

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

IN THE MATTER OF Joint Application of
Liberty Utilities Co., Liberty WWH, Inc.,
Western Water Holdings, LLC, and
Mountain Water Company for Approval
of a Sale and Transfer of Stock

UTILITY DIVISION

DOCKET NO. D2014.12.99

**CITY OF MISSOULA’S REPLY BRIEF IN SUPPORT OF MOTION TO COMPEL
UNREDACTED INFORMATION PRODUCED BY
WESTERN WATER HOLDINGS, LLC AND MOUNTAIN WATER COMPANY**

The City of Missoula (“the City”) has moved the PSC to compel Western Water Holdings, LLC (“WWH”) and Mountain Water Company (“Mountain Water”) to reproduce the documents previously produced in response to the PSC’s Data Requests (dated February 17, 2015) without redaction of salary and bonus information.

WWH and MWC filed their response brief on March 23, 2015. Rather than address the merits of the City’s motion, WWH and MWC instead argue the motion should be denied on procedural grounds. As discussed below, their arguments are without merit and the PSC should grant the City’s motion.

1. The City has “standing” to file its motion to compel.

WWH and MWC’s first argument is puzzling. They claim the City does not have “standing” to move the PSC to compel production of unredacted salary and bonus information because, under the procedural order, only the “discovering party may move . . . for an order compelling an answer.” (Order No. 7392, ¶ 14.) WWH and MWC claim that, since the salary and bonus information was requested pursuant to the PSC’s

request, the City is not the “discovering party” and cannot move to compel. According to WWH and MWC, only the PSC can “move . . . for an order compelling an answer.”

There are obvious problems with WWH and MWC’s argument. Paragraph 14 of the procedural order cannot apply to data requests made by the PSC. First, WWH and MWC do not explain how the PSC qualifies as a “party” to the case under paragraph 14; the PSC is the adjudicative body, not one of the parties. Second, they do not explain how the PSC could itself file a motion under paragraph 14: Would the PSC ask itself if it is okay to compel the production and then issue an order approving its own request? WWH and MWC’s argument makes little sense when the PSC is the entity who made the initial request for information.

The only way to reconcile WWH and MWC’s argument with the requirement of paragraph 14 is to suggest that even if the PSC has made a specific request, a party must independently make the very same request and wait for the very same response before it may file a motion to compel. Forcing parties to make needless, duplicative requests just to give them “standing” to file a motion to compel would be a waste of time and resources. WWH and MWC’s response shows that it is more interested in creating unnecessary and redundant hoops to jump through rather than addressing the merits of the City’s motion. It also proves that no matter how many rulings go against them on the issue of disclosing salary and bonus information, WWH and MWC will stop at nothing in their attempt to hide such information from the PSC, the public, and the City.

At any rate, since the City did not make the initial data request at issue, paragraph 14 simply does not govern its motion to compel, so there is no need to

establish “standing” under that paragraph. Neither the procedural rules nor any other rule governing discovery before the PSC prevents a party from filing a motion to compel when the PSC makes the initial data request. The City’s motion is therefore proper.

2. The City properly filed its motion, and it is timely.

WWH and MWC suggest the City delayed filing its motion until days after signing it. WWH and MWC are wrong – the City signed and e-filed its motion on the same day: March 12, 2015. The e-filing receipt is attached as **Exhibit A**.

WWH and MWC also claim the motion is untimely because it was filed more than 14 days after WWH and MWC served their response to the PSC’s data request on February 18, 2014. The City filed its motion to compel in response to both (1) WWH and MWC’s response to the PSC’s data request and (2) the PSC’s February 27, 2015 order in the related case – *In re 2013 Regulatory Annual Reports* (Docket No. N2014.2.21) – which requires MWC and one of its parent corporations, Park Water Company, to publicly disclose aggregate compensation information for their executives. The City filed its motion less than two weeks after the PSC’s February 27, 2015 order.

Ironically, while WWH and MWC demand that the City comply with the deadline in paragraph 14, WWH and MWC argue that the corresponding deadline for their response brief does not apply to them because the City’s motion is not subject to paragraph 14. *See* Response Br., p. 4. In other words, WWH and MWC want to pick and choose whether paragraph 14 applies so long as it benefits them and not the City.

Regardless, to the extent that WWH and MWC demand a literal reading of and strict compliance with paragraph 14’s deadline for filing a motion to compel, that literal

reading also means that paragraph 14 simply does not apply to the City's motion. Paragraph 14 and the associated deadline apply only to requests made by a "discovering party." The PSC, who made the initial request, is not a "party" in this case. Therefore paragraph 14 does not apply. Instead, the default Montana Rules of Civil Procedure apply, which do not impose deadlines for a motion to compel. *See* Mont. R. Civ. P. 37; Admin. R. Mont. 38.2.3301. The City's motion is therefore not untimely.

3. The City was not required to confer with WWH or MWC prior to filing its motion because any attempt to resolve the dispute would have been futile.

It is widely recognized that a party filing a motion to compel need not confer with the other party prior to filing the motion if any attempt to resolve the discovery dispute with the opposing party would be futile. *See, e.g., Tiki Shark Art, Inc. v. CaféPress, Inc.*, 2014 WL 3928799, at *3-*4 (D. Hawaii) (summarizing cases); *Bybee Farms LLC v. Snake River Sugar Co.*, 2008 WL 820186, at *7 (E.D. Wash. March 26, 2008); *United States v. Rempel*, 2001 WL 1572190, at *1 n.2 (D. Alaska 2001) ("Given the nature and substance of the instant motion and the track record of the parties, any 'meet and confer' effort as to this motion would almost surely have been futile.")

WWH, MWC, and their parent corporations have fought tooth and nail for years to keep executive compensation information shielded from public disclosure. One would be hard pressed to think of a more futile act than to now ask them to publicly disclose that information they fought so desperately to hide just over a month ago. In the related case – *In re 2013 Regulatory Annual Reports* (Docket No. N2014.2.21) – MWC and one of its parent corporations, Park Water Company, vigorously opposed any

public disclosure of their executive compensation information and, indeed, filed a motion to reconsider when the PSC ordered them to disclose aggregate salary information. Do they expect us to believe that WWH and MWC have now had a change of heart and would have been persuaded to publicly disclose that information if the City had simply made that request prior to filing its motion? If WWH and MWC inform the City that they are now willing to produce unredacted copies of the salary and bonus information, then the City will withdraw its motion and notify the PSC. If, however, they stay true to form and refuse to provide the salary and bonus information (it does not appear that they have ever provided the bonus information to the PSC, at least with regard to the value of the “golden parachute” - type Class B Unit Agreements), then the City maintains its motion seeking the information.

WWH and MWC’s long-standing opposition to publicly disclosing any salary or bonus information would have simply made the City’s request for that information a futile exercise. The City, therefore, was not required to “meet and confer” with WWH and MWC prior to filing its motion to compel.

- 4. While the City did not serve WWH or MWC via e-mail, that does not warrant a 14-day extension of their deadline to file a response brief or, for that matter, a second response brief.**

While the City properly served WWH and MWC with hard copies of its motion, WWH and MWC are correct that the City failed to serve them with the motion via e-mail. To that extent, the City would not have opposed their request to calculate their response brief deadline from the date they received the hard copies, and the City told them as much. *See* March 23, 2015 e-mail to WWH and MWC’s counsel, attached as **Exhibit B**.

Despite the City's offer, WWH and MWC filed their response to the City's motion to compel on March 23, 2015. Instead of addressing the merits of the City's motion, they chose to make a number of procedural arguments. Nevertheless, that does not permit them to now file a second response brief. The rules do not permit a party to first file a "procedural" brief and a separate "substantive" brief, as WWH and MWC asks to do here. The parties' procedural and substantive arguments must be contained in the same brief.

Since WWH and MWC's procedural arguments fail and they have not challenged the merits of the City's motion, the City respectfully requests that the PSC grant the City's motion to compel the production of unredacted salary and bonus information.

Respectfully submitted this 25th day of March, 2015.



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CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail and email upon the following counsel of record at their addresses this 25th day of March 2015:

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Kate M. Palmer

EXHIBIT

A



MT Public Service Commission's Official Website

PUBLIC SERVICE COMMISSION

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State of Montana
Public Service Commission
1701 Prospect Ave
P.O. Box 202601
Helena, MT 59620-2601

Telephone:*Main Switchboard:*

(406) 444-6199 Voice
(406) 444-4212 TDD
(406) 444-7618 FAX

*Consumer Complaints:**In-State*

(800) 646-6150 Voice

Local / Out of State

(406) 444-6150 Voice

Commissioner For District 1

Travis Kavulla
(406) 444-6166 Voice

Commissioner For District 2

Kirk Bushman
(406) 444-6165 Voice

Commissioner For District 3

Roger Koopman
(406) 444-6168 Voice

Commissioner For District 4

Bob Lake
(406) 444-6167 Voice

Commissioner For District 5

Brad Johnson
(406) 444-6169 Voice

Other Contacts:*File a Complaint:*

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Contact PSC Webmaster:

psc_webmaster@mt.gov

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Confirmation for file "2015-03-12 City's MTC Unredacted Info Produced by WWH and MWC.pdf" : 1F351F35497A00

Please keep a record of your Confirmation Receipt codes. A copy of your session information is being e-mailed to you. If you need to contact us about your filing, you will need to give the PSC representative these code so they can locate the filing quickly.

EXHIBIT

B

Randy Tanner

From: Randy Tanner
Sent: Monday, March 23, 2015 1:46 PM
To: 'tnelson@hollandhart.com'
Cc: Scott Stearns; Kate Palmer
Subject: In re Liberty Utilites et al.: City's motion to compel (Mont. PSC D2014.12.99)

Thor,

Scott forwarded me the message you left. You're correct that we did not serve you via e-mail or meet and confer before filing the motion. I apologize for these oversights. At least with respect to the first issue, we intend to file a notice with the PSC advising it that while service by mail was effective, service by e-mail was not. Therefore, we will ask that you be credited additional time to respond—i.e. having your response deadline run from the date you notified us that you did not receive the motion by e-mail (today, March 23, 2015).

As for the meet and confer, we assume that you oppose producing the material in unredacted form. We will therefore indicate in our notice that we have satisfied our meet and confer obligation and that you oppose our motion. If, however, you are willing to provide the material in unredacted form, please let me know.

Finally, we disagree with your position that the City does not have the ability to file the motion since it did not serve the discovery requests at issue. We will not withdraw our motion on that basis and will instead respond to that argument if you raise it in opposition to our motion.

Scott is tied up with the condemnation proceeding, so please e-mail me with any questions or concerns.

Thanks,

Randy

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