Motion to Compel Complete Response to MCC-010*. Although the MCC has styled its response differently, this document is responsive to Liberty's *Motion for Protective Order* and is within the same thread of argumentation. On July 1, 2015, Liberty filed its *Response to the MCC's Motion to Compel a Complete Response to MCC-010*. On July 16, 2015, the MCC filed its *Reply in Support of Motion to Compel Complete Response to MCC-010*.

DISCUSSION, ANALYSIS, FINDINGS & CONCLUSIONS

10. The Commission has previously determined that "both federal and state law prohibit disclosure of income tax returns." *In re Application of Mt. Water Co. for Auth. to Increase Rates and Charges for Water Serv. to its Missoula, Mont. Customers*, Dkt. No. D2010.4.41, Or. 7088a (Sept. 2, 2010) (citing Mont. Code Ann. § 15-31-511 and 26 U.S.C. § 6103). The Commission finds that Liberty's tax returns are "otherwise legally protectable" under Admin. R. Mont. 38.2.5007(2) (2015).

11. Liberty asserts that its due diligence materials and financial model, and its board minutes, are subject to protection as they constitute trade secret materials.

12. 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. The Commission may protect information that is deemed trade secret. *Id.* at ¶ 62.

13. 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.

14. 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).

15. Liberty provided a supporting affidavit with its *Motion*, as required by Admin. R. Mont. 38.2.5007(3)(c). *Aff. David Pasioka* (June 10, 2015).

16. Liberty “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.” *Aff. Pasioka* ¶ 2.

17. Liberty asserts that the data is information because it “is comprised of knowledge, data and facts communicated in writing.” *Mot.* p. 6 (June 10, 2015); *see also* *Admin. R. Mont.* 38.2.5001(3) (defining information).

18. Liberty asserts that the information in question contains information that is secret and that “Liberty does not share [the information] or disclose it to the public.” *Id.* at p. 7.

19. Liberty claims all the information in question is subject to reasonable efforts to maintain its secrecy. Liberty states that it “does not share or disclose” the information and that “only those Liberty employees and representatives with a direct need to know are authorized to access” the information. *Id.*

20. Liberty states that its information is not readily ascertainable by proper means. Liberty “has adopted reasonable security measures to ensure that [the information] is not readily ascertainable.” *Id.* at p. 8.

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

22. Liberty argues that it possesses both an economic value and a competitive advantage from keeping the subject information secret. *Id.* Liberty asserts that public disclosure of its financial model “would provide a clear competitive advantage for Liberty’s competitors.” *Id.* at p. 9. Liberty states that its competitors would “obtain the benefit of [its] proprietary financial model, without making the substantial investments, spending time, or acquiring the knowledge and experience necessary to innovate.” *Id.*

23. Liberty asserts that public disclosure of its board meeting minutes “would prejudice Liberty.” *Id.* Liberty argues that if a competitor “were allowed to review the meeting minutes... the competitor could use that... information to Liberty’s economic and competitive disadvantage.” *Id.*

24. The Commission has previously determined that the type of information that Liberty seeks to protect is trade secret. *Or. 7392f* ¶ 24 (Jun. 5, 2015) (protecting Confidential Information Memorandum and Management Presentation); *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).

25. Liberty has stated facts supporting a *prima facie* finding that the financial model and board minutes derive independent economic value from their secrecy. *See Great Falls Tribune*, ¶ 56.

26. Liberty additionally requests imposition of special provisions contemplated by Admin. R. Mont. 38.2.5002(3). Mot. at p. 10.

27. Pursuant to Admin. R. Mont. 38.2.5002(3), requests for special provisions to be included in protective orders “will not routinely be granted, but may be granted for good cause.”

28. Admin. R. Mont. 38.2.5023 states that when it is not feasible to provide confidential information to counsel and experts, “confidential information may be made available by the provider for inspection by legal counsel and experts at a place and a time mutually agreed on by the provider and the party, or as directed by the commission.”

29. Specifically, Liberty requests that the financial model be available by inspection by legal counsel and experts at a predetermined time and place. *Id.*; *see also* Admin. R. Mont. 38.2.5023. Liberty states that, in addition, it will arrange for remote access to the financial models by experts through a Webex portal. *Id.* Liberty also requests that the Commission approve the terms of a custom non-disclosure agreement. *Id.*

30. Liberty justifies the need for special provisions by pointing to the City’s condemnation proceeding. Liberty argues that special provisions are necessary to “ensure that the City does not use Liberty’s confidential information in the condemnation proceedings or disclose it outside of this matter.” *Id.*

31. In its *Response*, the City does not object to Liberty receiving a standard protective order accompanied by use of a standard non-disclosure agreement. However, the City argues that Liberty’s request for special provisions is “overreaching” and “entirely unnecessary.” *Response* p. 1 (June 16, 2015). The City appears to take particular exception to Liberty’s proposed custom non-disclosure agreement. The City argues that the traditional non-disclosure agreement utilized in Commission proceedings is sufficient, and that everyone understands that they are not permitted to disclose protected information. *Id.* at p. 4.

32. Admin. R. Mont. 38.2.5012 articulates the Commission's rules regarding non-disclosure agreements. Specifically, Admin. R. Mont. 38.2.5012(3) describes the content that must be included in a non-disclosure agreement signed by counsel and expert witnesses.

33. Admin. R. Mont. 38.2.5014(1) states that confidential information "must not be provided to, disclosed to, discussed with, or accessed by any person, including legal counsel, who has not first signed a commission-approved nondisclosure agreement."

34. Admin R. Mont. 38.2.5014(1) also states:

All persons who are entitled to receive or access confidential information shall neither use nor disclose the confidential information for any purpose other than the purposes of preparation for and conduct of the proceeding before the commission in which the protective order has been issued, and then solely as contemplated in the governing protective order and these rules, and shall take reasonable precautions to keep the confidential information secure in accordance with the purposes and intent of the protective order and these rules.

35. While the Commission's rules regarding protective orders specifically allow for the use of special provisions, the Commission's rules are much less explicit regarding the use of custom non-disclosure agreements. Nonetheless, the Commission finds that the regular non-disclosure agreement is adequate in this instance. The Commission's administrative rules and the standard non-disclosure language contained therein are quite clear.

36. The Commission cannot recall a time in which a party practicing before it has failed to adhere to the administrative rules regarding protective orders and non-disclosure agreements. The City and the MCC have practiced before this Commission in the past, and have without exception abided by the rules and expectations of the Commission regarding treatment of confidential information.

37. Liberty has remedies available to it if a party fails to adhere to the rules and non-disclosure agreement. It is unnecessary to implement a custom non-disclosure agreement. Liberty can seek relief pursuant to the Uniform Trade Secrets Act. *See* Mont. Code Ann. § 30-14-401 et seq. Under the Act parties can seek and be awarded exemplary damages and attorneys' fees. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1111 (9th Cir. 2001). Furthermore, in the event of a violation of the Commission's rules and non-disclosure agreement, Liberty can pursue sanctions in front of the Commission and in District Court.

38. The Commission is not persuaded that the use of a custom non-disclosure agreement is appropriate in this instance, therefore Liberty's request for such is denied.

39. The MCC, in its *Motion to Compel*, addresses and objects to Liberty's request for a protective order, specifically its request for special provisions. The MCC argues that parties before the Commission "are consistently and normally asked to produce, and do produce, financial information in Excel spreadsheet formats that make it possible for the parties requesting the information to work with the data..." Mot. at pp. 4-5 (June 24, 2015). This statement is true. Though they are not intended to be utilized routinely, the Commission's rules do allow for the implementation of special provisions.

40. The focus of the MCC's objection to the use of special provisions appears to revolve around Liberty's offered accommodation to allow experts access to its data. In its *Reply in Support of Motion to Compel Complete Response to MCC-010*, the MCC argues that Liberty's proposal that the MCC's expert access the subject information through a Webex portal is "an unacceptable and unauthorized intrusion into MCC's work product privilege." Reply at p. 4 (July 16, 2015).

41. The work product doctrine protects against the disclosure of the mental processes of an attorney, creating a privileged space in which an attorney can analyze and prepare a case. *State v. Ugalde*, 2013 MT 308, ¶ 37, 372 Mont. 234, 311 P.3d 772. Such privilege also extends to agents of an attorney. *Id.* This privilege plainly applies to MCC's counsel and expert witnesses.

42. However, the work product doctrine does not prevent imposition of special provisions pursuant to Admin. R. Mont. 38.2.5002(3). The Commission's rules allow for such provisions in rare situations. Due to the unique set of circumstances surrounding this proceeding, specifically, the distinct and concurrent proceeding regarding the City's condemnation of the water utility in Montana District Court, the Commission is convinced that special provisions are warranted in this instance.

43. Liberty asserts that it has "created a financial modeling program to create an economic advantage over competitors as Liberty continues to engage in competitive bidding processes and ultimately to invest in utility companies throughout North America." Aff. Pasioka at ¶ 6. To construct the model, Liberty states that it hired financial experts to create the model based on their unique knowledge and experience, and that the experts integrated secret valuations and assumptions. *Id.* Furthermore, the model contains forward looking projections regarding

Liberty's performance. *Id.* at ¶ 8. The Commission finds that Liberty's financial models are highly sensitive information.

44. Liberty also states that disclosure would provide competitors the benefit of the financial models without having to invest the time and expense that Liberty invested. *Id.* at ¶ 14. Liberty asserts competitors would learn of Liberty's approach to bidding on public utilities, and receive an advantage over Liberty in future acquisitions. *Id.* The Commission finds that disclosure of the subject information could significantly harm Liberty.

45. Liberty argues that disclosure may harm Liberty's interests in the pending condemnation action in Montana District Court, as well as potential future actions by municipalities in California to condemn other water systems. *Id.* at ¶ 15. Liberty points out that it was denied intervention in the District Court proceeding, and therefore lacks means to object to any improper use of its information in that proceeding. *Id.* The City is a rival buyer of the water utility presently owned and operated by Mountain Water, which Liberty is seeking this Commission's approval to acquire. The Commission finds that the unique circumstance of the concurrent condemnation proceeding creates additional risk.

46. In response to Liberty's request, the parties appear much more concerned with logistics than whether "good cause" for the special provisions is present. *See* Admin. R. Mont. 38.2.5002(3). The Commission finds that it is.

47. The confidential information must be made available by Liberty for inspection by Commissioners, legal counsel, and experts at a place and a time mutually agreed upon. The parties will simply have to reach an arrangement whereby parties are provided a reasonably private space in which to review and work with the subject information in order to adequately prepare their cases.

48. As is suggested by Admin. R. Mont 38.2.5002(3), transfer of information through a special medium is intended to be used sparingly and only in unusual circumstances. Determining when a protective order is warranted, and when special provisions are warranted, is always decided by the Commission on a case by case basis, after careful consideration of the facts.

49. Special provisions are not to be used in an attempt to frustrate discovery. "The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith." *Murphy Homes, Inc. v. Muller*, 2007 MT 140, ¶ 67, 337 Mont.

411, 162 P.3d 106 (quoting *Richardson v. State*, 2006 MT 43, ¶ 22, 331 Mont. 231, 130 P.3d 634). The implementation of special provisions should not be used to prevent parties from meaningful access to the information necessary to pursue their cases. All parties are cautioned that abuse of discovery must not be dealt with leniently. *Id.* at ¶ 68.

ORDER

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

50. Liberty's *Motion for a Protective Order* is GRANTED with respect to Liberty's due diligence materials and financial model, excerpts of minutes from Algonquin board meetings, and Liberty's 2012 and 2013 United States income tax returns.

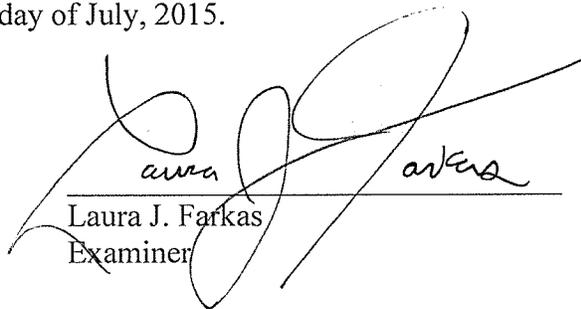
51. Liberty's request for use of a custom non-disclosure agreement is DENIED.

52. Liberty's request for special provisions pursuant to Admin. R. Mont. 38.2.5002(3) and Admin. R. Mont. 38.2.5023 is GRANTED with respect to Liberty's due diligence materials and financial model.

53. Liberty will submit its confidential information within 5 calendar days of the service date of this Order.

54. Liberty will make its confidential information subject to special provisions available for inspection by Commissioners, legal counsel, and experts at a place and a time mutually agreed on by the parties within 5 calendar days of the service date of this Order.

DONE AND DATED this 27th day of July, 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 No. D2014.12.99, Order No. 73921

Order Action Date: July 27, 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