

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. D2017.9.79
Establish Increased Rates for Natural Gas) ORDER NO. 7573a
Service in the State of Montana)

PROTECTIVE ORDER

PROCEDURAL HISTORY

1. On September 25, 2017, Montana-Dakota Utilities Co. (“MDU”) filed a natural gas rate case application (“Application”) with the Montana Public Service Commission (“Commission”).
2. On September 28, 2017, the Commission issued a Notice of Application and Intervention Deadline, establishing October 19, 2017, as the deadline to intervene with MDU’s Application. On November 9, 2017, the Commission issued a Notice of Staff Action granting intervention to the Montana Consumer Counsel, and noticed the attorneys representing the MCC and MDU. On November 14, 2017, the Commission issued a Procedural Order that, among other things, established the procedures for requesting Commission protection of sensitive information.
3. On December 4, 2017, the Commission received a Motion for an Order Protecting Information (“Motion”) from MDU. The Motion requests a protective order pursuant to Mont. Admin. R. 38.2.5001-5031 (2017), to protect asserted trade secrets from public disclosure in response to MCC-021 through -23, MCC-069, and MCC-084(d). Mot. at 1–2. Specifically, the Motion seeks protection of MDU’s responses to: MCC-021, -022, and -084 which concerns various MDU financial and director compensation information (“Proprietary Information”); MCC-023, which concerns copyrighted work product of third-party bond and credit reporting agencies (“Copyright Information”); and MCC-069, which concerns MDU’s federal and state tax returns (“Tax Information”).

4. The Commission noticed the Motion in its weekly agenda for the week beginning December 12, 2017. The Commission did not receive any public comment regarding the Motion, and on December 13, 2017, granted MDU's Motion.

DISCUSSION, FINDINGS, CONCLUSIONS

5. The Montana Constitution requires that Commission records and proceedings are publicly available. Mont. Const. Art. II, §§ 8–9. However the Commission may protect sensitive information, “when necessary to preserve trade secrets . . . or other information that must be protected under law.” Mont. Code Ann. § 69-3-105(2) (2015).

6. The Montana Supreme Court has articulated standards for evaluating Commission protective orders:

[A] non-human entity seeking protective orders or other protective measures for materials filed with a regulating governmental agency, such as the PSC, 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. The claimant's showing must be more than conclusory. It must be specific enough for the PSC, any objecting parties, and reviewing authorities to clearly understand the nature and basis of the public utility's claims to the right of confidentiality.

Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, ¶ 56, 319 Mont. 38, 89 P.3d 876.

7. The Commission has codified these authorities with a regulatory procedure that includes both procedural and substantive requirements. Procedurally, a motion for a protective order must include:

- (a) an identification of the person, including contact information (phone number and e-mail address) to whom communications from commission staff, parties, and interested persons may be made;
- (b) 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, suitable for meaningful use in testimony, arguments, public discussion, orders, and the public record;
- (c) a complete and specific factual basis, supported by affidavit of a qualified person, that supports the claim of confidential information; and
- (d) a complete and specific legal analysis, explaining why the information is confidential information.

Mont. Admin. R. 38.2.5007(3)(a)–(d).

8. Substantively, a motion for a protective order must establish—by thorough legal and factual examination—that the information sought to be protected is either a trade secret or otherwise legally protectable. Mont. Admin. R. 38.2.5007(2). Establishing a *prima facie* showing of trade secret confidentiality includes the following:

- (a) prior to requesting a protective order, the provider 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;
- (b) the claimed trade secret material is information;
- (c) the information is secret;
- (d) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy;
- (e) the secret information is not readily ascertainable by proper means; and
- (f) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy.

Mont. Admin. R. 38.2.5007(4)(b)(i)–(vi).

9. The Commission finds that MDU has met the procedural burden as required by Mont. Admin. R. 38.2.5007(3). MDU has provided: appropriate contact information (Mot. at 3, 15); a sufficient description of the information sought to be protected (*id.* at 3-14); a qualified affidavit that supports the confidentiality of the information (*Aff. of Jason Vollmer* (Dec. 4, 2017)); and a sufficient complete legal analysis as to why the information should be protected. (Mot. at 6–14).

10. The Commission also finds that MDU has established a substantive *prima facie* showing of trade secret confidentiality as required by Mont. Admin. R. 38.2.5007(4)(b). The Motion states: MDU has “considered that the Commission is a public agency and that there is a presumption of access to documents and information in the Commission’s possession” (Mot. at 2); that the material for which protection is sought is information (*id.* at 7, 13, *see generally* 10-12; *see also* Mont. Admin. R. 38.2.5001(3) (defining information)); all of the information in question contains secret information (Mot. at 7, 13, *see generally* 10–12); and the information is not readily ascertainable by proper means and is subject to reasonable efforts to maintain its secrecy (Mot. at 7, 13, *see generally* 10–12).

11. The final factor at issue in the trade secret analysis is whether the information that MDU is seeking to protect derives independent economic value or a competitive advantage from its secrecy.

12. MDU asserts that the Proprietary Information derives independent economic value from its secrecy, based on the content of the information, and that the Commission has protected similar information in the past. Disclosure of the Proprietary Information reveals, among other things, strengths, weaknesses, and management plans of MDU and its various subsidiary companies which MDU's competitors could utilize to develop an effective strategy to gain business advantage. Mot. 10. Further, MDU states that the Commission should protect the Proprietary Information because the Commission has previously protected non-public financial information provided to rating agencies. *See In re Application of MDU for Authority to Establish Increased Rates for Natural Gas Service*, Dkt. D2014.8.72, Order No. 7373a ¶¶ 8, 17 (Jan. 8, 2015).

13. The Commission finds that the Proprietary Information concerning responses to MCC-021 and MCC-022 derives independent economic value from its secrecy, which is reinforced by Commission practice which has protected similar information in the past. *Id.* Competitors could utilize the consolidating balance sheet and credit rating presentation information to gain competitive advantage over, among other things, MDU's unregulated subsidies.

14. The Commission finds that the Proprietary Information concerning responses to MCC-084 also derives independent economic value from its secrecy. MDU's response to the data request would reveal MDU's various earning targets and operation and maintenance expense goals for both MDU and its affiliated utility companies, found within MDU's incentive compensation plans. Aff. ¶ 9. Although it is the case the results from each incentive compensation plan are annually disclosed to the public through the Company's Proxy Statement filed with the Securities and Exchange Commission, the management plan underlying the results is not. While a competitor could generally determine the management plan based on MDU's annual Proxy Statement, the determination would remain general and not sufficiently tailored. Accordingly, the responses to MCC-084 derives independent economic value from its secrecy.

15. MDU states that the Copyright Information derives independent economic value from its secrecy, because it is otherwise legally protectable, and that the Commission has protected similar information in the past. As MDU's agreement with its credit and bond rating agencies prohibits reproduction and distribution of MDU's credit and bond reports without the third parties' express written permission, and the agencies have not authorized public disclosure

of MDU's reports, MDU argues that the Copyright Information is otherwise legally protectable as its disclosure may violate federal copyright laws under 17 U.S.C. § 106. Further, MDU states that the Commission should protect the Copyright Information because the Commission has protected similar information that might expose companies to liability for exposing the information. Mot. at 12. Finally, MDU requests waiver of the requirement to electronically file data responses found at ¶ 5 of Procedural Order No. 7573, if the Copyright Information is protected, as previously allowed by the Commission. *Id.*; see also *In re Application of MDU for Authority to Establish Increased Rates for Electric Service*, Dkt. D2015.6.51, Order No. 7433c ¶ 13 (Nov. 18, 2015).

16. The Commission finds that MDU's Copyright Information derives independent economic value from its secrecy, as it is otherwise legally protectable. Commission practice reinforces this finding, as the Commission routinely protects public disclosure of information that might expose companies to copyright infringement liability. *In re Application of MDU for Authority to Establish Increased Rates for Electric Service*, Dkt. D2015.6.51, Order No. 7433c (Nov. 18, 2015); *In re Application of NWE for Authority to Establish Increased Natural Gas & Electric Delivery Service Rates*, Cons. Dkt. D2009.9.129 & D2007.7.82, Order No. 7046b ¶ 12 (Mar. 9, 2010). Additionally, the Commission finds it reasonable under the circumstances to grant MDU's request for waiver of the requirement to electronically file the Copyright Information, as allowed by Mont. Admin. R. 38.2.305.

17. MDU states that the Tax Information derives independent economic value from its secrecy, because it is otherwise legally protectable, and that the Commission has protected similar information in the past. MDU argues that the Tax Information is otherwise legally protectable under Mont. Code Ann. § 15-31-511 and 26 U.S.C. § 6103(a), as disclosure of both state and federal corporate tax information is prohibited except under appropriate protective order procedures. Further, MDU states the Commission should protect the Tax Information because the Commission has protected similar information in the past. Mot. at 13.

18. The Commission finds that MDU's Tax Information derives independent economic value from its secrecy, as it is otherwise legally protectable. Commission practice reinforces this finding, as the Commission routinely protects public disclosure of both state and federal corporate tax information. *In re Application of MDU for Authority to Implement a Tracking Adjustment*, Dkt. D2016.12.96, Order No. 7533 (Jan. 4, 2017); *In re Application of*

Mountain Water Company for Authority to Increase Rates and Charges, Dkt. D2010.4.41, Order No. 7088a (Sept. 2, 2010).

19. The Commission finds—based on the procedural and substantive discussion of the Motion—that MDU’s Motion regarding its responses to MCC-021 through -23, MCC-069, and MCC-084(d) satisfy the Commission’s protective order requirements.

ORDER

IT IS ORDERED:

20. MDU’s Motion is GRANTED regarding MDU’s responses to MCC-021 through -23, MCC-069, and MCC-084(d).

21. Information submitted in accordance with this Order will be treated as “confidential information” pursuant to Mont. Admin. R. 38.2.5001–5031 (2017).

22. The Commission waives ¶ 5 of Procedural Order No. 7573 with respect to the Copyright Information, which shall not be filed electronically nor posted on the Commission’s website.

23. MDU must produce the information consistent with this Order by December 29, 2017.

DONE AND DATED this 13th day of December, 2017.



Zachary T. Rogala
Examiner

ATTEST:



Rhonda J. Simmons
Commission Secretary



Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

Mont. Admin. R. 38.2.5012

Docket No. D2017.9.79, Order No.7573a
Order Action Date: December 13, 2017

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 Mont. Admin. R. 38.2.5001–38.2.5030 (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 Mont. Admin. R. 38.2.5001–38.2.5030 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