

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

REGULATORY DIVISION  
DOCKET NO. D2014.12.99

---

**CITY OF MISSOULA’S MOTION TO COMPEL PRODUCTION OF DOCUMENTS  
WITHHELD IN RESPONSE TO  
DATA REQUESTS PSC-031 TO PSC-033(b)  
AND  
BRIEF IN RESPONSE TO WESTERN WATER HOLDINGS’ AND MOUNTAIN  
WATER COMPANY’S MOTION FOR A PROTECTIVE ORDER  
(PSC-028(b) and PSC-029(b))**

The City of Missoula (“City”) respectfully moves the Montana Public Service Commission (“PSC”) to compel Liberty Utilities Co. and Liberty WWH, Inc. (collectively, “Liberty”) to produce documents they withheld that are responsive to the PSC’s data request PSC-033(b). Liberty refused to provide the requested information, claiming it is not relevant and contains confidential “trade secrets.” Liberty, though, does not get to decide what is relevant or confidential. That is the PSC’s decision to make in the context of what the customers of Mountain Water and the people of Missoula need to know to participate meaningfully in the proceeding.

The City further requests the PSC order Mountain Water Company (“Mountain Water”) and Western Water Holdings, LLC (“Western Water”) to fully respond to

request PSC-031, which requested information related to dealings with the City of Missoula, and provide a privilege log for documents withheld on the basis of attorney-client privilege.

Finally, the PSC should deny Mountain Water and Western Water's Motion for a Protective Order. The information they provided and redacted in response to data requests PSC-028(b) and PSC-029(b) does not contain trade secrets and should therefore be produced. Even if it contains trade secrets, the PSC should order Mountain Water and Western Water to provide the PSC and the City with complete un-redacted versions of the information.

#### **BACKGROUND**

On April 2, 2015, the PSC served data requests PSC-028 through PSC-038 on Liberty, Western Water, and Mountain Water. Among other things, the PSC requested that Liberty, Western Water, and Mountain Water produce documents related to:

1. financial analyses and valuations prepared by Liberty in connection with the proposed sale (PSC-033(b)),
2. documents related to Carlyle Infrastructure and Western Water's dealings with the City, as well as the financial implications of selling Mountain Water to the City (PSC-031), and
3. the Wells Fargo financial analyses and presentations (the so-called "Project Orchard" documents and presentations) (PSC-028(b) and PSC-029(b)).

Liberty responded to PSC-033(b), and Mountain Water and Western Water responded to PSC-028(b), PSC-029(b), and PSC-031.

The PSC made these requests for a simple reason: The information is relevant to the issues in this matter and, ultimately, whether the PSC should approve Carlyle Infrastructure's sale of Mountain Water to Liberty. The PSC cannot reasonably evaluate

the sale of Mountain Water without performing its own due diligence on the value of Mountain Water. That analysis necessarily requires an understanding of how Mountain Water is valued in relation to the California water utilities that are up for sale in this deal. Liberty, Mountain Water, and Western Water have performed these valuations, and they would undisputedly inform the PSC's decision to either approve or reject the sale. In short, the PSC and the Missoula community need to know whether the proposed sale is a good deal or a bad deal. Liberty, Western Water, and Mountain Water have information relevant to that question but want to keep it a secret.

Liberty, Western Water, and Mountain Water have unilaterally decided to keep all of this information secret and not provide it to the PSC even though the PSC expressly requested it. As the PSC recently ordered, though, Liberty, Western Water, and Mountain Water do not get to "[make their] own confidentiality findings," whether they are "cloaked in relevance garb" or any other garb for that matter. (PSC Order 7392c, April 15, 2015)

#### ARGUMENT

**I. The PSC should order Liberty to produce the financial analyses requested in PSC-033(b).**

Liberty's rationalization for outright refusing to provide the financial analyses requested by the PSC in PSC-033(b) fails for several reasons. In PSC-033(b), the PSC requested Liberty to provide the financial analyses that Algonquin/Liberty conducted as part of its due diligence, including but not limited to projected financial results (e.g., income statements, balance sheets, cash flow). Instead of providing the data (whether

redacted or under seal) or moving for a protective order, Liberty outright refused to provide it, claiming the information is both irrelevant and contains “trade secrets.”

As an initial matter, Liberty does not get to decide what is relevant or what is confidential. The PSC requested the information precisely because it is relevant, and only the PSC may determine whether the information should be kept confidential. *See* Admin. R. Mont. 38.2.5007(1) (“Confidential information will be protected only on commission approval of a request by a provider.”).

Mountain Water and Western Water made and lost this very same argument when they responded to a PSC data request by providing redacted salary and compensation information. The PSC ordered Mountain Water and WWH to either publicly produce un-redacted versions of the information or file a motion for a protective order:

[T]he utility is effectively making its own confidentiality findings cloaked in relevance garb. Additionally, in the interest of avoiding duplicative discovery, the City may reasonably expect the Commission’s data requests will appropriately be answered. Only the Commission may determine whether information is confidential and may be redacted in its public form.

The PSC should issue the same order here: Liberty must either publicly produce the financial analyses or move for a protective order explaining why the publicly-filed versions of those analyses should be redacted. Liberty is not permitted to make those decisions *ipse dixit*.

Even if Liberty is in the driver’s seat when it comes to deciding what is confidential and what it may disclose (which it is not), none of the information it has withheld should remain withheld. If a party has information that it claims is

confidential, it nevertheless has to produce the information but may first file a protective order requesting that portions of the publicly-filed documents be redacted. That is the very purpose of the administrative rules governing protective orders – to require the filing of confidential information subject to a protective order. *See* Admin. R. Mont. 38.2.5007 (rules governing filing and protection of trade secrets and other confidential information). Mountain Water and Western Water, for example and to their credit, have at least filed a protective order related to the confidential information they have withheld (ill-founded as that request might be). Liberty’s outright refusal to provide the information requested by the PSC – without first moving for a protective order – is a blatant affront to the PSC’s rules.

Regardless, Liberty’s explanation of why the requested information contains trade secrets falls flat. Under Rule 38.2.5007(2), Liberty must provide a “thorough legal and factual examination [showing] that all information claimed to be confidential is a trade secret or otherwise legally protectable.” The only explanation that Liberty offers for withholding the information is a few conclusory sentences that are devoid of any legal support or factual description. (*See* Liberty’s response to PSC-033(b)). Liberty simply claims the information is confidential because it says so. Liberty bears the burden of showing the information at issue is truly confidential and, to that end, it has fallen far short. Admin. R. Mont. 38.2.5008(4) (“A provider has the burden at all times of demonstrating that information is confidential information.”).

The City respectfully requests the PSC to order Liberty to either publicly produce the information requested in PSC-033(b) or move for a protective order explaining why

publicly-filed versions should be redacted. For its part, the City would sign a non-disclosure agreement provided for in Rule 38.2.5014, if necessary.

**II. The PSC should order Mountain Water and Western Water to produce the documents requested in PSC-031(a), as well as a privilege log.**

While Mountain Water and Western Water filed a motion for a protective order related to PSC-028(b) and PSC-029(b) (discussed below), they did not file one related to PSC-031(a). And, yet, with the exception of a single e-mail containing two substantive lines, Mountain Water and WWH did not provide any information in response to that request. PSC-031 makes the following request:

On pages 6-7 of your testimony, you [Robert Dove] state that Carlyle Infrastructure and Western Water conferred with outside experts as well as conducted internal analysis to evaluate the tax, bond indenture, and regulatory implications of a potential sale of Mountain to the City. Please provide any and all written evaluations provided to Carlyle and/or to Western Water that are associated with this external and internal evaluation process.

In response, Mountain Water and Western Water offered only a cryptic claim of attorney-client privilege:

Although communications with counsel on the tax implications and potential “make whole” payments on bonds on a sale of Mountain Water, separate from a sale of Park Water, are subject to the attorney-client privilege, attached is an email from April, 2013 outlining the financial implications of such a sale with respect to tax consequences and make-whole payments. See WWH001080.

(See Mountain Water and Western Water’s response to PSC-031(a)). There are two critical problems with this response.

First, Mountain Water and Western Water do not explain whether any responsive documents actually exist. Presumably, since Robert Dove claimed that

Carlyle Infrastructure and Western Water consulted with outside experts and conducted their own internal analyses related to the sale of Mountain Water to the City, there exist documents that are responsive to the PSC's request. Yet, Mountain Water and Western Water provide only a single e-mail with two lines summarizing calculations by a "Park Water advisor/agent": "(1) Estimated tax on gains, at 40% rate, is \$18.6 million; (2) Make-whole premium on the \$52 million private placement bonds is \$27 million." (WWH001080).

If that e-mail is the only document that exists related to these analyses, then either: (1) Robert Dove made gross misrepresentations about the nature of those analyses in his testimony or (2) Mountain Water and Western Water are categorically withholding responsive documents that should be produced. Where, for example, are the analyses underlying the calculations in the e-mail excerpted above? Mr. Dove claims those analyses were performed, but none were provided. The PSC should order Mountain Water and Western Water to either provide responsive documents or explain why none exist.

Second, to the extent Mountain Water and Western Water assert that documents are protected by the attorney-client privilege, they must provide a privilege log identifying the nature of those documents. *See* Mont. R. Civ. P. 26(b)(6)(A). The PSC has expressly adopted Rule 26 of the Montana Rules of Civil Procedure. Admin. R. Mont. 38.2.3301(1). Rule 26(b)(6)(A) provides:

Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Here, Mountain Water and Western Water have undisputedly failed to provide a privilege log in accordance with subsection (ii), which prevents both the PSC and the City from evaluating Mountain Water and Western Water's privilege claim. Thus, in addition to ordering Mountain Water and Western Water to produce responsive documents (or affirmatively indicate that none exist), the PSC should also order them to produce a privilege log identifying documents they claim are privileged.

**III. Response to Mountain Water and Western Water's motion for a protective order: The PSC should order Mountain Water and Western Water to publicly disclose the information they are withholding.**

Along with their responses to the PSC's second set of data requests, Mountain Water and Western Water filed a motion for a protective order concerning requests PSC-028(b) and PSC-029(b). Through those requests, the PSC requested Mountain Water and Western Water to provide:

- the "Confidential Information Memorandum" (the so-called "Project Orchard" marketing memo) referenced in the Wells Fargo initial contact letter regarding the sale of WWH equity interest in Park Water Company (WWH000657-659) (PSC-028(b)) and
- copies of all management presentations that were provided to bidders as part of the second round in the transaction (PSC-029(b))

Mountain Water and Western Water provided the Project Orchard marketing memo and a July/August 2014 Project Orchard management presentation. But both were heavily redacted, deleting information that Mountain Water and Western Water claim is "trade secrets." In addition to blacking out key figures and charts in the

documents, nearly a dozen pages were deleted from the Project Orchard marketing memo and 17 pages were deleted from the Project Orchard management presentation. The PSC should order Mountain Water and Western Water to produce this information.

As an initial matter, there can be no dispute that the withheld information is relevant. Neither Mountain Water nor Western Water make any argument to the contrary. The information provides important insight into the value that Mountain Water and Western Water place on the Missoula water system, as well as Mountain Water's financial and administrative operations. Since Mountain Water and Western Water marketed this information to prospective buyers, one must assume this information contains their best calculations of the value of Mountain Water and an accurate assessment of its financial operations. What is more, the same assessment was also done for the two California utilities that are also part of the proposed sale to Liberty. Information related to those two utilities provides context for the Mountain Water valuation and the relative importance of Mountain Water to the overall sale.

While undisputedly relevant, Mountain Water and Western Water are withholding the information because they claim it contains "trade secrets" subject to protection under Montana law. *See* Mont. Code Ann. §§ 30-14-402(4), 69-3-105(2). Mountain Water and Western Water's argument fails. The PSC's administrative rules and the Montana Supreme Court recognize "that there is a constitutional presumption of access to documents and information in the commission's possession." Admin. R. Mont. 38.2.5007(b)(i); *Great Falls Tribune v. Mont. PSC*, 2003 MT 359, ¶ 61, 319 Mont. 38, 82 P.3d 876 (recognizing that utilities bear the burden of overcoming constitutional presumption of the public's right to view PSC records and materials).

The fact that Mountain Water and Western Water have attempted to keep the withheld information secret in their dealings with prospective buyers does not mean it should be kept confidential in this public proceeding:

In cases where a claimant seeks statutory protection from public disclosure under Montana's Uniform Trade Secrets Act, the claimant's efforts to maintain the information's secrecy must be 'reasonable under the circumstances.' Section 30-14-402(4)(b), MCA. What is reasonable under the circumstances should be entirely different in the context of a utility filing contracts with an agency, such as the PSC, as compared to an exchange of information between private parties. In other words, one might expect a more encompassing definition of a trade secret in litigation between private parties than would be recognized when a utility files a document with the PSC. Certainly the fact that the contracts, although private, were negotiated for the benefit of the public must be taken into consideration.

*Great Falls Tribune*, ¶ 61.

As with the contracts at issue in *Great Falls Tribune*, the analyses presented in the Project Orchard marketing memo and presentation were ostensibly prepared for the benefit of the public trust – the sale of Missoula's water system. The class of documents that might constitute "trade secrets" is therefore narrower in this context, and Mountain Water and Western Water have an affirmative duty to explain why the information should be kept secret from the public. *Id.* at ¶¶ 55-62. Mountain Water and Western Water cannot meet this burden. The Missoula community is entitled to know how its water system is valued, as well as the financial implications of a sale. The withheld information speaks directly to those inquiries.

What is more, Mountain Water and Western Water fail to explain why this information should be considered a "trade secret" in the first place. Much of the redacted information appears to be figures, charts, and numbers that are the end

product or output of Mountain Water and Western Water analyses – not the underlying analytic methods or investment strategies themselves. (See e.g. WWH000811, WWH000817, WWH000884, and WWH001054). Even if Mountain Water and Western Water’s analytic methodology or strategies have some sort of “independent economic value,” see Mont. Code Ann. § 30-14-402(4)(a), the findings and conclusions drawn from the analyses do not. Public disclosure of the findings and conclusions would not allow the public or competitors to reverse engineer Mountain Water and Western Water’s investment strategies or “secret” analytical methods.

Further, the purpose of protecting trade secrets is to prevent the “misappropriation” of proprietary information. See *Great Falls Tribune*, ¶ 70 (Nelson, J., concurring). Even if the withheld information is made public, Mountain Water and Western Water fail to explain how it would be misappropriated or misused by their “competitors.” Instead, Mountain Water and Western Water generically claim the information is “strategic” and would therefore give competitors a “competitive edge or an economic advantage regarding other similar projects.” (Mot. for Prot. Or., p. 7.)

Even assuming the information that Mountain Water and Western Water have withheld contains trade secrets, Mountain Water and Western Water cannot outright refuse to provide complete and un-redacted versions to the PSC and the City. The administrative rules do not permit a party to withhold documents merely because they might contain trade secrets. Instead, assuming information is truly confidential, it may only be withheld from “public disclosure,” not withheld from disclosure to parties or the PSC. See Admin. R. Mont. 38.2.5001(1). When confidential information is disclosed to parties or the PSC, that information may be filed under seal and is protected through

nondisclosure agreements served on the parties and the PSC prior to receiving the information. Admin. R. Mont. 38.2.5012, 38.2.5023; *see also Great Falls Tribune*, ¶ 62 (describing procedures that may be employed to protect trade secrets from public disclosure in PSC proceedings).

To the extent the PSC determines that any of the withheld information is truly confidential, the City will enter a non-disclosure agreement pursuant to Rule 38.2.5012 before receiving the information. Mountain Water and WWH have not identified any reason why the PSC or the City should not have access to this information. Instead, they argue it should only be kept out of the hands of their “competitors.”

By making its requests for this information, the PSC has determined for itself that the information is relevant to the issues in this case. The information that Mountain Water and Western Water have withheld does not contain trade secrets. Even if it does, Mountain Water and Western Water must, at a minimum, disclose the information to the PSC and the City.

#### CONCLUSION

For the reasons above, the City of Missoula requests the PSC to issue an order (1) compelling Liberty Utilities Co. and Liberty WWH, Inc. to produce the documents withheld in response to PSC-033(b) and (2) compelling Mountain Water and Western Water to provide any documents withheld in response to PSC-031, as well as a privilege log for documents withheld on the basis of attorney-client privilege.

Further, the City asks the PSC to either (1) deny Mountain Water and Western Water’s motion for a protective order and order them to publicly file the withheld and redacted documents or (2) order Mountain Water and Western Water to provide the

PSC and City with unredacted and complete versions of the withheld and redacted documents.

Respectfully submitted this 28<sup>th</sup> day of April 2015.



---

Scott M. Stearns  
Natasha Prinzing Jones  
BOONE KARLBERG P.C  
P.O. Box 9199  
Missoula, MT 59807-9199  
(406) 543-6646  
npjones@boonekarlberg.com  
sstearns@boonekarlberg.com

Jim Nugent  
City of Missoula  
CITY ATTORNEY'S OFFICE  
435 Ryman Street  
Missoula, MT 59802  
JNugent@ci.missoula.mt.us

*Attorneys for the City of Missoula*

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 28<sup>th</sup> day of April 2015:

Thorvald A. Nelson  
Nikolas S. Stoffel  
Holland & Hart LLP  
6380 South Fiddlers Green Circle  
Suite 500  
Greenwood Village, CO 80111  
tnelson@hollandhart.com  
nsstoffel@hollandhart.com  
cakennedy@hollandhart.com  
aclee@hollandhart.com

Michael Green  
Gregory F. Dorrington  
CROWLEY FLECK PLLP  
100 North Park, Suite 300  
P.O. Box 797  
Helena, MT 59624-0797  
mgreen@crowleyfleck.com  
gdorrington@crowleyfleck.com  
cuda@crowleyfleck.com  
jtolan@crowleyfleck.com

Robert Nelson  
Monica Tranel  
Montana Consumer Counsel  
111 North Last Chance Gulch, Suite 1B  
P.O. Box. 201703  
Helena, MT 59620-1703  
robnelson@mt.gov

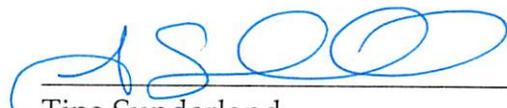
Christopher Schilling  
Chief Executive Officer  
Leigh Jordan  
Executive Vice President  
Park Water Company  
9750 Washburn Road  
Downey, CA 90241  
cschilling@parkwater.com  
leighj@parkwater.com

John Kappes  
President & General Manager  
Mountain Water Company  
1345 West Broadway  
Missoula, MT 59802-2239  
johnk@mtwater.com

Barbara Hall  
Legal Director  
The Clark Fork Coalition  
P.O. Box 7593  
Missoula, MT 59801  
Barbara@clarkfork.org

Todd Wiley  
Assistant General Counsel  
Liberty Utilities  
12725 West Indian School Road, Suite D-101  
Avondale, Arizona 85392  
todd.wiley@libertyutilities.com

Kate Whitney  
Public Service Commission  
1701 Prospect Avenue  
Helena, MT 59620-2601  
kwhitney@mt.gov  
**ORIGINAL SENT VIA OVERNIGHT  
DELIVERY**

  
\_\_\_\_\_  
Tina Sunderland