

Service Date: April 7, 2016

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

IN THE MATTER OF the Investigation of the) REGULATORY DIVISION
Montana Public Service Commission into)
Whether Mountain Water Company's) DOCKET NO. D2016.2.15
Rates are Just and Reasonable) ORDER NO. 7475c

PROTECTIVE ORDER

PROCEDURAL HISTORY

1. On January 29, 2016, the Montana Public Service Commission (“Commission”) voted to initiate a proceeding to inquire into whether Mountain Water Company’s (“Mountain Water”) current rates for its Missoula, Montana customers are just and reasonable.

2. On January 11, 2016, the Commission received the *Joint Applicants’ Notice of Closing and Withdrawal of Joint Application* in Docket No. D2014.12.99. This *Notice* informed the Commission that on January 8, 2016, the sale and transfer of Western Water stock to Liberty WWH closed, with Liberty WWH merging into Western Water and Western Water continuing as the wholly-owned subsidiary of Liberty Utilities. The Commission never completed its review of the sale and transfer in Docket No. D2014.12.99.

3. On February 3, 2016, the Commission issued a *Notice of Investigation and Intervention Deadline*. On March 1, 2016, the City of Missoula and Clark Fork Coalition were granted limited intervention. On March 2, 2016, the Montana Consumer Counsel was granted intervention. On March 7, 2016, the Commission, through delegation of authority to staff, issued *Procedural Order No. 7475a*.

4. On March 10, 2016, the MCC issued data requests MCC-001 through MCC-004. On March 15, 2016, Mountain Water filed a *Motion for Extension of Time to Respond to Montana Consumer Counsel's Data Requests*. Commission staff granted the Motion via a *Notice of Staff Action* on March 17, 2016.

5. On March 18, 2016, Mountain Water filed a *Motion for an Order Protecting Information Requested in Data Requests MCC-001 and MCC-002* (“Motion”) and the *Affidavit of William R. Killeen*.

FINDINGS OF FACT

6. Mountain Water seeks to protect "confidential trade secrets and material nonpublic information responsive to data requests MCC-001 and MCC-002." Mot. 1 (Mar. 18, 2016). Specifically, 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. 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. Mot. at p. 3.

7. Mountain Water has considered that the Commission is a public agency and that there is a constitutional presumption of public access to documents and information in the Commission’s possession.” Aff. William R. Killeen ¶ 14 (Mar. 18, 2016).

8. Mountain Water asserts that the information is secret. *Id.* at 13. Mountain Water takes steps to prevent public disclosure of the information it seeks to protect, including the following:

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.

Aff. Killeen at ¶ 16.

9. According to Mountain Water, the Confidential Information derives independent economic value from its secrecy, and Liberty Utilities derives economic value from its secrecy. *Id.* at 17. Mountain Water asserts that:

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.

Id. at ¶ 18.

CONCLUSIONS OF LAW

10. The Montana Constitution imposes “an ‘affirmative’ duty on government officials to make all of their records and proceedings available to public scrutiny.” *Great Falls Tribune v. Mont. Pub. Serv. Commn.*, 2003 MT 359, ¶ 54, 319 Mont. 38. However, “a trade secret is one form of information in which there is a statutorily defined property right.” *Id.* ¶ 59.

11. The Commission “may issue a protective order when necessary to preserve trade secrets . . . as required to carry out its regulatory functions.” Mont. Code Ann. § 69-3-105(2) (2015).

12. An entity seeking a protective order “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.” *Great Falls Tribune*, ¶ 56. “The claimant’s showing must be more than conclusory” and “must make clear . . . the basis for the request.” *Id.*; Mont. Admin. R. 38.5.5007(3) (2016).

13. A request for protective order must include “a complete and specific nonconfidential identification, description, and explanation of the information, item by item or by category of items which are alike, of all information for which protection is requested.” Mont. Admin. R. 38.2.5007(3)(b). For purposes of this Protective Order, paragraph 6 describes the information that Mountain Water seeks to protect.

14. In order to claim a trade secret as the basis for a protective order, a movant must demonstrate that: (1) It has considered the Commission is a public agency and that there is a Constitutional presumption of access to documents and information in the Commission’s possession; (2) the claimed trade secret material is information; (3) the information is secret; (4) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy; (5) the secret information is not readily ascertainable by proper means; and (6) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy. *Id.* at 38.2.5007(4)(b).

15. Mountain Water has demonstrated that the information in paragraph 6 is secret, is

subject to efforts reasonable under the circumstances to maintain its secrecy, is not readily ascertainable by proper means, and derives independent economic value from its secrecy. *Supra* ¶¶ 7-8. As a result, Mountain Water has made a *prima facie* showing that the information described in paragraph 6 consists of trade secrets entitled to protection under constitutional due process requirements.

ORDER

IT IS HEREBY ORDERED THAT:

16. Mountain Water's *Motion* is GRANTED;
17. Mountain Water must provide the information consistent with this Protective Order within two (2) calendar days of the service date of this Protective Order;
18. Information submitted in accordance with this Protective Order shall be treated as confidential pursuant to Title 38, Subchapter 50 of the Administrative Rules of Montana.

DONE AND DATED this 7th day of April, 2016.



Laura J. Farkas
Hearings Officer

ATTEST:


Aleisha Solem
Commission Secretary
(SEAL)

Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

(7-26-00)

ARM 38.2.5012

Docket No. D2016.2.15, Order No. 7475c

Order Action Date: April 7, 2016

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