

Service Date: March 17, 2016

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

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IN THE MATTER OF the Investigation of the)
Montana Public Service Commission into) REGULATORY DIVISION
whether Mountain Water Company's rates are)
Just and Reasonable.) DOCKET NO. D2016.2.15
)

**MOUNTAIN WATER COMPANY’S MOTION FOR AN ORDER PROTECTING
INFORMATION REQUESTED IN DATA REQUESTS MCC-001 AND MCC-002**

Mountain Water Company (“Mountain Water”) by and through its undersigned counsel, hereby submits to the Montana Public Service Commission (“Commission”) this Motion for a 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(4)(b) and (5). Mountain Water requests a protective order be issued to protect the confidential trade secrets and material nonpublic information responsive to data requests MCC-001 and MCC-002. Mountain Water integrates into its motion a brief in support.

In support of this motion, Mountain Water offers the Affidavit of William R. Killeen (“Killeen Affidavit”), the Director, Regulatory Operations for Liberty Utilities (Canada) Corp., the parent corporation of Liberty Utilities Co., a Delaware corporation (“Liberty Utilities”). Mr. Killeen is qualified to testify regarding these issues.

FACTUAL AND PROCEDURAL BACKGROUND

On January 29, 2016, the Commission “voted to initiate a proceeding to inquire into whether Mountain Water Company’s current water rates . . . are just and reasonable.” Notice of Investigation, PSC Docket No. D2016.2.15 (Feb. 3, 2016). The Commission initiated these

proceedings to determine whether Mountain Water’s rates are just and reasonable “under the current capital structure and cost of capital now that Liberty Utilities is the new owner of Mountain Water.” *Id.*

On March 10, intervenor Montana Consumer Counsel (“MCC”) served Mountain Water with various data requests, including data requests relating to Liberty Utilities’ financial affairs. Following a thorough legal and factual examination, Mountain Water and its legal counsel have determined that the documents responsive to data requests MCC-001 and MCC-002 (“Confidential Information”) are entitled to protection from public disclosure pursuant to Admin. R. Mont. 38.2.5007. Mountain Water 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. Killeen Affidavit, ¶ 14. Mountain Water 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. Killeen Affidavit, ¶ 14.

Mountain Water respectfully submits to the Commission that the Confidential Information is entitled to protection because it contains information that qualifies as “trade secret” under the Commission’s administrative rules and because 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) (emphasis added). For these reasons, Mountain Water respectfully requests the Commission grant its motion.

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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

Mountain Water seeks a protective order preventing the disclosure of the following confidential and proprietary information (“Confidential Information”):

- Documents that describe the \$235 million credit facility referenced in MCC-001. The relevant documents are contained in a Term Loan Agreement between J.P. Morgan and Liberty Utilities dated January 4, 2016 (“Term Loan Agreement”). The Term Loan Agreement contains confidential information and material nonpublic information. Killeen Affidavit, ¶ 6.
- Documents that describe the \$160 million private placement referenced in MCC-002. The relevant documents are contained in a Note Purchase Agreement dated as of April 30, 2015 (“Note Purchase Agreement”). The Note Purchase Agreement contains confidential information and proprietary trade secrets. Killeen Affidavit, ¶ 10.

FACTUAL AND LEGAL BASIS FOR PROTECTION

The Commission should grant Mountain Water’s motion and protect the Confidential Information from public disclosure because it contains “trade secrets” and/or it is “otherwise legally protectable.” *See* Admin.R.Mont. 38.2.5007(2). Mountain Water’s parent company, Liberty Utilities, possesses the Confidential Information. Liberty Utilities protects the Confidential Information from public disclosure and derives economic value from its secrecy. Admin.R.Mont. 38.2.5007(4)(b); *see also* Killeen Affidavit, ¶¶ 11-18. Furthermore, the Confidential Information is otherwise protectable because it contains material nonpublic information. *See* Admin. R. Mont. 38.2.5007(2); *see also* Killeen Affidavit, ¶¶ 13. Thus, the

Confidential Information is protected from public disclosure as a matter of Montana law. *See* Mont. Code Ann. § 69-3-105(2).

I. The Confidential Information Contains Trade Secrets.

As established in the Killeen Affidavit, the documents responsive to MCC-001 and MCC-002 satisfy all of the requirements to qualify as a “trade secret” under Montana law. Those documents are: (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) derive independent economic value, or a competitive advantage is derived, from its secrecy. Admin. R. Mont. 38.2.5007(4)(b). 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 is Liberty Utilities’ “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).

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

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

[K]nowledge, 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. Killeen Affidavit, ¶¶ 4-10. Therefore, the Confidential Information satisfies the first element necessary to qualify for a protective order. *See* Admin. R. Mont. 38.2.5007(4)(b)(ii).

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:

[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(4) (emphasis added).

Liberty Utilities does not share the Confidential Information or disclose it to the public. Killeen Affidavit, ¶ 15. Its disclosure is not required by law and is not published or otherwise made publicly available. Killeen Affidavit, ¶ 15. In fact, both the Term Loan Agreement and the Note Purchase Agreement are governed by confidentiality provisions. Killeen Affidavit, ¶ 15. Liberty Utilities has adopted reasonable measures to maintain the secrecy of the Confidential Information. Killeen Affidavit, ¶ 16. As a result, the Confidential Information is not generally known and is not readily ascertainable by proper means. Killeen Affidavit, ¶ 15.

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.

Liberty Utilities does not share or disclose the Confidential Information. Killeen Affidavit, ¶ 15. In fact, both the Term Loan Agreement and the Note Purchase Agreement are governed by confidentiality provisions. Killeen Affidavit, ¶ 15. Liberty Utilities has enacted reasonable security measures to protect the secrecy of the Confidential Information. Killeen Affidavit, ¶ 16. Liberty Utilities does not share or disclose the Confidential Information and only those Liberty Utilities employees and representatives with a direct need to know are authorized to access the Confidential Information. Killeen Affidavit, ¶ 15. Furthermore, Liberty Utilities has adopted reasonable security measures to maintain the secrecy of the Confidential Information. Killeen Affidavit, ¶ 16. For these reasons, the Confidential Information is subject to efforts reasonable under the circumstances to maintain its secrecy. *See* Admin. R. Mont. 38.2.5007(4)(b)(iv).

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

The Confidential Information is not within the public domain. Killeen Affidavit, ¶ 15. In fact, both the Term Loan Agreement and the Note Purchase Agreement are governed by confidentiality provisions. Killeen Affidavit, ¶ 15. Only those Liberty Utilities employees and representatives with a direct need to know are authorized to access it. Killeen Affidavit, ¶ 15. Additionally, Liberty Utilities has adopted reasonable security measures to maintain the secrecy of the Confidential Information. Killeen Affidavit, ¶ 16. Therefore, Liberty Utilities’ 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 Confidential Information derives independent economic value from its secrecy.

See Admin. R. Mont. 38.2.5007(4)(b)(vi). Liberty Utilities is able to acquire extensive access to capital on behalf of its subsidiaries based in part on its ability to maintain the confidentiality of its financial affairs. Killeen Affidavit, ¶ 17. Disclosing the Confidential Information to the public would damage the economic interests of Liberty Utilities because Liberty Utilities would be less likely to receive access to capital. Killeen Affidavit, ¶ 18. As a result, Liberty Utilities would be unable to provide its subsidiaries, including Mountain Water, with access to capital. Killeen Affidavit, ¶ 18. Disclosure of the Confidential Information ultimately would harm those who benefit from Liberty Utilities' access to capital—Liberty Utilities' (and by extension, Mountain Water's) customers. Killeen Affidavit, ¶ 18.

II. The Confidential Information Is Otherwise Legally Protectable.

The Confidential Information is “otherwise legally protectable” because it contains material nonpublic information that is provided to the United States Securities and Exchange Commission (“SEC”) and/or securities ratings agencies. Killeen Affidavit, ¶ 13. Specifically, the Term Loan Agreement states that the “AGREEMENT MAY INCLUDE MATERIAL NON-PUBLIC INFORMATION CONCERNING [LIBERTY UTILITIES] AND [THE LENDER] CONFIRMS THAT IT HAS DEVELOPED COMPLIANCE PROCEDURES REGARDING THE USE OF MATERIAL NON-PUBLIC INFORMATION AND THAT IT WILL HANDLE SUCH MATERIAL NON-PUBLIC INFORMATION IN ACCORDANCE WITH THOSE PROCEDURES AND APPLICABLE LAW, INCLUDING FEDERAL AND STATE SECURITIES LAWS.”

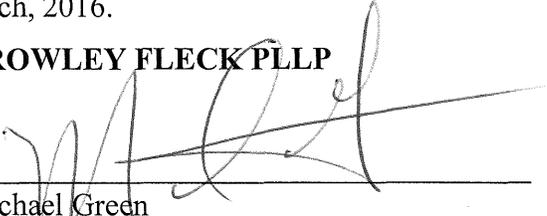
The Commission previously has concluded that material nonpublic information is protected from public disclosure. *See* PSC Docket No. D2007.7.79, Order No. 6846c (Oct. 12, 2007) (“material nonpublic information . . . merits protection from public disclosure” under Montana Code Annotated § 69-3-105(2)). 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). Thus, the Confidential Information is “otherwise legally protectable” as a matter of Montana law.

CONCLUSION

For the foregoing reasons, Mountain Water respectfully requests the Commission grant its motion for a protective order.

Submitted this 17th day of March, 2016.

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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on March 17, 2016, the foregoing was served via electronic and U.S. mail on:

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AFFIDAVIT OF WILLIAM R. KILLEEN

AFFIDAVIT OF WILLIAM R. KILLEEN FILED IN SUPPORT OF MOUNTAIN WATER COMPANY'S MOTION FOR AN ORDER TO PROTECT LIBERTY UTILITIES CO.'S CONFIDENTIAL INFORMATION REQUESTED IN DATA REQUESTS MCC-001 AND MCC-002.

William R. Killeen, being duly sworn, states:

1. I am the Director, Regulatory Operations for Liberty Utilities (Canada) Corp., the parent corporation of Liberty Utilities Co., a Delaware corporation ("Liberty Utilities"). Liberty Utilities is an American corporation that owns and operates regulated gas, water, sewer and electric utilities in various states. Liberty Utilities is the parent company of Western Water Holdings, LLC, which is the parent company of Park Water Company, which is the parent company of Mountain Water Company ("Mountain Water").
2. I am responsible for overall strategy development and management of regulatory affairs for all Liberty Utilities rate-regulated utilities throughout the United States. My principal business address is 354 Davis Road, Oakville, ON L6J 2X1.
3. I am familiar with the information the Montana Consumer Counsel (the "MCC") is seeking in this docket in data requests MCC-001 and MCC-002. I have personal knowledge of the facts stated herein. Any opinions expressed herein are based on my experience, as well as my knowledge of the information.

LIBERTY UTILITIES' TERM CREDIT FACILITY

4. Liberty Utilities paid \$250 million for the membership units of Western Water Holdings and assumed outstanding debt of Park Water (on a consolidated basis). The acquisition was financed with proceeds from a term credit facility issue on January 4, 2016 for \$235 million

and cash on hand at Liberty of \$15 million. This terms credit facility has an expiration date of July 4, 2017.

5. Data request MCC-001 asks Mountain Water to “fully describe the \$235 million term credit facility” and “provide all documentation concerning . . . the term credit facility,” including “prospectuses, offering letters and other communications with lenders or prospective lenders, security documents, registrations, filings and all reports to or communications with securities regulators.”
6. The relevant documents are contained in a Term Loan Agreement between J.P. Morgan and Liberty Utilities dated January 4, 2016 (“Term Loan Agreement”). The Term Loan Agreement contains confidential information and material nonpublic information.

LIBERTY UTILITIES’ PRIVATE PLACEMENT OF SENIOR UNSECURED NOTES

7. Liberty Utilities’ parent company, Algonquin Power & Utilities Corp. (“APUC”), issued a press release on April 30, 2015. In that press release, APUC stated that Liberty Utilities had closed a “US \$160 million private placement of senior unsecured 30 year notes bearing a coupon of 4.13%. The proceeds will be used to partially fund the previously announced acquisition of the Park Water System occurring late in 2015, and for general corporate purposes.”
8. Unfortunately, the closing on the Western Water merger did not occur in 2015 and, as a result, Liberty Utilities used the \$160 million private placement of senior unsecured 30 year notes for general corporate purposes, including maintaining the target capital structure of Liberty Utilities at a 55/45 equity to debt level.
9. Data request MCC-002 asks Mountain Water to “fully describe in full detail (including dates) the disposition and use of this \$160 million and provide all documentation concerning the private placement, including but not limited to prospectuses, offering letters and other communications with lenders or prospective lenders, security documents, registrations, all reports to or communications with securities regulators, as well as any modifications and/or amendments to these documents concerning the changed use of funds.”
10. The relevant documents are contained in a Note Purchase Agreement dated as of April 30, 2015 (“Note Purchase Agreement”). The Note Purchase Agreement contains confidential information and proprietary trade secrets.
* * * * *
11. Data requests MCC-001 and MCC-002 request disclosure of confidential information and proprietary trade secrets.
12. Furthermore, data requests MCC-001 and MCC-002 request disclosure of material nonpublic information that Liberty Utilities has provided to securities regulators and ratings agencies in accordance with federal law.

13. Prior to requesting this protective order, Mountain Water and Liberty Utilities engaged in a thorough legal and factual examination to determine whether the information requested in data requests MCC-001 and MCC-002 is confidential and proprietary. With the assistance of legal counsel, Mountain Water and Liberty Utilities have made a good faith determination that the documents responsive to data requests MCC-001 and MCC-002 (collectively, the "Confidential Information") contain confidential and proprietary trade secrets, as well as confidential material nonpublic information, entitled to protection against public disclosure pursuant to Admin R. Mont. 38.2.5001, *et seq.* and Montana Code Annotated § 69-3-105(2).
14. Mountain Water and Liberty Utilities have 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. Mountain Water and Liberty Utilities understand they bear the burden of establishing a *prima facie* showing of confidentiality, factually and legally, and that confidential information is protected only upon Commission approval.
15. The Confidential Information is not within the public domain. Liberty Utilities has not otherwise shared the Confidential Information or disclosed the Confidential Information to the public and only those Liberty Utilities employees and representatives with a direct need to know are authorized to access the Confidential Information. Disclosure of the Confidential Information is not required by law and is not published or otherwise made public. In fact, both the Term Loan Agreement and the Note Purchase Agreement are governed by confidentiality provisions. Thus, the Confidential Information is not generally known and not readily ascertainable by proper means.
16. Liberty Utilities has adopted reasonable security 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. Liberty Utilities 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.
17. The Confidential Information derives independent economic value from its secrecy, and Liberty Utilities derives economic value from its secrecy. Liberty Utilities is able to acquire extensive access to capital on behalf of its subsidiaries based in part on its ability to maintain the confidentiality of its financial affairs.
18. Disclosing the Confidential Information to the public would damage the economic interests of Liberty Utilities because Liberty Utilities would be less likely to receive access to capital. As a result, Liberty Utilities would be unable to provide its subsidiaries, including Mountain Water, with access to capital. Disclosure of the Confidential Information ultimately would harm those who benefit from Liberty Utilities' access to capital—Liberty Utilities' (and by extension, Mountain Water's) customers.

END OF AFFIDAVIT

Executed on the 17th day of March, 2016, at Oakville, Ontario, Canada



William R. Killeen
Director, Regulatory Operations for Liberty Utilities (Canada) Corp.

SUBSCRIBED and SWORN to before me on the 17th day of March, 2016, by William R. Killeen.

[Seal]



Printed Name Danielle Ann Waldman
Notary public for the Province of Ontario
Residing at 511-90 Broadview Ave Toronto ON
My commission expires: Does not expire