

Service Date: January 24, 2018

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. 7573e
Service in the State of Montana	)	

**ORDER GRANTING 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 14, 2017, the Commission issued a procedural order that, among other things, established the procedures for requesting Commission protection of sensitive information.

3. On January 10, 2018, the Commission received a motion for a protective order from MDU (“Motion”). 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-113(c) through MCC-116. Mot. at 1. Specifically, the Motion seeks protection of MDU’s: combined utility return on investment capital and related information (“ROI”); monthly trial balances and related information through December 31, 2017 (“Trial Balances”); MDU’s 2015 Federal income tax return (“Tax Return”). *Id.* at 2.

4. The Commission noticed the Motion in its weekly agenda for the week beginning January 22, 2018. The Commission did not receive any public comment regarding the Motion, and on January 24, 2018 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 2, 13); a sufficient description of the information sought to be protected (*Id.* at 2–12); a qualified affidavit that supports the confidentiality of the information (*Third Affidavit of Jason Vollmer* (January 10, 2018)); and a sufficient complete legal analysis as to why the information should be protected. (Mot. at 3–12).

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 8; Aff. ¶ 4); all of the information in question contains secret information (Mot. at 8-9; Aff. ¶¶ 12-13); and the information is not readily ascertainable by proper means and is subject to reasonable efforts to maintain its secrecy (Mot. at 9; Aff. ¶ 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 states that the ROI and Trial Balance Information should be protected as they are otherwise legally protectable, and they contain privileged trade secrets because they derive independent economic value from their secrecy. First, MDU states the ROI and Trial Balance Information are otherwise legally protectable, as its selective disclosure would violate Securities and Exchange Commission Fair Disclosure regulations. *See* 17 CFR § 243.100 through .101; Mot. at 3-6. MDU reinforces this argument, stating that the Commission has protected similar “otherwise legally protectable” information in the past, and within this same

docket. *Id.* at 5; *see In re MDU's Natural Gas Rate Case*, Dkt. D2017.9.79, Order 7573b (Jan. 4, 2018); *In re Joint Application for Approval of Indirect Transfer of Control*, Dkt. D2010.5.55, Order 7096(a) (July 28, 2010). Second, MDU states that the ROI and Trial Balance Information derives independent economic value from their secrecy, due to the fact that MDU claims both are otherwise legally protectable, contains financial information from MDU divisions not subject to Commission jurisdiction, and that the Commission has protected similar information as trade secret in the past. Mot. at 10-12.

13. Next, MDU states that the Tax Return information should be protected as it is otherwise legally protectable, and it contains privileged trade secrets because it derives independent economic value from its secrecy. First, 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. MDU reinforces this argument, stating that the Commission has protected similar tax information in the past, and within this same docket. Mot. at 6-7; *In re MDU's Natural Gas Rate Case*, Dkt. D2017.9.79, Order 7573a (Dec. 13, 2018); *In re Application for MDU to Implement a Tracking Adjustment*, Dkt. D2016.12.96, Order 7533 (Jan. 4, 2017). Second, MDU states that the Tax Return information derives independent economic value from its secrecy, due to the fact that MDU claims it is otherwise legally protectable, and that the Commission has protected similar information in the past. Mot. at 12.

14. The Commission finds that MDU's ROI and Trial Balance Information are both otherwise legally protected, and they derive independent economic value from their secrecy. Although not within the Commission's jurisdiction, the ROI and Trial Balance Information could reasonably be deemed "material nonpublic information," as they are information that an average prudent investor ought reasonably to be informed about, if it were to be disclosed. *See* 17 CFR § 243.100(a) (prohibiting selective intentional disclosure of material nonpublic information), 17 CFR § 270.8b-2(g) (defining "material"). Specific disclosure of MDU's responses to MCC-0113(c), 114, and 115 in this docket, without MDU generally disclosing the information as required by the SEC to the investing public, would likely violate SEC regulations. Accordingly, the Commission finds that both the ROI and Trial Balance Information are otherwise legally protectable. Additionally, both derive independent economic value from their secrecy, as disclosing the investment return information could provide competitors with specific cash-flow information about MDU's various operations, which could highlight valuable business

opportunities and inform competitor business strategy. This finding is reinforced by Commission precedent, which has recently protected similar information. *See In re MDU's Natural Gas Rate Case*, Dkt. D2017.9.79, Order 7573b (Jan. 4, 2018).

15. Additionally, the Commission finds that MDU's Tax Return information is both otherwise legally protected, and it derives independent economic value from its secrecy. The Tax Return information is otherwise legally protected. Mont. Code Ann. § 15-31-511; 26 U.S.C. § 6103(a). Additionally, the information derives independent economic value from its secrecy, as disclosure of MDU's tax returns could allow competitors to identify and incorporate various competitive advantages, such as any tax-reduction strategies employed by MDU in providing regulated utility services in Montana. Commission practice reinforces this finding, as the Commission routinely protects public disclosure of both state and federal corporate tax information. *In re MDU's Natural Gas Rate Case*, Dkt. D2017.9.79, Order 7573a (Dec. 13, 2017).

16. The Commission finds—based on the procedural and substantive discussion of the Motion—that MDU's Motion regarding its responses to MCC-113(c) through MCC-116 satisfies the Commission's protective order requirements.

### ORDER

IT IS ORDERED:

17. MDU's Motion is GRANTED regarding MDU's response to MCC-113(c) through MCC-116. Information submitted in accordance with this Order will be treated as "confidential information" pursuant to Mont. Admin. R. 38.2.5001–5031 (2018). MDU must produce the information consistent with this Order by January 29, 2018.

DONE AND DATED this 24th day of January, 2018.



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.7573e

Order Action Date: January 24, 2018

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.

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Typed or Printed Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date of Signature

Business Address:

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\_\_\_\_\_  
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\_\_\_\_\_  
Employer

\_\_\_\_\_  
Party Represented