

**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 RESPONSE TO WESTERN WATER HOLDINGS
AND MOUNTAIN WATER COMPANY’S
MOTION FOR A PROTECTIVE ORDER
(PSC-028(b) and PSC-029(b))**

In PSC-028(b) and PSC-029(b), the PSC asked Western Water and Mountain Water to provide the “Confidential Information Memorandum” (the so-called “Project Orchard” marketing memo) and copies of all management presentations that were provided to bidders. In response, Western Water and Mountain Water provided heavily redacted copies of the Project Orchard memo and a July/ August 2014 Project Orchard management presentation. Western Water and Mountain Water blacked out key figures and charts and deleted 21 pages from the memo and 17 pages from the presentation. Western Water and Mountain Water then filed an untimely motion for a protective order (the first protective order) seeking to keep the “confidential

information” out of the public’s hands.¹ The City of Missoula timely responded to that motion and incorporates that motion here by reference: The redacted information does not consist of trade secrets.

Now, nearly two months after the PSC served its data requests and more than a month after they first responded to those requests, Western Water and Mountain Water have filed a “supplemental” response and a second motion for a protective order seeking to keep key portions of that “supplemental” information hidden from the public. This “supplemental” response is not supplemental: It does not contain newly discovered information or information created after Western Water and Mountain Water first responded to the requests. It contains the same memo and presentation provided in the first response but also includes the several pages that were initially deleted.² In short, the “supplemental” response consists of complete, redacted copies of the memo and presentation that Western Water and Mountain Water previously provided. Western Water and Mountain Water should have provided complete copies in the first place, and they offer no explanation for why they waited until now to do so.

Western Water and Mountain Water’s supplemental response is yet another example of how they believe they’re calling the shots in this matter. They believe information is relevant only if they say so. They believe it is confidential if they say so.

¹ Western Water and Mountain Water’s first motion for a protective order was untimely because it was filed after they responded to the PSC’s data requests, in violation of Procedural Order No. 7392, ¶ 11: “If a data request asks for protected information, the responding party must file a motion for a protective order as soon as practicable, but no later than the deadline to respond to the data request.” For this reason alone, both the first motion for a protective order and this second motion should be denied.

² The information contained in the previously deleted pages relates to the finances, operations, capital investments, and projected growth of Park Central Basin and Apple Valley, the two California water utilities owned by Park Water Company. See WWH001352–WWH001373 (Project Orchard memo) and WWH001435–WWH001452.

And it will be produced only if they say so. The PSC has previously explained that Western Water and Mountain Water are not the arbiters of relevance or confidentiality. In its May 28, 2015 order, the PSC observed that Mountain Water and Western Water's discovery tactics have hampered the free flow of information through their creation of a protracted and demanding discovery process. (Order 7392d, ¶ 8.)

Western Water and Mountain Water's decision to capriciously withhold information from its first production and then now provide it without explanation prejudices the other parties in this matter. The "supplemental" production comes after the original deadline for the City to file its testimony and only two days before the extended deadline. It is not hard to imagine, then, how Western Water and Mountain Water's approach to discovery plays to their advantage: If they can initially withhold broad categories of information and then produce it only when ordered by the PSC or arbitrarily at a later date, as is the case with this "supplemental" production, then they control the other parties' access to that information and their capacity to use that information in this proceeding. The City, for example, still has no access to the broad categories of financial and investment information that Western Water and Mountain Water have withheld in response to dozens of data requests from the PSC, the City, and the Montana Consumer Counsel. The PSC has already deemed this information relevant. (*See, e.g.*, Order 7392d.) All the while, deadlines are passing in this matter without the City being able to participate as meaningfully as it should. In particular, the City has not been able to offer its witnesses' testimony and reserves the right to do so pending complete responses to their data requests and rulings from the PSC on the

outstanding motions for protective orders and motions to compel. What is more, given the delay the withholding has created, the PSC should stay these proceedings until complete responses are provided.

The supplemental response is improper, but the PSC should nonetheless deny the accompanying motion for a protective order. First, it is untimely. Western Water and Mountain Water should have provided this information more than a month ago, and they should have filed this motion for a protective order well before that. But they did not. (*See* Order No. 7392, ¶ 11: “If a data request asks for protected information, the responding party must file a motion for a protective order as soon as practicable, but no later than the deadline to respond to the data request.”)

Second, much like the supplemental response itself, the second motion for a protective order is not new. It is largely cut and pasted from the first motion and should be denied for the same reasons the first motion should be denied. The City therefore incorporates by reference its response to the first motion for a protective order.

Western Water and Mountain Water’s second production – the previously deleted pages – relates to the finances, operations, capital investments, and projected growth of Park Central Basin and Apple Valley, the two California water utilities owned by Park Water Company. *See* WWH001352–WWH001373 (Project Orchard memo) and WWH001435–WWH001452. Western Water and Mountain Water claim this information is confidential because:

[T]he Town of Apple Valley has indicated its intent to condemn Park Water's utility operations in Apple Valley. In this circumstance, information regarding any California water utility's financial performance, opportunities for growth, water sourcing strategies, or capital investment plans derives economic value (actual or potential) from not being known by the Town of Apple Valley nor readily ascertainable by proper means.

In short, according to Western Water and Mountain Water, the information has "independent economic value" because they say so. Where does the value of this information come from? How would it be independently valuable to a competitor? And how is the Town of Apple Valley a "competitor" in the first place?³ Western Water and Mountain Water make no attempt to answer these questions.

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 v. Mont.*

³ If Apple Valley does not attempt to condemn its water system, then it is not a competitor. If it does attempt to condemn the water system and is successful, then it would not be a competitor of Park Water because it would own that system. And if it is unsuccessful, it would not be a competitor because it would not own a water system. Apple Valley and Park Water would be competitors only if they each owned water systems serving the same market, and that simply is not possible.

PSC, 2003 MT 359, ¶ 62, 319 Mont. 38, 82 P.3d 876 (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.”

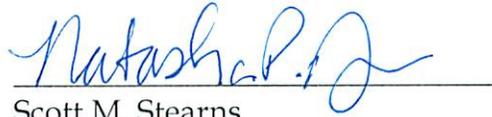
By making its requests for this information, the PSC has determined for itself that the information is relevant to the issues in this case. Western Water and Mountain Water offer no explanation to the contrary. The information that Mountain Water and Western Water have withheld does not contain trade secrets. Even if it does, Mountain Water and Western Water must, at a minimum, disclose the information to the PSC and the City.

CONCLUSION

While Western Water and Mountain Water’s “supplemental” response is improper, the PSC should nonetheless deny their second motion for a protective order for the same reasons their first motion should be denied. Both motions are untimely and, in both motions, Western Water and Mountain Water fail to provide any justification for why the redacted information consists of trade secrets. It does not. Regardless, that information should be provided to the PSC and the City in its complete, un-redacted form. The City should further be permitted to file supplemental

testimony once it receives that information, and the PSC should stay these proceedings until the City receives the information.

Dated this 2nd day of June 2015.



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CERTIFICATE OF SERVICE

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**ORIGINAL SENT VIA OVERNIGHT
DELIVERY**


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