

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

IN THE MATTER OF the Joint Application)	
of Liberty Utilities Co., Liberty WWH, Inc.,)	REGULATORY DIVISION
Western Water Holdings, LLC, and Mountain)	
Water Company for Approval of a Sale and)	DOCKET NO. D2014.12.99
Transfer of Stock)	

**WESTERN WATER HOLDINGS' AND MOUNTAIN WATER COMPANY'S
MOTION FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT**

Western Water Holdings, LLC (“Western Water”) and Mountain Water Company (“Mountain Water”), by and through their counsel, Holland & Hart LLP, respectfully submit this *Motion for Protective Order and Brief in Support* (“Motion”) to the Montana Public Service Commission (“Commission”). Pursuant to Administrative Rule of Montana (“ARM”) 38.2.5001 through 38.2.5030, Western Water and Mountain Water respectfully requests the Commission to issue a protective order to govern the use and disclosure of certain state and federal income tax information requested as part of the discovery process.

I. INTRODUCTION

Western Water and Mountain Water are parties to a Joint Application for Approval of a Sale and Transfer of Stock (“Application”), filed with the Commission on December 15, 2014, requesting the Commission’s approval for Liberty WWH, Inc. to merge with and into Western Water, and Liberty Utilities Co., as a consequence of such merger, to acquire the stock of Western Water. As a result of the Application, on or about February 2, 2015, Western Water and Mountain Water received data requests numbered PSC-001 through PSC-027 from Commission staff. Responding to PSC-026(b) will require the disclosure of state and federal tax returns, and

Western Water and Mountain Water seek a protective order from the Commission to preserve the confidentiality of this information.

Western Water and Mountain Water have 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. Western Water and Mountain Water understand that they have the burden of demonstrating that the identified information is confidential information and they must, with this Motion, establish a *prima facie* showing of confidentiality and make clear the basis for the claim of confidentiality. In this Motion, Western Water and Mountain Water have overcome the presumption that the public should have unrestricted access to the state and federal tax information and have established a *prima facie* showing of confidentiality.

II. CONTACT PERSONS

The contact persons regarding this Motion and regarding items to be protected are:

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III. IDENTIFICATION OF THE CONFIDENTIAL INFORMATION

With this Motion, Western Water and Mountain Water seek a protective order to preserve the confidentiality of the 2013 federal and state income tax returns for Western Water,

referenced in Schedule 4.19(2) of the Merger Agreement and requested in PSC-026(b). This Commission has consistently recognized that tax returns are confidential as a matter of law.¹

IV. LEGAL BASIS FOR PROTECTION

In PSC-026, the Commission staff requested copies of Western Water's 2013 federal and state tax returns. Corporate income tax returns are expressly made confidential under both Montana and federal law,² and thus should be treated as confidential information as a matter of law.

Federal law expressly prohibits an employee from the State of Montana from publicly disclosing federal income tax returns or information contained within federal tax returns. 26 U.S.C. § 6103 provides:

(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)(O) 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.”

Under this same federal statute, the definition of “return information” includes:

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

¹ See e.g., Order No. 7251a in Docket No. D2012.7.81 and Order No. 7249a in Docket No. D2012.9.94.

² Section 15-31-511(1) MCA, and 26 USC § 6103(a).

the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense...³

Thus, the tax return at issue is confidential as a matter of federal law. Similarly, Montana's tax code contains a provision which requires the confidential treatment of tax records, including federal tax return information required to be disclosed by the State of Montana.

Section 15-31-511(1) of the Montana Code states:

Except as provided in this section, in accordance with a proper judicial order, or as otherwise provided by law, it 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 required under this chapter or any other information relating to taxation secured in the administration of this chapter; or (b) any federal return or information in or disclosed on a federal return or report required by law or rule of the department under this chapter.

Because Montana law requires confidential treatment of "the amount of income or any particulars set forth or disclosed in any return or report" as well as "any federal return or information in or disclosed on a federal return," the Commission must take the necessary action to protect Western Water's tax return from public disclosure.

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 constitute or by statute."⁴ Here, the tax returns at issue are afforded status as confidential information under both federal and state law, and the Commission "has consistently protected Montana and federal income tax returns..."⁵ Therefore, the Commission must take measures in this proceeding to protect Western Water's state and federal tax returns from public disclosure by granting the requested protective order to maintain the confidentiality of the documents sought in PSC-026.

³ 26 U.S.C. § 6103(b)(2).

⁴ *Great Falls Tribune v. Mont. Public Service Comm'n*, 82 P.3d 876 (Mont. 2003)

⁵ Order No. 7251a at ¶ 2, Docket No. D2012.7.81.

V. WAIVER OF ARM 38.2.5007(3)(c)

Mountain Water and Western Water have not filed with this motion an affidavit by a qualified person explaining the “specific factual basis” that supports the claim of confidentiality, as required by ARM 38.2.5007(3)(c), because the federal and state tax returns are confidential and subject to protection as a matter of law. Therefore, no factual justification is required and waiver of the requirements in ARM 38.2.5007(3)(c) is appropriate.

VI. CONCLUSION

For the reasons set forth above, Mountain Water and Western Water respectfully request the Commission grant this Motion. In addition, Mountain Water and Western Water respectfully requests the Commission waive the affidavit requirement under ARM 38.2.5007(3)(c) as the protection and confidentiality of tax returns is a matter of law.

Respectfully submitted this 17th day of February, 2015.

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**ATTORNEYS FOR MOUNTAIN WATER
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CERTIFICATE OF SERVICE

I hereby certify that on this, the 17th day of February, 2015, **WESTERN WATER HOLDINGS' AND MOUNTAIN WATER COMPANY'S MOTION FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT** was filed with the Montana PSC and served via U.S. Mail and/or e-mail, unless otherwise noted, to the following:

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