

Service Date: May 16, 1996

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

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IN THE MATTER of the Application of	)	UTILITY DIVISION
MOUNTAIN WATER COMPANY for	)	
Authority to Increase Rates and Charges	)	DOCKET NO. D96.4.61
for Water Service to its Missoula Division	)	ORDER NO. 5910a

PROTECTIVE ORDER  
BACKGROUND

On May 3, 1996 the Montana Public Service Commission (PSC or Commission) received a Motion for Protective Order from the Mountain Water Company (Mountain Water) in Docket No. D96.4.61. Mountain Water seeks to protect either (1) confidential business information closely held by Mountain Water or (2) information which its employees have a reasonable and legitimate expectation will be protected as a right of privacy.

ORDER

IT IS ORDERED that this Protective Order, covering the material and information described by Mountain Water in its Motion, and material and information filed throughout the proceedings in Docket No. D96.4.61, determined by the Mountain Water to be confidential, shall be in effect, unless there is a Commission or Mountain Water decision that the information need not remain protected, as provided in this Order.

Confidential Information

1. (a) Confidential Information. All documents, data, information, studies and other materials furnished pursuant to any interrogatories, requests for information, other discovery requests, or subpoenas and depositions, or pursuant to Commission order, that are claimed to be of private, privileged or confidential shall be furnished pursuant to the terms of this Order. All persons accorded access under this Order shall treat this private, confidential or privileged commercial and financial information as confidential (referred to as "Confidential Information"). Confidential Information shall not be used nor disclosed except for the purpose of this proceeding, and solely in accordance with this Order. The Commission shall mark or stamp all material claimed to be Confidential Information with a designation indicating its private, proprietary or confidential nature, and submit this Confidential Information to the Commission on yellow paper for identification for filing purposes.

(b) Use of Confidential Information and Persons Entitled to Review. All Confidential Information submitted pursuant to this Order shall be given solely to counsel for the parties and shall not be used or disclosed except for purposes of this proceeding. However, counsel may authorize access to any specific Confidential Information for the purpose of this proceeding to those persons designated their experts in this matter. Any such expert may be an employee of a party, provided that such employee's duties are dedicated to regulatory activities on behalf of the party, and such employee's duties are not related to marketing or strategic planning of competitive products or services, including those provided by any party to this proceeding. Any member of the Public Service Commission and staff, the Consumer Counsel and staff and staff members of intervenor State agencies may have access to any

Confidential Information provided under this Order, and shall be bound by the terms of this Order.

(c) Nondisclosure Agreement (Exhibit "A"). Before giving access to Confidential Information to any counsel or expert pursuant to & 1(b), counsel for the party seeking review of the Confidential Information shall deliver a copy of this Order to the counsel or expert, who shall agree in writing to comply with and be bound by this Order before disclosure. Confidential Information shall not be disclosed to any person who has not signed a nondisclosure agreement form incorporated herein as Exhibit "A." Court reporters shall also sign an Exhibit "A." Exhibit "A" requires the persons obtaining disclosure first to read a copy of this Protective Order and certify in writing that they have reviewed the Order and consented to be bound by its terms. The agreement shall contain the signatory's full name, permanent address and employer, and the name of the party with whom the signatory is associated. The agreement shall be delivered to counsel for Mountain Water and a copy delivered to the Commission.

(d) Delivery of Documentation. Where feasible, Confidential Information will be marked as such and delivered to counsel. The Confidential Information may also be made available for review by counsel and experts accorded access in a place and a time mutually agreed on by the parties, or as directed by the Commission.

#### Procedures for Objections

2. This Order establishes a procedure to expedite handling of information that a party claims is confidential. However, issuance of the Order does not constitute a ruling on the confidentiality of any such document. The following procedures govern challenges to confidentiality status and to access to confidential information.

(a) Challenge and Objection to Confidentiality Status. If the

parties are unable to agree that certain documents, data, information, studies or other matters constitute private, confidential or privileged commercial and financial information, the party objecting to the private claim shall request the Commission's review pursuant to this Order. Upon determining whether any documents, data, information, studies or other submitted matters are Confidential Information, the Commission will enter an order resolving the issue.

(b) Request for Removal from Protection. Any party upon ten (10) days notice may file a request for removal of Confidential Information from the protective requirements of this Order or from the sealed record, to be placed in the public record. Upon a challenge to the confidential or proprietary nature of this information, a hearing examiner and/or the Commission shall resolve the issue following proceedings in camera conducted with only persons present with authorized access to such confidential matter. The record of in camera hearings shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER, DOCKET NO. D96.4.61" and transcribed only upon agreement of the parties or Order of the Hearing Examiner or the Commission. If transcribed, the record shall be separately bound, segregated, sealed, and withheld from inspection by any person not authorized disclosure under this Order. There may be no release from the restrictions of this Order without either an agreement of the parties or an Order of the Hearing Examiner or the Commission, after notice to the parties and a hearing. If the Hearing Examiner or the Commission should rule that any information should be removed from the protection of this Order or the sealed record, the parties, at the request of the providing party to enable it to seek a stay or other relief, shall not disclose such information or use it in the public record for five (5) business days.

### Confidential Information as Evidence

3. (a) Receipt into Evidence. At least ten (10) days before using or referring to any Confidential Information as evidence, the party shall notify the providing party of its intention to use this information. The requesting and the providing parties shall make a good faith effort to reach an agreement on how to use the information so as not to reveal its private, confidential or proprietary nature. If such efforts fail, the providing party shall identify, within five (5) business days, which portions to place in the sealed record of the documents containing Confidential Information to be offered or referred to on the record. Only one (1) copy may be made of designated documents to be placed in the sealed record and only for that purpose. Otherwise, parties shall make only general references to Confidential Information in these proceedings.

(b) Seal. While in the custody of the Commission, materials subject to this Order shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER, DOCKET NO. D96.4.61." Due to the private nature, these materials shall not be considered as records in the possession or retained by the Commission within the meaning of the open meetings or public records statutes.

(c) In camera Hearing. Any Confidential Information requiring oral disclosure to be placed in the sealed record in this proceeding shall be offered in an in camera hearing, attended only by persons authorized access to the Information under this Order. Cross-examination on and substantive reference to Confidential Information and the portion of the record containing the references shall be marked and treated as provided in this Order.

(d) Appeal. Sealed portions of the record in this proceeding may be forwarded on appeal to any court of competent jurisdiction in

accordance with applicable rules and regulations, but under seal as designated herein for the information and use of the Court.

(e) Return. Unless otherwise ordered, Confidential Information, including transcripts of any depositions to which a claim of confidentiality is made, shall remain under seal, subject to the protective requirements of this Order, and shall be returned to counsel for Mountain Water within 30 days after final settlement or conclusion of this matter, including administrative or judicial review.

#### Citations and References in Pleadings and Briefs

4. Reference to Confidential Information in the sealed record, when necessary in pleadings, cross-examination, briefs, argument or motions, shall be by citation of title or exhibit number or some other nonconfidential description. Substantive references to Confidential Information shall be placed in a separate section of the pleading or brief and submitted to the Hearing Examiner or the Commission under seal. This sealed section shall be served only on counsel of record (one copy each) who have signed an Exhibit "A." All the protections afforded in this Order apply to materials prepared and distributed under this paragraph.

#### Reference to Confidential Information

5. (a) Use in Decisions and Orders. When practicable, the Commission will refer to Confidential Information in only a general form and will avoid reproduction in any decision of Confidential Information to the greatest possible extent. If it is necessary in this proceeding to discuss Confidential Information other than in a general form, the discussion with this protected information shall be placed in a separate section of the Order or Decision under seal. This sealed section shall be served only on counsel of record (one copy each) who have signed an Exhibit "A." Counsel for other parties

shall receive the cover sheet to the sealed portion and may review the sealed portion on file with the Commission once they have signed an Exhibit "A."

(b) Summary for Record. In all instances when Mountain Water files material with the Commission pursuant to this order which Mountain Water considers to be Confidential Information, Mountain Water shall concurrently file a brief non-proprietary written summary of the Confidential Information. In other instances, if deemed necessary by the Commission, Mountain Water shall prepare a written summary of the Confidential Information referred to in a decision or order to be placed on the public record.

6. Segregation of Files. All Confidential Information filed with the Commission will be sealed by the Commission, segregated and withheld from inspection by any person not bound by the terms of this Order. Confidential Information may be released from the restrictions of this Order by agreement of the parties or, after notice and hearing, pursuant to an Order of the Commission or final order of a Court having jurisdiction. The Consumer Counsel may retain all written Confidential Information obtained under this order, but shall withhold it from inspection by others, except for Consumer Counsel staff and counsel, unless it is released by the Public Service Commission and/or a final order of a court under this paragraph, subject always to the terms of confidentiality in this Order.

#### Preservation of Confidentiality

7. All persons receiving access to any Confidential Information by reason of this Order shall neither use nor disclose the Confidential Information for purposes of business or competition, or any purpose other than to prepare for and conduct this proceeding as provided in this Order, and shall take reasonable precautions to keep

the Confidential Information secure, pursuant to this Order.

#### Reservation of Rights

8. The parties affected by the terms of this Protective Order further retain the right to question, challenge and object to the admissibility of any and all data, information, studies and other matters furnished under the terms of this Protective Order in response to interrogatories, requests for information or cross-examination on the grounds of relevancy or materiality.

#### Nonwaiver of Rights

9. This Order does not constitute any waiver of the rights of any party in this Docket to contest any assertion or finding of private, confidentiality or privilege, and to appeal such determination of the Commission or such assertion by a party.

#### Amendment or Modification

10. The Commission retains jurisdiction of this matter and may alter or amend these provisions, upon motion by an appropriate party and reasonable notice.

DONE AND DATED this 15th day of May, 1996 by a vote of 3 - 2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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NANCY MCCAFFREE, Chair  
(Voting to Dissent)

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DAVE FISHER, Vice Chair

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BOB ANDERSON, Commissioner

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DANNY OBERG, Commissioner

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BOB ROWE, Commissioner  
(Voting to Dissent - Attached)

ATTEST:

Kathlene M. Anderson  
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

EXHIBIT "A"

I have reviewed the foregoing Protective Order in Mountain Water Docket No. D96.4.61, dated May 15, 1996, and agree to be bound by the terms and conditions of such order.

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Signature

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Typed or Printed Name

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Employer or Firm

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Business Address

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Party

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Date

DISSENT OF COMMISSIONER ROWE

DOCKET No. D96.4.61

ORDER No. 5910a

I dissent from one element of the Protective Order in this matter.

Mountain Water's motion for a protective order specifically requested a protective order to protect its employees "right of privacy," and discussed the issue at length. The Commission's order is silent on the issue, although it was squarely raised. As a result, should Mountain Water elect to file this information under the protective order it will be necessary to go through a cumbersome "order to show cause proceeding" to make it public. The protective order should have specifically provided that information about executive compensation (e.g. president, vice president, company secretary or assistant secretary) should not be filed under a protective order.

Mountain Water recognizes that under Section 69-3-105(2), MCA, protective order status should extend to "trade secrets," and that under Section 30-14-402(4), MCA, a trade secret is only that which "derives independent economic value ... from not being generally known ...." There is no colorable argument that executive compensation for a mid-sized water company with no competitors is a trade secret.

Instead, Mountain Water argues that employees' right to privacy should be protected under Article II, Section 2 of the Montana Constitution, and cites without discussion two cases. Mountain Water omits "the rest of the story." First, Mountain Water mis-cites the Montana Constitution. Article II is the Declaration of Rights. Section 2, cited by Mountain Water, is the right of self-government.

Presumably, the intended cite was to Section 10, the right of individual privacy.

Second, Mountain Water fails to cite other countervailing sections of the Declaration of Rights. Section 8 protects the right of public participation in government. Section 9 protects the public's right to know. Both rights are abridged when information in which the public has a legitimate interest is kept from them.

Third, under the cases cited by Mountain Water, executive compensation would not be protected. *State v. Burns*, 253 Mont. 37 (1992) held that the privacy interest of a defendant accused of criminal sexual conduct outweighed the state's interest in reviewing other files to identify possible witnesses or other incidents which could be used to impeach the defendant's character or develop evidence of other crimes. In *Burns* the court identified a two-pronged test to determine whether the privacy interest would be protected:

- 1) Whether the person involved had a subjective or actual expectation of privacy; and.
- 2) Whether society is willing to recognize that expectation as reasonable.

Id. at 41 (citations omitted). For senior managers and officers of a public utility, it is difficult to accept that an expectation of privacy exists. Compensation information is routinely reported in a variety of contexts. For Mountain Water the portion of executive salary assigned to the Missoula operation is already publicly reported to the PSC in the annual report. This information is reported for the company President, company Secretary, Missoula Vice President and Missoula Assistant Secretary. It is unreasonable to expect information to be public for one purpose and confidential for another, especially in the same forum.

Were one of the affected persons to have an actual or subjective expectation of privacy concerning compensation, it is highly unlikely society would recognize that expectation as reasonable.

Justice Brandeis stated a public utility is “the substitute for the State in the performance of the public service, thus becoming a public servant.” *Missouri ex. rel. Southwestern Bell v. Missouri PSC*, 262 U.S. 276, 291 (1923). Both the right to know and the right to participate in government create strong presumptions that information should be available. Executive compensation is often of intense public concern in utility rate cases, including previous Mountain Water cases. (Occasionally public focus on this issue detracts from attention which should be paid to other more significant issues.)

In all cases, the presumption should be in favor of openness and the burden on the party seeking coverage under a protective order. In each case, citizens should have available to them sufficient information to decide whether they agree with the Commission’s eventual decision. In the key case concerning Public Service Commission protective orders the Montana Supreme Court recognized the need to “disclose to the public all information required to enable citizens to determine the propriety of government actions affecting them.” *Mtn. States Tele. v. Dept. of Public Service Reg.*, 194 Mont. 277, 285-6 (1981). If executive compensation is kept secret, citizens will be impaired in their ability to make this determination. Based on this discussion, I hope Mountain Water will elect to file any information about executive compensation as non-proprietary. Should it be filed as proprietary, I will seek an order to show cause why it should not be disclosed.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of May, 1996

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BOB ROWE  
Commissioner

It should go without saying that I do not take a position on whether issues relating to compensation will be contested in this case, or whether any particular level of compensation is unreasonable.

The second case cited by Mountain Water, *Mt. Human Rights Commission v. City of Billings*, 199 Mont. 434 (1982), held that as part of an employment discrimination complaint the Human Rights Commission could require an employer to submit evidence relating to persons other than the complainant, provided the information was handled in such a way as to minimize the invasion of other persons' privacy. There, the Court balanced the right of privacy against the right of human dignity, Montana Constitution, Article II, Section 4.

Were Mountain Water or its parent publicly traded, this information would also be publicly available through the Securities and Exchange Commission.