

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

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| <b>IN THE MATTER OF</b> 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 )                             |                        |

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**WESTERN WATER HOLDINGS' AND MOUNTAIN WATER COMPANY'S  
RESPONSE TO THE CITY OF MISSOULA'S MOTION TO COMPEL  
AND  
REPLY TO THE CITY'S RESPONSE TO MOUNTAIN WATER'S AND WESTERN  
WATER'S MOTION FOR A PROTECTIVE ORDER**

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Western Water Holdings, LLC (“Western Water”) and Mountain Water Company (“Mountain Water”), by and through their counsel, Holland & Hart LLP, respectfully submit this response and reply to the City of Missoula’s (“City”) Motion to Compel Production of Documents (“Motion to Compel”) and Response to Mountain Water’s and Western Water’s Motion for Protective Order (“Response,” and together with the Motion to Compel, the “Motion and Response”), filed with the Commission on April 28, 2015.<sup>1</sup> The Commission should reject the Motion to Compel a further response to PSC-031(a) based on relevance, and should grant Mountain Water’s and Western Water’s motion for protective order as to portions of the documents provided in response to PSC-028(d) and PSC-029(d) as the information redacted from the Confidential Information Memorandum (“CIM”) and Management Presentation is either irrelevant or trade secret.

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<sup>1</sup> Although the Motion to Compel and Response were filed as a single pleading, they are focused on different discovery responses, request different relief, and should be addressed separately.

Regarding the Motion to Compel, the City is unsatisfied with the answer Mountain Water and Western Water provided to a Commission data request. In particular, the Commission asked in PSC-031(a): “On pages 6-7 of your testimony, you 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 objected on the basis of relevance, but, in an effort to satisfy the Commission Staff, provided an e-mail with a quantification of the capital gains taxes and a make-whole premium on Park Water Company’s (“Park Water”) bonds that would result if the Mountain Water system was sold to the City. Further, Mountain Water and Western Water explained the financial issues associated with a sale of Mountain Water to the City in response to PSC-031(b) and provided all of the communications between Carlyle Infrastructure Partners, LP (“Carlyle”) and the City regarding a proposed sale in response to PSC-031(c). Lastly, Mountain Water and Western Water indicated that some of the documents requested and withheld on relevance grounds were also protected by attorney-client privilege. The City seeks to compel Mountain Water and Western Water to provide all of the documents withheld on relevance grounds and to provide a privilege log for the documents protected by the attorney-client privilege despite the relevance objection.

However, based on the City’s arguments in the Motion to Compel, it should be apparent to the Commission that the City is abusing the Commission’s discovery process as a means to obtain additional information to support its condemnation effort. For the second time the City has proposed an overly broad interpretation of the Commission’s data requests, based on a self-

serving view of the Commission's intent behind those requests. And, for the second time the City has moved to compel responses to the Commission's discovery requests that were satisfactory to the Commission, undermining the City's interpretation of the Commission's intent. But information relevant to the condemnation proceeding is not necessarily relevant here, a fact the Commission should find particularly true for the information subject to the City's most recent Motion to Compel. Because the information subject to the City's Motion to Compel is not relevant or likely to lead to the discovery of information of consequence to evaluating the sale and transfer of Western Water stock under the no-harm-to-consumers standard, the relief sought in the Motion to Compel should be denied.

Regarding the Response to the Motion for Protective Order, the Commission also asked Mountain Water and Western Water to provide the CIM referenced in the Wells Fargo initial contact letter regarding the sale of Western Water's equity interest in Park Water<sup>2</sup> and copies of all management presentations that were provided to bidders as part of the second round in the transaction.<sup>3</sup> Mountain Water and Western Water filed a motion for a protective order for portions of the CIM and Management Presentation where information was redacted based on confidentiality, and the sections redacted in black on the documents provided in response to PSC-028(d) and PSC-029(d) are the subject of the motion for protective order (the "Confidential Information"). As detailed in the motion for protective order, the Confidential Information is appropriately considered trade secret under Montana law, because the information is secret, subject to efforts reasonable under the circumstances to maintain its secrecy, not readily ascertainable by proper means, and independent economic value or a competitive advantage is derived from its secrecy. Despite the City's argument to the contrary, the Confidential

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<sup>2</sup> PSC-028(b).

<sup>3</sup> PSC-029(b).

Information was prepared exclusively for a private purpose—not for the benefit of the public—and should therefore be evaluated under a broader interpretation of trade secret under Montana Supreme Court precedent.

Mountain Water and Western Water also objected to portions of both documents on the basis of relevance, and identified those portions in the narrative response to PSC-028(b) and PSC-029(b). Regarding the portions redacted based on relevance,<sup>4</sup> those portions are irrelevant to this proceeding because they exclusively discuss the operations of the California water systems – Park Water’s Central Park Basin and Apple Valley. None of the Irrelevant Information discusses or relates to the Mountain Water utility system or anything in the state of Montana. Consequently, production of the Irrelevant Information could only be provided after a timely motion to compel and after a Commission finding of relevance. But the City’s opportunity to move to compel that information expired on May 5, 2015, and as a result the City cannot compel the disclosure of the Irrelevant Information now.

### **I. Response to the City’s Motion to Compel**

With the Motion to Compel, the City has asked the Commission to require Mountain Water and Western Water to provide the legal advice and analysis underlying Carlyle’s determination that a sale of Mountain Water to the City would result in capital gains tax and a make-whole premium on Park Water’s bonds. However, a sale of Mountain Water to the City or any other entity is not the transaction before the Commission, and information regarding the financial consequences of selling Mountain Water to the City separate from Western Water’s other utility assets is not relevant or remotely likely to lead to the discovery of evidence relevant to evaluating the proposed sale and transfer of Western Water stock to Liberty Utilities under the

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<sup>4</sup> Pages 47-68 of the Confidential Information Memorandum and pages 9-26 of the Management Presentation (the “Irrelevant Information”).

no-harm-to-consumers standard. Absent from the Motion to Compel is any support for the Commission to find information regarding the tax and bond implications of a sale of Mountain Water to the City is relevant to this proceeding, because no such support exists.

Mountain Water and Western Water agree with the City that the Montana Rules of Civil Procedure apply to Commission proceedings.<sup>5</sup> However, information is only discoverable if it is reasonably calculated to lead to the discovery of admissible evidence.<sup>6</sup> Evidence is only admissible if it is relevant,<sup>7</sup> which requires the evidence to have “any tendency to make the existence of any fact that is *of consequence* to the determination of the action more probable or less probable than it would be without the evidence.”<sup>8</sup> What is missing from the City’s Motion to Compel is any explanation of how information regarding Carlyle’s analysis of the financial ramifications of a hypothetical, independent sale of Mountain Water is of consequence to evaluating the sale and transfer of Western Water stock under the no-harm-to-consumers standard. Consistent with the two-step process established by the Montana Rules of Civil Procedure, the Commission must first determine whether the information being sought is relevant or likely to lead to the discovery of admissible (*i.e.*, relevant) evidence prior to entertaining concerns regarding the confidentiality of that information.<sup>9</sup> Although the City may wish to obtain the information which is the subject of the Motion to Compel, the City lacks a basis to argue that the information is discoverable based on the issue before the Commission.

At most, the City could argue that information regarding Carlyle’s evaluation of the City’s offer for Mountain Water is relevant to determining whether Carlyle complied with the

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<sup>5</sup> Admin. R. Mont. 38.2.3301(1).

<sup>6</sup> MT. R. RCP. Rule 26(a)(1).

<sup>7</sup> Rule 402, Montana Rules of Evidence.

<sup>8</sup> Rule 401, Montana Rules of Evidence (emphasis added).

<sup>9</sup> “Parties may obtain discovery regarding any non-privileged matter that *is relevant* to any party’s claim or defense...The information sought need not be admissible at trial if the discovery appears *reasonably calculated to lead to the discovery of admissible evidence.*” M. R. Civ. P. 26(b)(1) (emphasis added).

2011 Letter Agreement, by and between Carlyle, the City, and the Clark Fork Coalition. But, pursuant to the terms of the Letter Agreement, any dispute regarding Carlyle's obligation to consider the City's offer for Mountain Water in good faith must be resolved through arbitration,<sup>10</sup> not by debating the Letter Agreement before this Commission. The City has not invoked the arbitration provision. Furthermore, the City actually conceded during the condemnation trial that Carlyle *complied* with the Letter Agreement. Specifically, the City's Mayor, John Engen, provided the following testimony regarding the Letter Agreement during cross-examination by Mountain Water's counsel, Mr. Conner: <sup>11</sup>

Q. I understand that. But you made the offer. It was rejected, which was Carlyle's right. You said that, right?

A. Correct.

Q. So my question, sir: As far as you were concerned, that agreement was not violated, was it?

A. No.

Thus, because a dispute over the Letter Agreement is not for the Commission to decide, and because the proposed transaction does not include the sale and transfer of Mountain Water as a stand-alone entity, any information regarding the financial consequences of a sale of Mountain Water separate from Western Water's other utility assets is irrelevant to the case before the Commission. Recognizing as much, Mountain Water and Western Water objected to PSC-031 on the basis of relevance.<sup>12</sup> However, rather than providing no response to the question, Mountain Water and Western Water provided documentation showing the results of the analysis:

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<sup>10</sup> Letter Agreement ¶ 2(e), produced in response to PSC-024 as WWH000576-WWH000580.

<sup>11</sup> See WWH001097-001099, provided in response to MCC-002(c).

<sup>12</sup> "Mountain Water and Western Water object to this request to the extent it seeks information not relevant to the subject matter of the instant proceeding, information not reasonably calculated to lead to the discovery of evidence admissible in the instant proceeding..." Response to PSC-031.

the tax consequences of a sale of Mountain Water was approximately \$18.6 million, and the make-whole premium on the \$52 million private placement bonds was approximately \$27 million.<sup>13</sup> Although that information was provided in the spirit of cooperation, this issue remains irrelevant to this proceeding because a sale of Mountain Water alone is *not* what is before the Commission to approve. The analysis of the implications of a sale to the City was procured to evaluate an offer from the City to acquire Mountain Water's assets *separate* from the additional assets of Park Water's other operating units. Accordingly, there is no basis to compel Western Water and Mountain Water to provide any of the analysis underlying the estimated tax and bond premium implications, regardless of the attorney-client privilege, and the City's Motion to Compel should be denied.

## **II. Reply to the City's Response for Motion for a Protective Order**

As a preliminary matter, the City's Response can only be interpreted to apply to the information redacted from the CIM and Management Presentation on the basis of confidentiality (*i.e.*, the Confidential Information), rather than the portions that were redacted on the basis of relevance (*i.e.*, the Irrelevant Information). As made clear from the City's filing, the Motion to Compel was directed solely at the responses provided to PSC-031 to PSC-033(b), while the Response was directed at the motion for a protective order for documents provided in response to PSC-028(b) and PSC-029(b), the CIM and Management Presentation. As such, the City's opportunity to file a motion to compel Irrelevant Information redacted from the CIM and Management Presentation expired on May 5, 2015, 14 days after the responses were filed with the Commission.<sup>14</sup> No motion to compel was filed regarding Irrelevant Information, and the

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<sup>13</sup> See WWH001080 provided in response to PSC-031.

<sup>14</sup> Order No. 7292 at ¶ 14 ("the discovering party may move within fourteen (14) calendar days after service of the response for an order compelling an answer.")

Commission's present inquiry must be limited to what the City put before it – a response opposing Mountain Water's and Western Water's motion for protective order.

With that in mind, all of the Confidential Information redacted from the CIM and Management Presentation was redacted on the basis of confidentiality, not relevance. Mountain Water acknowledged the presumption regarding access to documents and information in the Commission's possession,<sup>15</sup> and only redacted select information appropriately considered trade secret under Montana law. Specifically, Mountain Water redacted the following types of information from the CIM and Management Presentation:

- Western Water's analysis of the current market for investment in privately-owned water utilities, including comparisons against publicly traded utilities;
- Western Water's analysis of Park Water and its subsidiaries as a potential prospect for acquisition in the privately-owned water utility investment market;
- Western Water's analysis, from an investment perspective, of the California and Montana regulatory environments for privately-owned water utilities;
- Western Water's analysis, from an investment perspective, of the opportunities for growth within the privately-owned water utility industry within Park Water Company's areas of operation;
- Certain operational and financial information regarding Park Water's subsidiaries; and
- The key assumptions underlying Western Water's analysis and forecasts.

In opposing the claim of trade secret for this information, the City provides a tortured argument that the CIM and Management Presentation were somehow "prepared for the benefit of the public trust,"<sup>16</sup> when in reality these documents were prepared for an entirely private transaction—the sale and transfer of stock in Western Water.<sup>17</sup> The CIM and Management

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<sup>15</sup> Motion for Protective Order at p. 2.

<sup>16</sup> Motion and Response at p. 10.

<sup>17</sup> Mountain Water recognizes that the marketing materials initially identified Park Water Company stock as the asset being sold. However, whether it was Western Water or Park Water Company stock being sold and transferred,

Presentation are not utility contracts, which was the focus of the dispute in *Great Falls Tribune v. Mont. PSC*, 82 P.3d 876, but instead are confidential materials prepared for the private sale and transfer of a non-utility asset—Western Water stock. In this regard, the *Great Falls Tribune* case cited by the City actually supports a broader interpretation of trade secret, as these materials were drafted exclusively to serve as “an exchange of information between private parties.”<sup>18</sup> Furthermore, the CIM and Management Presentation were *not* drafted or negotiated “for the benefit of the public.”<sup>19</sup> Rather, these materials were prepared so Carlyle could divest Western Water and its subsidiaries through a competitive bidding process.

The City also argues that Mountain Water failed “to explain why this information should be considered ‘trade secret’ in the first place,”<sup>20</sup> despite Mountain Water’s explaining how independent economic value and a competitive advantage is derived from that information remaining secret.<sup>21</sup> The City then claims Mountain Water failed to explain how the redacted information “would be misappropriated or misused by... ‘competitors,’” despite Mountain Water having explained:

In addition to the independent economic value of information regarding Western Water’s and Carlyle’s investment strategies and analysis, Western Water also derives a competitive advantage from the secrecy of the Confidential Information to the extent it applies to Park Water’s utility operations in California. Specifically, the Town of Apple Valley has indicated its intent to condemn Park Water’s water utility operations in Apple Valley. Due to this threat of condemnation, the Town of Apple Valley is most appropriately viewed as a known competitor to Western Water. Accordingly, Western Water derives a competitive advantage by protecting financial and operational information regarding the Park Central Basin and Apple Valley assets.<sup>22</sup>

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the result is the same for Mountain Water – an upstream change in ownership with no impact on Mountain Water’s utility rates, property, or operations.

<sup>18</sup> *Great Falls*, 82 P.3d at 887.

<sup>19</sup> *Id.*

<sup>20</sup> Motion and Response at p. 10.

<sup>21</sup> Motion for Protective Order at p. 6-7.

<sup>22</sup> Motion for Protective Order at p. 7.

The City may be sympathetic to a parallel effort to condemn another Park Water utility, and may well have an interest in pushing for the public availability of as much information as possible in support of that effort. However, as the City's efforts in this proceeding thus far demonstrate, a potential condemnor should be treated as a competitor, and a competitive advantage is derived by maintaining the confidentiality of financial and operational information regarding the assets potentially subject to a condemnation action.

Finally, on this issue of confidentiality, Mountain Water and Western Water have not indicated any intent to withhold the Confidential Information, as suggested by the City in its Response. If the motion for protective order is granted, Mountain Water will of course provide the Confidential Information in accordance with the Commission's confidentiality rules.

Although the City's Response should be construed only as a response to the motion for protective order and not as a motion to compel the Irrelevant Information redacted from the CIM and Management Presentation on the basis of relevance, even if the Commission were to construe the Response as a motion to compel it must also be denied. Strung throughout the Motion and Response is the City's references to the value of Mountain Water and the Missoula community's "need to know whether the proposed sale is a good deal or a bad deal."<sup>23</sup> But despite conclusory statements such as "there can be no dispute that the withheld information is relevant,"<sup>24</sup> the City provided no justification explaining why the Irrelevant Information redacted from the CIM and Management Presentation is, in fact, relevant to the issue before the Commission. These statements and arguments demonstrate that the City's continued confusion over what is relevant to evaluating approval of the sale and transfer of Western Water stock to Liberty Utilities. In contrast, Western Water and Mountain Water specifically acknowledge

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<sup>23</sup> Motion and Response at p. 3.

<sup>24</sup> Motion and Response at p. 9.

redacting information regarding Park Water Company's Central Basin and Apple Valley operations in California based on relevance,<sup>25</sup> as those operations have nothing to do with Mountain Water or its Montana customers.

But again, the City's arguments fit perfectly with its interests in the condemnation case. Information regarding the valuation of Mountain Water relative to Western Water's other utility assets is helpful to determining how much the City will have to pay for Mountain Water's assets *if and when* the City prevails in the condemnation case. However, that information is not relevant to the issue before the Commission, because Liberty Utilities, as the buyer of Western Water, made it absolutely clear through testimony and responses to discovery that it *will not* seek an acquisition adjustment to Mountain Water's existing rate base. For example, David Pasieka testified that "Liberty Utilities will not seek an acquisition or rate base adjustment to cover or reflect the purchase price in water rates."<sup>26</sup> And at least six of Liberty Utilities' discovery responses include similar statements, such as "Liberty does not intend to seek an acquisition adjustment to the existing rate base of Mountain Water in a future rate case."<sup>27</sup>

Thus, there is no basis in this proceeding for the Commission to agree that the "Missoula community is entitled to know how its water system is valued, as well as the financial implications of a sale,"<sup>28</sup> because the value is irrelevant following the assurance that there *will not* be any financial implications of the sale for Mountain Water's customers in Missoula. In short, the City is attempting to make valuation an issue in this proceeding because its beneficial to the condemnation case, but Liberty Utilities' commitment makes valuation irrelevant to this proceeding and the issue before the Commission to decide. Accordingly, even if the City's

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<sup>25</sup> See responses to PSC-028(b) and PSC-029(b).

<sup>26</sup> Testimony of David Pasieka at p. 5.

<sup>27</sup> Response to PSC-008; See also responses to PSC-002(a), (c), (d), (e); PSC-007(b).

<sup>28</sup> Motion to Compel at p. 10.

Response was construed as a motion to compel the Irrelevant Information, despite such a motion being untimely under the Commission's procedural order, the motion should still be denied because the Irrelevant Information is not of consequence to evaluating the transaction before the Commission.

### **III. Conclusion**

The Commission should reject the City's transparent attempt to use the Commission's discovery process to obtain information that is irrelevant to the proposed transaction for its condemnation case. Because any information regarding the financial consequences of a sale of Mountain Water to the City or the value of Mountain Water or Western Water is irrelevant to evaluating the proposed sale and transfer under the no-harm-to-consumers standard, the Commission should deny the City's Motion to Compel responses to PSC-031(a). Additionally, because the Confidential Information identified in Mountain Water's motion for a protective order is appropriately considered trade secret under Montana law, the Commission should require that information be protected as confidential by granting the protective order. To the extent the Commission interprets the City's Response as being a motion to compel the Irrelevant Information, it should be denied because information regarding Park Water's California utilities, including their value, is irrelevant to this proceeding.

Respectfully submitted this 8th day of May, 2015.

**HOLLAND & HART LLP**

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**ATTORNEYS FOR MOUNTAIN WATER  
COMPANY AND WESTERN WATER  
HOLDINGS**

**CERTIFICATE OF SERVICE**

I hereby certify that on this, the 8th day of May, 2015, **WESTERN WATER HOLDINGS' AND MOUNTAIN WATER COMPANY'S RESPONSE TO THE CITY OF MISSOULA'S MOTION TO COMPEL AND REPLY TO THE CITY'S RESPONSE TO MOUNTAIN WATER'S AND WESTERN WATER'S MOTION FOR A PROTECTIVE ORDER** 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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