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

IN THE MATTER OF the Application of ) REGULATORY DIVISION  
Montana-Dakota Utilities Co., a Division of )  
MDU Resources Group, Inc., for Authority to ) DOCKET NO. D2015.6.51  
Establish Increased Rates for Electric Service in )  
the State of Montana )  
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MONTANA-DAKOTA UTILITIES CO.’S MOTION FOR AN ORDER PROTECTING  
INFORMATION REQUESTED IN DATA REQUEST LCG-063

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Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. (“Montana-Dakota”), by and through its counsel, hereby submits to the Montana Public Service Commission (“Commission”) this Motion for Protective Order and Brief in Support. This motion is filed pursuant to Admin. R. Mont. 38.2.5001, *et seq.* Montana-Dakota requests a protective order be issued to protect confidential and proprietary information responsive to Data Request LCG-063. Montana-Dakota integrates into its motion a brief in support.

Montana-Dakota also offers the Affidavit of Nathan W. Ring, Vice President, Controller, and Chief Accounting Officer for Montana-Dakota, in support of this motion. Mr. Ring is qualified to testify regarding these issues.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Montana-Dakota is a publicly traded company that is regulated by the Securities and Exchange Commission (“SEC”). The SEC enforces what is known as Regulation Fair Disclosure (“Regulation FD”). *See* 17 CFR 243. Regulation FD was enacted to eliminate the selective disclosure of nonpublic information and requires publicly traded companies to disclose material nonpublic information to all investors at the same time, with certain exceptions. *See* 17 CFR § 243.100(a).

In its normal scope of business operations, Montana-Dakota selectively provides credit and equity analysts with Montana-Dakota’s nonpublic, proprietary and confidential information in compliance with SEC regulations, and as expressly allowed by Regulation FD. *See* 17 CFR § 243.100(b). The credit and equity analysts are required to maintain the confidentiality of the nonpublic information they receive, other than the resulting credit ratings they provide to the public. When Montana-Dakota discloses nonpublic information to credit and equity analysts, it does so for the sole purpose of obtaining or keeping its credit ratings, which are then disclosed by the rating agency to the investing public.

In Data Request LCG-063, the Montana Large Consumer Group (“LCG”) has asked Montana-Dakota to “provide copies of all correspondence, presentations, and all other materials that Montana-Dakota and its parent provided to credit and equity analysts over the last two years.” As a general rule, Regulation FD prohibits Montana-Dakota from selectively disclosing that nonpublic information to LCG, the Commission, and other parties. *See* 17 CFR §

243.100(a). Regulation FD does allow Montana-Dakota to selectively disclose its nonpublic information to individuals “who expressly agree to maintain the disclosed information in confidence,” however. *See* 17 CFD § 243.100(b)(2)(ii).

Prior to requesting this protective order, Montana-Dakota engaged in a thorough legal and factual examination to determine whether the information requested in Data Request LCG-063 is confidential and proprietary. With the assistance of legal counsel, Montana-Dakota has made a good faith determination that the documents responsive to Data Request LCG-063 (collectively, “Confidential Information”) contain confidential and proprietary trade secrets entitled to protection against public disclosure pursuant to Admin R. Mont. 38.2.5001, *et. seq.* Ring Affidavit, ¶ 11. Specifically, Montana-Dakota believes that the nonpublic confidential and proprietary materials Montana-Dakota has provided to ratings agencies such as Standard & Poor’s, Moody’s and Fitch Ratings (“credit and equity analysts”) all should be protected from public disclosure as required by Montana law.

Montana-Dakota 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. Ring Affidavit, ¶ 12. Montana-Dakota understands that it bears the burden of establishing a *prima facie* showing of confidentiality, factually and legally, and that confidential information is protected only upon Commission approval. Ring Affidavit, ¶ 12.

Montana-Dakota respectfully submits to the Commission that the confidential information identified herein is entitled to protection because it contains information that qualifies as a “trade secret” under the Commission’s administrative rules, or that it is “otherwise legally protectable.” *See* Admin. R. Mont. 38.2.5007(2). Montana law establishes that the Commission “may issue a protective order when necessary to preserve trade secrets . . . or other

information that must be protected under law, as required to carry out its regulatory functions.”

Mont. Code Ann. § 69-3-105(2).

### **CONTACT PERSON**

As required by Admin. R. Mont. 38.2.5007(3)(a), communications may be made to the undersigned counsel, at the information listed below, regarding this motion and the items to be protected.

### **IDENTIFICATION OF CONFIDENTIAL INFORMATION**

Montana-Dakota seeks a protective order preventing the disclosure of documents responsive to Data Request LCG-063. Specifically, the Commission should protect from public disclosure all nonpublic information that Montana-Dakota has provided to credit and equity analysts over the last two years, as required by Montana law.

### **FACTUAL AND LEGAL BASIS FOR PROTECTION**

The Commission should grant Montana-Dakota’s motion and protect the Confidential Information from public disclosure because it qualifies as “trade secret” under the Commission’s administrative rules or is “otherwise legally protectible.” *See* Admin. R. Mont. 38.2.5007(2). The Confidential Information also complies with the definition of “trade secret” found at Montana Code Annotated § 30-14-402(4) (“‘Trade secret’ means information 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”). Thus, the Confidential Information

contains “constitutionally protected property rights.” *Great Falls Tribune Co. v. Great Falls Pub. Sch., Bd. of Trustees, Cascade Cnty.*, 255 Mont. 125, 130, 841 P.2d 502, 505 (1992).

The PSC historically has granted motions to protect information similar to the Confidential Information identified above. For example, the PSC has granted a motion to protect “non-public financial information provided to the rating agencies.” PSC Docket No. D2014.8.72, Order No. 7373a, ¶¶ 8, 17. Under Montana law, “it is a well-established principle of agency law that an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure.” *Waste Mgmt. Partners of Bozeman, Ltd. v. Montana Dep't of Pub. Serv. Regulation*, 284 Mont. 245, 257, 944 P.2d 210, 217 (1997).

Furthermore, the Confidential Information satisfies all of the necessary criteria for a protective order under the Commission’s rules. It is: (1) information; (2) secret; (3) subject to efforts reasonable under the circumstances to maintain its secrecy; (4) not readily ascertainable by proper means; and (5) derives independent economic value, or a competitive advantage is derived, from its secrecy. Admin. R. Mont. 38.2.5007(4)(b).

**1. The Confidential Information qualifies as “information” under the Commission’s rules.**

Under the Commission’s administrative rules, “information” is defined as:

knowledge, observations, opinions, data, facts, and the like, whether recorded or communicated in writing, orally, electronically, or otherwise, and whether provided through pleadings, reports, exhibits, testimony, work papers, or similar items or attachments to such items, or in response to discovery, subpoena, order, audit, investigation, or other request.

Admin. R. Mont. 38.2.5001(3).

The Confidential Information is comprised of knowledge, data and facts that are recorded in writing. Ring Affidavit, ¶¶ 5-7. Therefore, the Confidential Information satisfies the first element necessary to qualify for a protective order.

**2. The Confidential Information is secret.**

The Commission's administrative rules do not define the term "secret." The ordinary meaning of "secret" is "something that is kept or meant to be kept unknown or unseen by others." OXFORD DICTIONARY OF ENGLISH 1608, (3d ed. 2010). The Uniform Trade Secrets Act defines "trade secret" as

information 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(4) (emphasis added).

Montana-Dakota has not otherwise shared the Confidential Information or disclosed the Confidential Information to the public. Ring Affidavit, ¶ 13. Disclosure of the Confidential Information is not required by law and is not published or otherwise made public. Ring Affidavit, ¶ 13. Although Montana-Dakota does disclose the Confidential Information to credit and equity analysts, it does so in accordance with federal law and pursuant to confidentiality agreements with the credit and equity analysts. Ring Affidavit, ¶ 13. Montana-Dakota has adopted reasonable measures to maintain the secrecy of the Confidential Information. Ring Affidavit, ¶ 14. As a result, the Confidential Information is not generally known and is not readily ascertainable by other persons. Ring Affidavit, ¶ 13. Therefore, it satisfies the "secrecy" element necessary for a protective order under Admin. R. Mont. 38.2.5007(4)(b)(iii).

**3. The Confidential Information is subject to reasonable efforts under the circumstances to maintain its secrecy.**

Montana-Dakota does not share or disclose the Confidential Information. Ring Affidavit, ¶ 13. Montana-Dakota has enacted policies to protect the secrecy of the Confidential

Information. Ring Affidavit, ¶ 14. Montana-Dakota does not share or disclose the Confidential Information and only those Montana-Dakota employees and representatives with a direct need to know are authorized to access the Confidential Information. Ring Affidavit, ¶ 13. Furthermore, Montana-Dakota has adopted reasonable security measures to maintain the secrecy of the Confidential Information. Ring Affidavit, ¶ 14. For these reasons, the Confidential Information is subject to efforts reasonable under the circumstances to maintain its secrecy.

**4. The Confidential Information is not readily ascertainable by proper means.**

The Confidential Information is not within the public domain. Ring Affidavit, ¶ 13. Only those Montana-Dakota employees and representatives with a direct need to know are authorized to access it. Ring Affidavit, ¶ 13. Although Montana-Dakota does disclose the Confidential Information to credit and equity analysts, it does so in accordance with federal law and pursuant to confidentiality agreements with the credit and equity analysts. Ring Affidavit, ¶ 13. Additionally, Montana-Dakota has adopted reasonable security measures to ensure that the Confidential Information is not readily ascertainable. Ring Affidavit, ¶ 14. Therefore, Montana-Dakota's Confidential Information is not readily ascertainable by proper means, as required by Admin. R. Mont. 38.5.5007(4)(b)(v).

**5. The Confidential Information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy.**

The Commission's administrative rules establish that Montana-Dakota must derive some economic value or competitive advantage from the Confidential Information's secrecy. *See* Admin. R. Mont. 38.2.5007(4)(b)(vi). The Confidential Information derives independent economic value from its secrecy, and Montana-Dakota also derives economic value from its secrecy. The non-public financial information provided by Montana-Dakota to the rating agencies reveals information which, among other things, could provide Montana-Dakota's

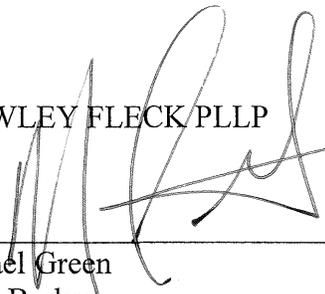
competitors with valuable insight into its strengths and weaknesses, its profitable and not so profitable companies, and management's plans for successfully competing against them. Disclosing the Confidential Information to the public would damage the economic interests of Montana-Dakota. Ring Affidavit, ¶ 15.

**CONCLUSION**

For the foregoing reasons, Montana-Dakota respectfully requests the Commission grant its motion for protective order.

Dated this 4<sup>th</sup> day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2015, the foregoing was served via electronic and U.S. mail on:

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

IN THE MATTER OF MONTANA-DAKOTA ) REGULATORY DIVISION  
UTILITIES CO., a Division of MDU Resources )  
Group, Inc., for Authority to Establish Increased ) DOCKET NO. D2015.6.51  
Rates for Electric Service )  
)  
)  
)

**AFFIDAVIT OF NATHAN RING**

STATE OF NORTH DAKOTA )  
 )  
:ss  
County of Burleigh )

I, **NATHAN W. RING**, declare and state under penalty of perjury as follows:

1. I am the Vice President, Controller, and Chief Accounting Officer for MDU Resources Group, Inc. As Vice President, Controller, and Chief Accounting Officer, I have managerial responsibility for overseeing MDU Resources', including its division Montana-Dakota Utilities Co. ("Montana-Dakota"), communications with ratings agencies such as Standard & Poor's, Moody's and Fitch Ratings ("credit and equity analysts").

2. My principal place of business is 1200 West Century Avenue, Bismarck ND 58506.

3. I am familiar with the information the Montana Large Consumer Group (the "LCG") is seeking in this docket in data request LCG-063.

4. I have personal knowledge of the facts stated herein. Any opinions expressed herein are based on my knowledge and personal experience.

5. Montana-Dakota is a publicly traded company that is regulated by the Securities and Exchange Commission (“SEC”). The SEC enforces what is known as Regulation Fair Disclosure (“Regulation FD”). *See* 17 CFR Part 243. Regulation FD was enacted to eliminate the selective disclosure of nonpublic information and requires publicly traded companies to disclose material nonpublic information to all investors at the same time, with certain exceptions. *See* 17 CFR § 243.100(a).

6. In its normal scope of business operations, Montana-Dakota selectively provides credit and equity analysts with Montana-Dakota’s nonpublic, proprietary and confidential information in compliance with SEC regulations, and as expressly allowed by Regulation FD. *See* 17 CFR § 243.100(b). The credit and equity analysts are required to maintain the confidentiality of the nonpublic information they receive, other than the resulting credit ratings they provide to the public.

7. When Montana-Dakota discloses nonpublic information to credit and equity analysts, it does so for the sole purpose of obtaining or keeping its credit ratings, which are then disclosed by the rating agency to the investing public.

8. In Data Request LCG-063, LCG has asked Montana-Dakota to “provide copies of all correspondence, presentations, and all other materials that Montana-Dakota and its parent provided to credit and equity analysts over the last two years.”

9. As a general rule, Regulation FD prohibits Montana-Dakota from selectively disclosing that nonpublic information to LCG, the Commission, and other parties. *See* 17 CFR § 243.100(a).

10. Regulation FD does allow Montana-Dakota to selectively disclose its nonpublic information to individuals “who expressly agree to maintain the disclosed information in confidence,” however. *See* 17 CFD § 243.100(b)(2)(ii).

11. Prior to requesting this protective order, Montana-Dakota engaged in a thorough legal and factual examination to determine whether the information requested in data request LCG-063 is confidential and proprietary. With the assistance of legal counsel, Montana-Dakota has made a good faith determination that the documents responsive to data request LCG-063 (collectively, “Confidential Information”) contain confidential and proprietary trade secrets entitled to protection against public disclosure pursuant to Admin R. Mont. 38.2.5001, *et. seq.*

12. Montana-Dakota has considered that the Montana Public Service Commission (“Commission”) is a public agency and that there is a constitutional presumption of access to documents and information in the Commission’s possession. Montana-Dakota understands it bears the burden of establishing a *prima facie* showing of confidentiality, factually and legally, and that confidential information is protected only upon Commission approval.

13. Montana-Dakota has not otherwise shared the Confidential Information or disclosed the Confidential Information to the public. Disclosure of the Confidential Information is not required by law and is not published or otherwise made public. Although Montana-Dakota does disclose the Confidential Information to credit and equity analysts, it does so in accordance with federal law and pursuant to confidentiality agreements with the credit and equity analysts. Only those Montana-Dakota employees and representatives with a direct need to know are authorized to access the Confidential Information. Thus, the Confidential Information is not readily ascertainable by proper means.

14. Montana-Dakota has adopted reasonable measures to maintain the secrecy of the Confidential Information: securing its business offices and facilities, restricting access via individual access cards, locking main building doors, locking file cabinets, password-protecting computer files, and using automated e-mail encryption. Montana-Dakota also shreds confidential documents that are no longer in use. Thus, the Confidential Information is subject to efforts reasonable under the circumstances to maintain its secrecy.

15. The Confidential Information derives independent economic value from its secrecy, and Montana-Dakota also derives economic value from its secrecy. The non-public financial information provided by Montana-Dakota to the rating agencies reveals information which, among other things, could provide Montana-Dakota's competitors with valuable insight into its strengths and weaknesses, its profitable and not so profitable companies, and management's plans for successfully competing against them. Disclosing the Confidential Information to the public would damage the economic interests of Montana-Dakota.

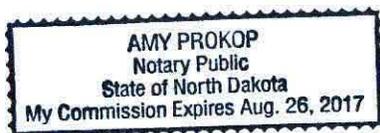
16. For these reasons, Montana-Dakota respectfully requests that the Montana Public Service Commission protect the Confidential Information and grant Montana-Dakota's motion for a protective order as authorized by Montana law.

Dated this 4<sup>th</sup> day of November, 2015.

  
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**NATHAN W. RING**

SUBSCRIBED and SWORN to before me this 4<sup>th</sup> day of November 2015.

(SEAL)



  
\_\_\_\_\_  
Notary Public for the State of \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Residing at: \_\_\_\_\_  
My Commission Expires: \_\_\_\_\_