

Service Date: November 6, 2015

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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)
)

MONTANA-DAKOTA UTILITIES CO.'S MOTION FOR AN ORDER PROTECTING
INFORMATION REQUESTED IN DATA REQUESTS LCG-060 TO -062

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.*, and, more specifically, Admin. R. Mont. 38.2.5007(5). Montana-Dakota requests a protective order be issued to protect the copyrighted third-party credit reports responsive to Data Requests LCG-060 to -062, and to limit Montana-Dakota's potential exposure to liability for contributory copyright infringement. 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

In Data Requests LCG-060 to -062, the Montana Large Consumer Group (“LCG”) asked Montana-Dakota to produce various “credit reports” for MDU and its affiliates published by Standard & Poor’s, Moody’s and Fitch Ratings over the past two years (“third-party credit reports”). MDU and its affiliates are not rated by Moody’s, so there are no responsive materials for Moody’s. Standard & Poor’s and Fitch Ratings do rate MDU and its affiliates, however, and those credit agencies have published credit reports responsive to Data Requests LCG-060 to -062. Ring Affidavit, ¶ 7.

Those third-party credit reports are the copyrighted works of Standard & Poors and Fitch Ratings. Ring Affidavit, ¶ 8. The unauthorized reproduction and public dissemination of these third-party works may be prohibited by federal copyright laws. *See* 17 U.S.C. § 106 (“the owner of a copyright under this title has the exclusive rights . . . to reproduce the copyrighted work in copies”). Furthermore, pursuant to the term-of-use agreements Montana-Dakota agreed to, Montana-Dakota is prohibited from reproducing or distributing the third-party credit reports without the third parties’ express written permission. Ring Affidavit, ¶ 9.

Montana-Dakota requested permission from Standard & Poor’s and Fitch Ratings to produce the third-party credit reports to the Commission and requesting parties. Standard & Poor’s and Fitch Ratings have agreed to allow Montana-Dakota to produce hard copies of the third-party credit reports to the Commission and requesting parties, but have not authorized posting the third-party credit reports on a public website. Ring Affidavit, ¶ 10.

Prior to requesting this protective order, Montana-Dakota engaged in a thorough legal and factual examination to determine whether the information requested in Data Requests LCG-060 to -062 is confidential and proprietary. With the assistance of legal counsel, Montana-Dakota has made a good faith determination that the documents responsive to Data Requests LCG-060 to -062 (collectively, “Confidential Information”) contain copyrighted materials, the unauthorized reproduction of which are prohibited by federal law. *See* 17 U.S.C. § 106. Thus, Montana-Dakota believes the third-party credit reports are entitled to protection against public disclosure on the Commission’s website pursuant to Admin. R. Mont. 38.2.5007(5). Ring Affidavit, ¶ 5.

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, ¶ 6. 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, ¶ 6.

Montana-Dakota respectfully submits to the Commission that the confidential information identified herein is entitled to protection because it contains information that 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) (emphasis added).

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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 the third-party credit reports responsive to Data Requests LCG-060 to -062.

FACTUAL AND LEGAL BASIS FOR PROTECTION

The Commission should grant Montana-Dakota's motion and protect the Confidential Information from public disclosure because it is "otherwise legally protectible." *See* Admin. R. Mont. 38.2.5007(2). Specifically, the unauthorized reproduction and public dissemination of the Confidential Information may be prohibited by federal copyright laws. *See* 17 U.S.C. § 106 ("the owner of a copyright under this title has the exclusive rights . . . to reproduce the copyrighted work in copies").

The Commission historically has granted motions to protect information similar to the Confidential Information identified above. For example, when other parties have sought to protect copyrighted materials from unauthorized reproduction, the Commission has not required those parties to file electronic copies of the copyrighted materials. *See* Docket No. D2009.9.129/D2007.7.82, Order No. 7046b, ¶ 12 ("the Commission recognizes that by providing copies to it for publication on the Commission's website NWE may expose itself to liability for contributory copyright infringement" and therefore "the Commission will not require NWE to file the documents electronically"). In that instance, the Commission only required the providing party to "produc[e] the documents to the Commission and parties." *Id.* Montana-Dakota's

motion requests an identical result. 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).

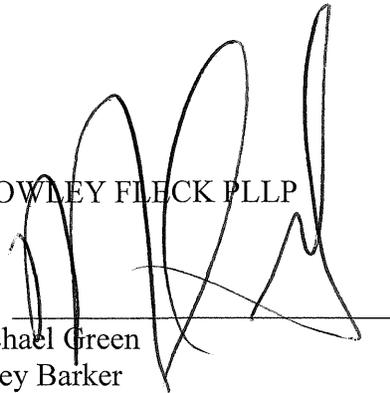
Although Montana-Dakota understands that ¶ 5 of Procedural Order 7433 in this docket requires parties to electronically file responses to data requests, Montana-Dakota respectfully requests the Commission to waive enforcement of that provision to protect the copyrighted works of the third-party credit agencies, and to limit Montana-Dakota’s potential exposure to liability for contributory copyright infringement. *See* Admin. R. Mont. 38.2.305 (“the Commission or any hearing examiner may waive the application of any rule”). Such an action is consistent with Commission precedent. *See* Docket No. D2009.9.129/D2007.7.82, Order No. 7046b, ¶ 12.

CONCLUSION

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

Dated this 6th day of November, 2015.

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Attorneys for Montana-Dakota

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2015, the foregoing was served via electronic and U.S. mail on:

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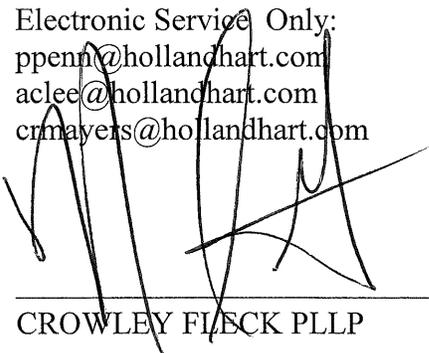
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DEPARTMENT OF PUBLIC SERVICE REGULATION
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IN THE MATTER OF MONTANA-DAKOTA) REGULATORY DIVISION
UTILITIES CO., a Division of MDU Resources)
Group, Inc., for Authority to Establish Increased) DOCKET 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 have personal knowledge of the facts stated herein. Any opinions expressed herein are based on my knowledge and personal experience.
4. I am familiar with the information the Montana Large Consumer Group (the "LCG") is seeking in this docket in Data Requests LCG-060 to -062, i.e., various credit reports

for MDU and its affiliates published by Standard & Poor's, Moody's and Fitch Ratings over the past two years ("third-party credit reports").

5. Prior to requesting this protective order, Montana-Dakota engaged in a thorough legal and factual examination to determine whether the information requested in Data Requests LCG-060 to -062 is confidential and proprietary. With the assistance of legal counsel, Montana-Dakota has made a good faith determination that the documents responsive to Data Requests LCG-060 to -062 (collectively, "Confidential Information") contain copyrighted materials entitled to protection against unauthorized reproductions pursuant to Admin R. Mont. 38.2.5001, *et seq.*, and, more specifically, Admin. R. Mont. 38.2.5007(5).

6. 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.

7. MDU and its affiliates are not rated by Moody's, so there are no responsive materials for Moody's. Standard & Poor's and Fitch Ratings do rate MDU and its affiliates, however, and those credit agencies have published credit reports responsive to Data Requests LCG-060 to -062.

8. Those third-party credit reports are the copyrighted works of Standard & Poors and Fitch Ratings. The unauthorized reproduction and public dissemination of these third party works may be prohibited by federal copyright laws. *See* 17 U.S.C. § 106 ("the owner of a copyright under this title has the exclusive rights . . . to reproduce the copyrighted work in copies").

9. Furthermore, pursuant to the term-of-use agreements Montana-Dakota agreed to, Montana-Dakota is prohibited from reproducing or distributing the third-party credit reports without the third parties' express written permission.

10. Montana-Dakota requested permission from Standard & Poor's and Fitch Ratings to produce the third-party credit reports to the Commission and requesting parties. Standard & Poor's and Fitch Ratings have agreed to allow Montana-Dakota to produce hard copies of the third-party credit reports to the Commission and requesting parties, but have not authorized posting the third-party credit reports on a public website.

11. Although Montana-Dakota understands that ¶ 5 of Procedural Order 7433 in this docket requires parties to electronically file responses to data requests, Montana-Dakota respectfully requests the Commission to waive enforcement of that provision to protect the copyrighted works of the third-party credit agencies, and to limit Montana-Dakota's potential exposure to liability for contributory copyright infringement.

12. 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.

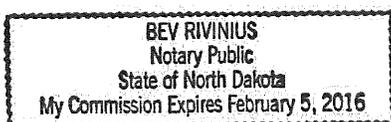
Dated this 6th day of November, 2015.



NATHAN W. RING

SUBSCRIBED and SWORN to before me this 6th day of November 2015.

(SEAL)



Bev Rivinius
Notary Public for the State of North Dakota
Printed Name: Bev Rivinius
Residing at: Burleigh County, ND
My Commission Expires: _____