

**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 RECONSIDERATION OF ORDER TO COMPEL**

Western Water Holdings, LLC (“Western Water”) and Mountain Water Company (“Mountain Water”), by and through their counsel, Holland & Hart LLP, and pursuant to Admin. R. Mont. 38.2.4806, respectfully submit this motion for reconsideration (“Motion”) of the Montana Public Service Commission’s (“Commission”) Order No. 7385c (“Order to Compel”).

With this Motion, Mountain Water and Western Water propose the following path forward regarding the redacted information in the documents provided in response to PSC-001 through PSC-027. First, contemporaneously with this Motion, Mountain Water and Western Water are filing for a protective order to protect the confidential information subject to the City’s Motion to Compel — specifically, the redacted salaries in the Employment Agreements and unit amounts in the Class B Unit Agreements that were provided in response to PSC-015 and PSC-024. That information will be provided consistent with the Commission’s decision on the motion for protective order. Second, Mountain Water and Western Water will explain why each piece of the redacted information contained in the other documents provided in response to PSC-001 through PSC-027 is irrelevant and why the Commission should continue to allow that information to be redacted based on relevance, not confidentiality.

Ultimately, this approach will provide a solution that satisfies each of the parties. The Commission, City, and other parties will receive access to the redacted information in the Employment Agreements and Class B Unit Agreements subject to the Motion to Compel, while Mountain Water and Western Water will be allowed to withhold the redacted information—information no party sought access to through a motion to compel—based on relevance.

I. INTRODUCTION

On February 17, 2015, Mountain Water and Western Water responded to the Commission’s first set of data requests, PSC-001 through PSC-027. Responding to these requests required the production of a number of documents that were identified in the schedules to the Plan and Agreement of Merger, provided to the Commission as Exhibit B to the Joint Application for Approval of a Sale and Transfer of Stock, which initiated this proceeding. Although Mountain Water and Western Water believe many of the documents requested in PSC-001 through PSC-027 are irrelevant to determining whether the proposed sale and transfer before the Commission satisfies the no-harm-to-consumers standard, ultimately Mountain Water and Western Water elected to provide the requested documents, with certain information redacted, in order to actually show the Commission and other interested parties that the documents were, in fact, irrelevant and to avoid an unnecessary discovery dispute.

On March 16, 2015, the City of Missoula (“City”) filed its Motion to Compel Unredacted Information Produced by Western Water Holdings, LLC and Mountain Water Company (“Motion to Compel”), *27 days after the responses were filed with the Commission and served on the parties*. In addition to filing the Motion to Compel *13 days after the deadline* established by the Procedural Order in this proceeding,¹ the City also failed to serve the Motion to Compel

¹ Order No. 7392 at ¶ 14.

by email as required by the Commission,² and failed to confer with counsel for Mountain Water and Western Water as required by the Montana Rules of Civil Procedure.³ The City offered no justification for its failure to comply with the Commission’s directives, except to argue that the Motion to Compel was somehow related to a separate and independent docket where the only issue was the confidentiality of Mountain Water’s employee compensation information required to be provided in Mountain Water’s annual report to the Commission.⁴ Regarding the requirement to confer, the City argued such a conferral would have been futile because Mountain Water has consistently refused to provide compensation information *publicly*.⁵ What the City neglected to consider was whether Western Water and Mountain Water would agree to provide that information as confidential under the terms and conditions of a protective order from this Commission—the type of negotiated result intended to be achieved by the duty to confer.

Because of the City’s failure to serve by email as required by the Commission, Mountain Water and Western Water received the Motion to Compel on March 20, 2015. Recognizing that the City’s Motion to Compel was in clear violation of the Commission’s requirements, and given the ambiguity regarding the City’s ability to move to compel under the language in the Procedural Order,⁶ Mountain Water and Western Water filed a response directed solely at the procedural flaws in the Motion to Compel on March 23, 2015, within the Commission’s general seven-day deadline to respond to pre-hearing motions.⁷ Although the City’s inexcusable failure to comply with the Commission’s procedures warranted denial of the Motion to Compel, Mountain Water and Western Water requested a 14-day deadline to provide a substantive

² *Id.* at ¶ 7, Exhibit B to the City’s Reply in Support of the Motion to Compel.

³ M.R.Civ.P. Rule 37(a)(1).

⁴ City’s Reply in Support of the Motion to Compel at p. 3.

⁵ *Id.* at pp. 4-5.

⁶ “the **discovering party** may move within fourteen (14) days of service of the response for an order compelling an answer.” Order No. 7392 at ¶ 14 (emphasis added). As noted, the requests at issue were issued by the Commission, not by the City.

⁷ Order No. 7392 at ¶ 17.

response to the Motion to Compel following the City conferring with counsel for Mountain Water and Western Water as required by Rule 37 of the Montana Rules of Civil Procedure.

On April 15, 2015, the examiner appointed by the Commission issued the Order to Compel subject to this request for reconsideration. The Order to Compel went beyond the scope of the information identified in the City's Motion to Compel—specifically information regarding any bonuses or compensation for Western Water's subsidiaries' employees—and instead ordered Mountain Water and Western Water to either provide unredacted versions of all of the documents or file a motion for protective order to maintain the confidentiality of all of the redacted information. The Order to Compel was also silent as to the procedural flaws in the City's Motion to Compel and Mountain Water and Western Water's request for an extension of time in order to achieve a negotiated resolution and, if necessary, file a substantive response to the Motion to Compel. In addition to being silent regarding the City's failure to comply with Commission's procedures—procedures that are intended to ensure order and fairness in Commission proceedings—the Order to Compel also failed to provide any analysis regarding whether and how the redacted information at issue is relevant or would lead to the discovery of relevant information to evaluating whether the proposed sale and transfer satisfies the no-harm-to-consumers standard.

The result of this twisted procedural history is an order that is unjust and unreasonable for at least two reasons. First, the Commission must address and reconcile the City's failure to comply with the unambiguous procedural requirements governing participation in proceedings before this Commission with a result that ultimately gives the City exactly what it asked for. Without addressing these procedural flaws, the Commission has ratified a system where chaos

rules while procedural requirements are selectively enforced or ignored without regard for fairness or prejudice to the parties before it.

Second, the Commission must engage in a two-step analysis regarding the redacted information to determine (1) if the information is actually relevant or likely to lead to the discovery of relevant evidence under the no-harm-to-consumers standard, and (2) only *if* the information is relevant or likely to lead to the discovery of relevant evidence, whether the information is confidential. Instead, the Order to Compel treats the determination of relevance and confidentiality as mutually exclusive,⁸ rather than recognizing the reality that information can be both *irrelevant* and *confidential*. Furthermore, Mountain Water and Western Water did not make their “own confidentiality findings cloaked in relevance garb.”⁹ Indeed, the responses to these requests clearly state: “***If information redacted from the responsive documents is found to be relevant, Mountain Water and Western Water reserve the right to file for a protective order to maintain the confidentiality of the redacted information.***”¹⁰ But the Order to Compel provides no analysis and makes no finding of relevance regarding the redacted information; it just orders Mountain Water and Western Water to either provide or move to protect the information without regard for the relevance objections.

Alternatively, the Commission can avoid delving into an analysis of the relevance of all of the redacted information and the procedural flaws with the Motion to Compel by accepting Mountain Water’s and Western Water’s commitment to provide the information that was subject to the Motion to Compel, consistent with the Commission’s decision on the motion for a protective order, and modifying the Order to Compel so it does not require Mountain Water and

⁸ See Order 7392c at p. 2 (“Upon review of this redacted information in the context of the data responses, it is apparent that this information should be treated as confidential information, subject to potential protection through a motion for protective order, rather than irrelevant or undiscoverable information.”)

⁹ Order 7392c at p. 2.

¹⁰ See, e.g., Response to PSC-015 (emphasis added).

Western Water to produce the information redacted based on relevance and outside the scope of the Motion to Compel.

II. ARGUMENT

The Order to Compel requires Mountain Water and Western Water to either provide unredacted versions of the documents produced in response to PSC-014, PSC-015, PSC-016, PSC-022, and PSC-024 or file a motion for a protective order for the redacted information.¹¹ However, in addition to compelling the provision of information beyond that identified in the City's Motion to Compel, the Order to Compel makes no finding of relevance for any of the information redacted from the documents produced by Mountain Water and Western Water. As noted above, Mountain Water and Western Water will provide the confidential information contained in the responsive documents to PSC-015 and PSC-024 that were the focus of the City's Motion to Compel, consistent with the Commission's decision on the motion for protective order filed contemporaneously with this Motion. Regarding PSC-014, PSC-015, PSC-016, PSC-022, and PSC-024, Mountain Water and Western Water provide the following support to show that the redacted information is not relevant, regardless of whether it is potentially protectable as confidential.

a. PSC-014

In response to PSC-014, Mountain Water and Western Water provided seven documents: one Unsecured Intercompany Promissory Note between Western Water and Park Water Company ("Park Water") (WWH000002-WWH000005), and six promissory notes between individual employees and Western Water (WWH000006-WWH-000035).

¹¹ The Order to Compel also requires Mountain Water and Western Water to provide or protected the documents provided in response to PSC-019 and PSC-021; however, no documents (redacted or unredacted) were provided in response to those requests.

Regarding the Unsecured Intercompany Promissory Note, Chris Schilling's Signature, the names of the six employees receiving loans to help finance the tax obligation arising from the Class B Unit Grant Agreements, and the amount of the loan provided to each employee were redacted from the document. These documents were executed in December 2012, years before Western Water or Park Water was marketed for sale. Although not confidential, Mr. Schilling's signature was redacted on the basis of relevance and to minimize the number of signatures that are publicly available on documents filed with the Commission—signatures that could be used for identity theft or forgery. The names of the six employees and the amount of the loans were redacted on the basis of relevance, as these promissory notes between employees and Park Water are not being financed by utility revenues and are not related to the proposed transaction before the Commission. However, the names and amounts of the loans are also confidential.

Similarly, the employee names, signatures, and loan amounts were redacted from the promissory notes between Western Water and those employees on the basis of relevance, although this information (other than the signatures) is also confidential. The promissory notes memorialize the employees' obligation to repay the loan from Western Water provided to help finance the tax obligation resulting from the Class B Unit Grant Agreements. Again, these promissory notes were executed in 2012, years before either Western Water or Park Water was marketed for sale. Although not confidential, signatures were redacted on the basis of relevance and to minimize the number of signatures that are publicly available on documents filed with the Commission—signatures that could be used for identity theft or forgery. The names and loan amounts were redacted based on relevance as they are not compensation or bonuses and they have no impact on Mountain Water's utility rates or operations, but in addition to being irrelevant, the employee names and loan amounts are also confidential.

In evaluating the relevance of the Unsecured Intercompany Promissory Note and six promissory notes, it bears reminding that the underlying Class B Unit Agreements that gave rise to the tax liability these promissory notes were intended to help finance are being provided in response to PSC-015, consistent with the discussion above and subject to the Commission's decision on Mountain Water and Western Water's motion for protective order.

b. PSC-015

In addition to the Employment Agreements and Class B Unit Grant Agreements provided in response to PSC-015, Mountain Water and Western Water also produced the following documents containing redacted information: Park Water Company Employee Benefit Plan (Wrap-Around Plan) (WWH000142-WWH000163); First Amendment to Park Water Employee Benefit Plan (Wrap-Around Plan) (WWH000164-WWH000164); Retiree Medical Reimbursement Arrangement (WWH000165-WWH000180); and the Third Amendment to Park Water Employee Benefit Plan (Wrap-Around Plan) (WWH000181-WWH000181).

In Park Water's Employee Benefit Plan (Wrap-Around Plan), the employer identification number ("EIN") was redacted. The EIN is both irrelevant and confidential. There is no basis to find that the EIN is relevant or likely to lead to the discovery of admissible evidence in this proceeding, and requiring Mountain Water and Western Water to pursue a protective order for this information would result in an unnecessary and inefficient use of resources for both the Commission and the parties.

Both the First and Third Amendments to Park Water's Employee Benefit Plan (Wrap-Around Plan) included the names of Park Water's former employees who were granted eligibility as retired employees for purposes of the plan, despite the other eligibility requirements included in the plan. In addition to redacting these former employees' names, the signature for

Mary Young, Park Water's Senior Vice President of Administration, was redacted from these documents on the basis of relevance and to minimize the number of signatures that are publicly available on documents filed with the Commission—signatures that could be used for identity theft or forgery. Ms. Young's signature was also the only information redacted from the Retiree Medical Reimbursement Arrangement. Again, there is no basis to find that the employees' names or signatures are relevant or likely to lead to the discovery of admissible evidence in this proceeding, and requiring Mountain Water and Western Water to pursue a protective order for this information would result in an unnecessary and inefficient use of resources for both the Commission and the parties.

Although Mountain Water and Western Water commit to providing the salary information in the Employment Agreements and number of Class B Units in the Class B Unit Grant Agreements consistent with the Commission's decision on the motion for a protective order for that information, Mountain Water and Western Water wish to maintain the redaction of the signatures on the public versions of these documents based on relevance. Again, the signatures are not relevant or likely to lead to the discovery of admissible evidence in this proceeding, and maintaining the redaction of the signatures will minimize the number of signatures that are publicly available on documents filed with the Commission—signatures that could be used for identity theft or forgery.

c. PSC-016

The only document provided in response to PSC-016 was the Ancillary Matters Agreement between Western Water and Christopher Schilling (WWH000225-WWH000232), which was also provided in response to PSC-015. The only information redacted in this document was the signatures of Mr. Schilling and Mr. Robert Dove, both on the basis of

relevance. These signatures are not relevant or likely to lead to the discovery of admissible evidence in this proceeding, and maintaining the redaction of the signatures will minimize the number of signatures that are publicly available on documents filed with the Commission—signatures that could be used for identity theft or forgery.

d. PSC-022

In response to PSC-022, Mountain Water and Western Water provided the following documents that included information redacted on the basis of relevance:

<u>Document Provided</u>	<u>Redacted Information</u>
Park Water Company – Seventh Supplemental Indenture (WWH000328-WWH000345)	<ul style="list-style-type: none"> • Signatures
Park Water Company – Eighth Supplemental Indenture (WWH000346-WWH000449)	<ul style="list-style-type: none"> • Signatures
Park Water Company – Ninth Supplemental Indenture (WWH000450-WWH000464)	<ul style="list-style-type: none"> • Signatures
Park Water Company – Tenth Supplemental Indenture (WWH000465-WWH000481)	<ul style="list-style-type: none"> • Signatures • Information of bond purchasers (ID numbers, phone numbers, etc.)
Park Water Company – Eleventh Supplemental Indenture (WWH000482-WWH000496)	<ul style="list-style-type: none"> • Signatures
Park Water Company – Twelfth Supplemental Indenture (WWH000497-WWH000511)	<ul style="list-style-type: none"> • Signatures
Park Water Company – Thirteenth Supplemental Indenture (WWH000512-WWH000529)	<ul style="list-style-type: none"> • Signatures
Park Water Company – Fourteenth Supplemental Indenture (WWH000530-WWH000546)	<ul style="list-style-type: none"> • Signatures

These indentures are components of Mountain Water’s long-term debt that is already reflected in Mountain Water’s rate base, or that should be reflected in Mountain Water’s rate base following its next rate case. Only the signatures and information regarding bond

purchasers, other than the purchaser's identity, under the indentures was redacted, and there is no basis to find the redacted information is relevant or likely to lead to the discovery of admissible evidence in this proceeding.

e. PSC-024

In response to PSC-024, Mountain Water and Western Water provided three additional documents with redacted information: a Loan Agreement with Wells Fargo (WWH000547-000570); a Loan Letter Agreement (WWH000571-WWH000575); and a COBANK Term Loan (WWH000619-WWH-000653). In the Loan Agreement with Wells Fargo, only bank account information and signatures were redacted, both on the basis of relevance. In the Loan Letter Agreement, the Wheeler's personal address and signatures were redacted. And in the COBANK Term Loan, the loan number, bank account information, and signatures were redacted. There is no basis to find that any of the redacted information in these documents is relevant or likely to lead to the discovery of admissible evidence in this proceeding, regardless of the confidential status of the information.

III. CONCLUSION

For the reasons set forth above, the Commission should reconsider and modify the Order to Compel by either (1) providing an analysis regarding the City's failure to comply with the Commission's procedural requirements, reconciling that failure with the Commission's decision to ultimately grant the Motion to Compel, and providing an analysis regarding how the redacted information is relevant or will lead to the discovery of relevant evidence to evaluate the proposed transfer under the no-harm-to-consumers standard; or (2) accepting the redactions discussed above on the basis of relevance and removing the requirement for Mountain Water and Western

Water to provide unredacted documents or file a motion for protective order for the documents produced in response to PSC-014, PSC-015 (in part), PSC-16, PSC-022, and PSC-024.

Respectfully submitted this 27th day of April, 2015.

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**ATTORNEYS FOR MOUNTAIN WATER
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CERTIFICATE OF SERVICE

I hereby certify that on this, the 27th day of April, 2015 **WESTERN WATER HOLDINGS' AND MOUNTAIN WATER COMPANY'S MOTION FOR RECONSIDERATION OF THE ORDER TO COMPEL** was filed with the Montana PSC and served via U.S. Mail and e-mail, unless otherwise noted, to the following:

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