

**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)	

**MOUNTAIN WATER’S AND WESTERN WATER’S REPLY TO THE CITY OF
MISSOULA’S RESPONSE TO MOUNTAIN WATER’S AND WESTERN WATER’S
MOTION FOR RECONSIDERATION AND MOTION FOR PROTECTIVE ORDER**

Mountain Water Company (“Mountain Water”) and Western Water Holdings, LLC (“Western Water”), by and through their counsel, Holland & Hart LLP, respectfully submit this reply to the City of Missoula’s (“City”) Response to Mountain Water’s and Western Water’s Motion for Reconsideration and Motion for Protective Order (“Response”), filed with the Commission on May 4, 2015.

Reply to Response to Motion for Reconsideration

I. The City is not demanding Mountain Water and Western Water produce much of the information that was redacted based on relevance.

As an initial matter, the City concedes that much of the information redacted from the documents produced in discovery is irrelevant. Specifically, the City agrees that it is not seeking the production of signatures, phone numbers, fax numbers, bank account numbers, taxpayer ID numbers.¹ Thus, the Commission should grant the Motion for Reconsideration to the extent Order No. 7392c required the disclosure of that information.

¹ Response at p. 3.

II. The Commission recognizes objections based on relevance.

The Commission has adopted the Montana Rules of Civil Procedure (“MRCP”) to govern discovery,² and the Montana Rules of Evidence (“MRE”) govern the conduct of hearings and “shall be applied in all contested cases” before the Commission.³ The combination of the MRCP and MRE establish the test the Commission must apply to evaluate objections based on relevance.

Under the MRCP, 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.”⁴ Under the MRE, evidence is relevant if it has “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.”⁵ And evidence must be relevant to be admissible.⁶

Accordingly, discovery must either be seeking information that is *of consequence* to the determination of the action or reasonably calculated to lead to the discovery of information that is *of consequence* in order to be discoverable. Following an objection based on relevance, it is up to the Commission to walk through this analysis to determine if the information being requested is actually discoverable under the MRCP and MRE. This process is not new. The Commission has followed this process when faced with objections based on relevance, either

² Admin. R. Mont. 38.2.3301.

³ Admin. R. Mont. 38.2.4201.

⁴ MRCP 26(b)(1).

⁵ Rule 401, MRE (emphasis added).

⁶ Rule 402, MRE.

sustaining or overruling the relevance objections following the proper relevance analysis under the MRE.⁷

III. Order No. 7392c did not analyze the Mountain Water’s and Western Water’s relevance objections.

Order No. 7392c provided absolutely no analysis of the relevance of the redacted information, instead determining it was potentially protectable as confidential “rather than irrelevant or undiscoverable information.”⁸ This approach is procedurally flawed, because the confidentiality of information only matters following a determination of relevance under the MRCP and MRE. Mountain Water and Western Water objected to the requests based on relevance and redacted information based on those objections. Without a proper finding of relevance for the redacted information, there is no basis to compel Mountain Water and Western Water to provide the information subject to the objections.

That said, Mountain Water and Western Water respect the Commission’s rules. Following a proper analysis of relevance, Mountain Water and Western Water will produce the information or seek a protective order for confidential information as appropriate. However, Mountain Water and Western Water are entitled to the protection provided by relevance objections under the MRCP and MRE, and the Commission is responsible for evaluating whether those objections are appropriate.

IV. The City’s Response is flawed.

The City’s response is flawed in several respects. First, the City is challenging the relevance objection regarding the names and loan amounts redacted from the promissory notes

⁷ See e.g., Docket No. D2012.1.3, Order No. 7199d; D2011.5.41, Order No. 7159i.

⁸ Order 7392c at p. 2.

produced in response to PSC-014.⁹ However, the City's arguments are meritless. Specifically:

- The City argues the names and loan amounts in the promissory notes are relevant because the Commission asked for them, ignoring the fact the Commission did not move to compel the redacted information.
- The City argues the amounts of the promissory notes are relevant because Mountain Water is “spending big on executives” while “ignoring the needs of a degraded water system.” But, by their very nature, these promissory notes *must be repaid*, so it is a misrepresentation to describe the loans as “spending.” Further, the promissory notes are secured with the pledge of Class B Units. Additionally, the City's claim that Mountain Water is “ignoring the needs of a degraded water system” is an affront to Mountain Water and ignores the fact that the Commission is tasked with ensuring the adequacy of Mountain Water's system, which it has done in docket after docket for decades.¹⁰
- The City argues the amounts of the promissory notes are relevant because Mountain Water's rates are funding the loans. This is simply not true. The loans were provided by Western Water, and the City points to no evidence in Mountain Water's last rate case showing that the loans are included in rate base or being recovered through rates. And there are no rate changes being proposed in this proceeding. Once again, the City ignores the fact that promissory notes must be repaid (indeed, the note itself is the promise to repay with interest), and instead continues to focus on irrelevant issues rather than the primary issue in this

⁹ Response at pp. 3-4

¹⁰ See § 69-3-201, MCA.

proceeding: Liberty Utilities' fitness as the upstream owner of Mountain Water, which is currently owned by a holding company.

- The City argues these agreements are relevant because they are in full force and effect and being transferred as part of the proposed transaction, ignoring the fact that means they are already binding on Western Water regardless of the proposed sale. But because these promissory notes are already binding, and are binding on Western Water not Mountain Water, they are not of consequence to the proposed transaction.
- The City argues the promissory notes are relevant because the people of Missoula “always end up getting stuck with the bill when it comes due.” Again, this claim ignores the fact the promissory notes must be repaid, with interest, and the fact Western Water, not Mountain Water, made the loans to the employees. It also ignores the reality that the rates charged to the people of Missoula for their water service must be approved by the Commission, through proceedings that the City and other interested parties are welcome to participate in to ensure “sweetheart deals” are not being recovered through rates. The City simply ignores this well-established process intended to protect Mountain Water’s customers.
- Finally, the City argues the promissory notes and Class B Unit agreements are relevant because they are compensation. But because Mountain Water’s rates are not at issue in this proceeding, information regarding compensation is irrelevant. Additionally, the payments under the Class B Unit Agreements will be paid from the proceeds from the sale of Western Water, not from revenues generated by

utility rates, while the promissory notes must be repaid with interest. Despite the objection to both the promissory notes and Class B Unit agreements based on relevance, Mountain Water and Western Water committed to providing the Class B Unit agreements anyway, consistent with the Commission's decision on the motion for protective order to maintain the confidentiality of that information.

Finally, the City argues Mountain Water and Western Water failed to meet and confer prior to objecting to discovery requests based on relevance and redacting information based on those objections. But the MRCP only requires conferral prior to filing a motion to compel,¹¹ and there is no similar rule requiring conferral prior to objecting to discovery based on relevance. In fact, resolving relevance objections through negotiation is one of the reasons conferrals are required *after* such objections are asserted. And despite the City's claim that Mountain Water and Western Water refused to meet and confer,¹² the City made no attempt to meet and confer prior to filing its motion to compel.

Ultimately, the City's arguments demonstrate the importance of the Commission in resolving disputes over relevance. Because Order No. 7392c did not provide any analysis of the relevance objections under the MRCP and MRE, Mountain Water's and Western Water's motion for reconsideration should be granted.

Reply to Response to Motion for a Protective Order

Much like the response to the motion for reconsideration, the City's response to Mountain Water's and Western Water's motion for a protective order contains a variety of inaccurate statements that must be addressed. As a preliminary matter, the City addresses the relevance of the Class B Unit agreements in its Response to the motion for a protective order, ignoring the

¹¹ MRCP 37(a)(1).

¹² Response at p. 3.

fact the relevance of these agreements has been conceded (for purposes of discovery only), while the confidentiality of the unit amounts remains for the Commission to determine.

The City argues Mountain Water and Western Water are in violation of Order No. 7392c because they have not provided an unredacted copy of Mr. Schilling's employment agreement. However, portions of that document are subject to the pending motion for reconsideration. Rather than providing multiple supplemental responses to that request, Mountain Water and Western Water are waiting for a decision on the motion for reconsideration before filing the unredacted document.

The City then focuses its opposition on the Class B Unit agreements, which Mountain Water and Western Water have committed to provide in accordance with the Commission's decision on the pending motion for a protective order. In opposing the motion for protective order, the City argues:

- The Class B Unit agreements are “unquestionably relevant” because they are paid through rates. This is false. Payments under the Class B Unit agreements will be paid from the proceeds from the sale of Western Water, not from revenue generated by Mountain Water's rates. But in making this relevance argument, the City acknowledges these documents are compensation (although not in the form of salaries). The Commission's recent Order No. 7385b in Docket No. N2014.2.21 found compensation information *is confidential* unless it is already publicly available. And because the Class B Unit agreements are not publicly available, Order No. 7385b supports approval of the pending motion for a protective order.
- The City argues “[t]he PSC and the public have a right to know how much of their water bills will be used to pay these top earners when, ultimately, Liberty or any other

buyer attempts to recoup its purchase price through customer bills.”¹³ This argument completely ignores Liberty Utilities’ repeated commitment that it will not seek an acquisition or rate base adjustment to cover or reflect the purchase price in water rates.¹⁴ The City’s argument also assumes the Class B Unit payments will be paid from water rates, when they will actually be paid from the proceeds from the sale of Western Water stock. And, once again, nothing ends up in Mountain Water’s rates without being approved by the Commission, a process the City has the opportunity to participate in following an application for a rate increase.

- The City argues the Class B Unit agreements show that “Western Water and Mountain Water have an incentive to inflate the purchase price.”¹⁵ This ignores the fact the purchase price for Western Water was the result of a competitive bidding process, not an act of price setting by Mountain Water or Western Water. Additionally, it ignores the reality that the purchase price is irrelevant in light of Liberty Utilities’ commitment that it will not seek an acquisition or rate base adjustment to reflect or recover the cost of acquiring Western Water in Mountain Water’s water rates.
- The City argues that the Commission should order the public disclosure of the aggregate amount of the Class B Units awarded under the Class B Unit agreements. This request is procedurally improper, as it amounts to an additional discovery request following the expiration of the discovery deadline. Additionally, the policy supporting the disclosure of aggregate compensation information in Mountain

¹³ Response at p. 7.

¹⁴ See e.g., Testimony of David Pasioka at p. 5.

¹⁵ Response at p. 8.

Water's annual reports is inapplicable here, as Mountain Water and Western Water are not required to produce the compensation information in this proceeding, such as with an annual report, and the fact compensation information is irrelevant to evaluating the sale and transfer of Western Water stock

In short, the City's response demonstrates its continued commitment to fighting this transaction based on fictional allegations, such as Liberty Utilities' will seek to recover the purchase price from Missoula residents or the payments under the Class B Unit agreements will be paid using revenue from Mountain Water's rates, despite the facts of this case proving such claims are false. Because the Commission recently found that compensation information is confidential, and because the Class B Unit agreements are not publicly available, the pending motion for a protective order should be granted.

Conclusion

Because the Commission failed to comply with the MRCP and MRE in evaluating Mountain Water's and Western Water's relevance objections prior to compelling the disclosure of the redacted information, the motion for reconsideration should be granted. And because the Class B Unit agreements contain individual compensation information that is not otherwise available to the public, the motion for a protective order for that information should be granted.

Respectfully submitted this 8th day of May, 2015.

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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 REPLY TO THE CITY OF MISSOULA'S RESPONSE TO MOUNTAIN WATER'S AND WESTERN WATER'S MOTION FOR RECONSIDERATION AND MOTION FOR 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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