

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

IN THE MATTER OF the Application of)
UTILITY SOLUTIONS, LLC to)
Implement Initial Rates and Charges)
for Water Services in its Elk Grove)
Subdivision, Gallatin County, Montana)
Service Area)

UTILITY DIVISION

DOCKET NO. D2005.11.163

Consolidated with

IN THE MATTER OF the Application of)
UTILITY SOLUTIONS, LLC to)
Implement Initial Rates and Charges)
for Wastewater Services in its Elk)
Grove Subdivision, Gallatin County,)
Montana Service Area)

UTILITY DIVISION

DOCKET NO. D2005.11.164

MOTION FOR PROTECTIVE ORDER

Utility Solutions, LLC respectfully moves the Montana Public Service Commission (“Commission”) for the issuance of a protective order in accordance with the Commission’s administrative rules, specifically ARM 38.2.5001 *et seq.* Utility Solutions integrates with its motion its brief in support of the motion.¹

INTRODUCTION

The Montana Consumer Counsel (“MCC”) has requested the production of Utility Solutions’ federal and state income tax returns. MCC Data Requests 007 and 040. As explained below, income tax returns are confidential as a matter of federal and state law. Any questions regarding the confidentiality of the income tax returns are to be addressed to:

¹ Utility Solutions is not filing concurrently with this Motion the Affidavit specified in ARM 38.2.5007(3)(c). As explained below, the confidential materials which must be provided under protective order are confidential as a matter of both state and federal law.

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Mr. Alke is designated as the contact person pursuant to ARM 38.2.5007(3)(a).

LEGAL ANALYSIS

1. Federal and state income tax returns are confidential under both federal and state law.

Federal law expressly prohibits an employee of the State of Montana from publicly disclosing federal income tax returns or federal return information:

(a) **General rule.** Returns and return information shall be confidential, and except as authorized by this title---

...
(2) no officer or employee of any State, any local law enforcement agency receiving information under subsection (1)(7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (1)(7)(D) who has or had access to returns or return information under this section.

...
shall disclose any return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

26 U.S.C. § 6103(a). Federal law broadly defines the term "return information" to include such basic information as the taxpayer's identity and the nature, source, or amount of its taxable income:

(2) **Return information.** The term "return information" means---
(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by,

recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense,

26 U.S.C. § 6103(b)(2).

The State of Montana has chosen to establish a state income tax system that is inextricably tied to, and interwoven with, the federal income tax system. For example, Montana law defines the basic term “gross income” on the state tax return to mean: “all income recognized in determining the corporation’s gross income for federal tax purposes.” Mont. Code Ann. § 15-31-113(1) (emphasis added).

A special federal requirement applies when a state requires attachment of the federal income tax return to the state income return:

(8) State law requirements. (A) Safeguards. Notwithstanding any other provision of this section, no return or return information shall be disclosed after December 31, 1978, to any officer or employee of any State which requires a taxpayer to attach to, or include in, any State tax return a copy of any portion of his Federal return, or information reflected on such Federal return, unless such State adopts provisions of law which protect the confidentiality of the copy of the Federal return (or portion thereof) attached to, or the Federal return information reflected on, such State tax return.

26 U.S.C. § 6103(p)(8)(emphasis supplied). Accordingly, to comply with federal law, Montana enacted Mont. Code Ann. § 15-31-511. That statute unequivocally provides that state income tax returns are confidential information which cannot be publicly disclosed: “[I]t is unlawful to divulge or make known in any manner: (a) the amount of income or any particulars set forth or disclosed in any return or report filed under this chapter...”. Mont. Code Ann. §15-31-511(1).

II. **The Commission is legally obligated to preserve the confidentiality of Utility Solutions' tax returns and tax return information through the issuance of a protective order.**

No party to a Commission proceeding is entitled to obtain access to Utility Solutions' confidential tax records, other than under a protective order as sought by Utility Solutions in this case. The provisions of 26 U.S.C. § 6103 and Mont. Code Ann. § 15-31-511 are binding upon the MCC as the requesting agency, and upon the Commission as the forum agency. Moreover, the Montana Supreme Court has expressly recognized that the Commission must protect confidential information under a protective order where "the data is protected from disclosure elsewhere in the federal or state constitution or by statute." *Great Falls Tribune v. Mont. Public Service Comm'n*, 2003 MT 359, ¶ 39, 318 Mont. 39, ¶ 39, 82 P.3d 876, ¶ 39.

The Montana courts have already ruled that federal and state tax returns and return information are confidential information which is entitled to protection against public disclosure under state and federal law. *Elliott v. Montana Department of Revenue*, Lewis and Clark County Cause No. CDV-2004-777 (Slip Opinion dated April 6, 2005) affirmed on different grounds in *Elliott v. Montana Department of Revenue*, 2006 MT 267, 334 Mont. 195, 146 P.3d 741.

CONCLUSION

Utility Solutions has made a showing of its legal entitlement to a protective order covering the requested income tax returns. The income tax returns are confidential, and cannot be publicly disclosed, as a matter of state and federal law. If the Commission wants the requested documents to be provided to the MCC, and filed with the Commission, it is legally obligated to issue a protective order which protects the returns, and the information contained in the returns, from public disclosure.

Dated this 20th day October, 2009.

HUGHES, KELLNER, SULLIVAN & ALKE, PLLP

By



John Alke

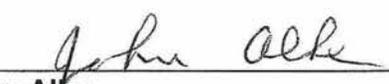
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Helena, MT 59624-1166

ATTORNEYS FOR UTILITY SOLUTIONS, LLC

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that a copy of the foregoing **MOTION FOR PROTECTIVE ORDER** was served upon the following by providing a true and correct copy thereof on October 20, 2009, as follows:

**ROBERT NELSON
MONTANA CONSUMER COUNSEL
PO BOX 201703
HELENA MT 59620-1703**



John Alke