

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

IN THE MATTER OF THE JOINT
APPLICATION FOR APPROVAL TO
CHANGE AND ESTABLISH NATURAL
GAS DELIVERY SERVICE RATES FOR
ENERGY WEST MONTANA, INC. AND
CUT BANK GAS COMPANY

UTILITY DIVISION
Docket No. D2017.9.80

MOTION FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT

Energy West Montana, Inc. (“EWM”) and Cut Bank Gas Company (“CBGC”) (collectively, the “Joint Applicants”), by and through their counsel, Holland & Hart LLP, respectfully submit this Motion for Protective Order and Brief in Support (“Motion”) to the Montana Public Service Commission (“Commission”). Pursuant to Administrative Rules of Montana (“ARM”) 38.2.5001 through 38.2.5030, the Joint Applicants respectfully ask the Commission to issue a protective order to govern the use and disclosure of certain state and federal income tax returns requested in discovery in this proceeding. As the Commission has previously recognized, these tax returns are confidential as a matter of law.

I. INTRODUCTION

On January 25, 2018, the Joint Applicants received data requests PSC-060 through PSC-107 from the Commission staff. Responding to PSC-079 will require the production of state and federal tax returns, and the Joint Applicants seek a protective order from the Commission to preserve the confidentiality of this information.

The Joint Applicants have considered that the Commission is a public agency and that there is a presumption of access to documents and information in the Commission’s possession.

The Joint Applicants understand that they have the burden of demonstrating that the identified information is confidential information and they must, with this Motion, establish a *prima facie* showing of confidentiality and make clear the basis for the claim of confidentiality. In this Motion, the Joint Applicants have overcome the presumption that the public should have unrestricted access to the state and federal tax returns at issue and have established a *prima facie* showing of confidentiality.

II. CONTACT PERSONS

The contact persons regarding this Motion and regarding items to be protected are:

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III. IDENTIFICATION OF THE CONFIDENTIAL INFORMATION

With this Motion, the Joint Applicants seek a protective order to preserve the confidentiality of their 2014, 2015, and 2016 federal and state income tax returns, requested in PSC-079. This Commission has consistently recognized that tax returns are confidential as a matter of law.¹

IV. LEGAL BASIS FOR PROTECTION

In PSC-079, the Commission staff requested copies of the Joint Applicants 2014, 2015, and 2016 federal and state income tax returns. Corporate income tax returns are expressly made

¹ See e.g., Order No. 7251a in Docket No. D2012.7.81; Order No. 7249a in Docket No. D2012.9.94; Order No. 7392a in Docket No. D2014.12.99; and Order No. 7573a in Docket No. D2017.9.79.

confidential under both Montana and federal law,² and thus should be treated as confidential information as a matter of law in this proceeding.

Federal law expressly prohibits an employee of the State of Montana from publicly disclosing federal income tax returns or information contained within federal tax returns. 26

U.S.C. § 6103 provides:

(a) General rule. Returns and return information shall be confidential, and except as authorized by this title – (2) no officer or employee of any State, any local law enforcement agency receiving information under subsection (1)(7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (1)(7)(O) who has or had access to returns or return information under this section...shall disclose any return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term “officer or employee” includes a former officer or employee.”

Under this same federal statute, the definition of “return information” includes:

a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense...³

Thus, the tax return at issue is confidential as a matter of federal law. Similarly, Montana's tax code contains a provision which requires the confidential treatment of tax records, including federal tax return information required to be disclosed by the State of Montana.

Section 15-31-511(1) of the Montana Code states:

Except as provided in this section, in accordance with a proper judicial order, or as otherwise provided by law, it is unlawful to divulge or make known in any manner: (a) the amount of income or any particulars set forth or disclosed in any

² Section 15-31-511(1) MCA, and 26 USC § 6103(a).

³ 26 U.S.C. § 6103(b)(2)(A).

return or report required under this chapter or any other information relating to taxation secured in the administration of this chapter; or (b) any federal return or information in or disclosed on a federal return or report required by law or rule of the department under this chapter.

Because Montana law requires confidential treatment of “the amount of income or any particulars set forth or disclosed in any return or report” as well as “any federal return or information in or disclosed on a federal return,” the Commission must take the necessary action to protect the Joint Applicants’ tax returns from public disclosure.

The Montana Supreme Court has expressly recognized that the Commission must protect confidential information under a protective order where “the data is protected from disclosure elsewhere in the federal or state constitute or by statute.”⁴ Here, the tax returns at issue are afforded status as confidential information under both federal and state law, and the Commission “has consistently protected Montana and federal income tax returns...”⁵ Therefore, the Commission must take measures in this proceeding to protect the Joint Applicants’ state and federal tax returns from public disclosure by granting the requested protective order to maintain the confidentiality of the documents sought in PSC-079.

V. WAIVER OF ARM 38.2.5007(3)(c)

The Joint Applicants have not filed with this motion an affidavit by a qualified person explaining the “specific factual basis” that supports the claim of confidentiality, as required by ARM 38.2.5007(3)(c), because the federal and state tax returns are confidential and subject to protection as a matter of law. Therefore, no factual justification is required and waiver of the requirements in ARM 38.2.5007(3)(c) is appropriate. And the Commission has previously

⁴ *Great Falls Tribune v. Mont. Public Service Comm’n*, 82 P.3d 876 (Mont. 2003)

⁵ Order No. 7251a at ¶ 2, Docket No. D2012.7.81.

waived the affidavit requirement in ARM 38.2.5007(3)(c) for protective orders for state and federal tax returns.⁶

VI. CONCLUSION

For the reasons set forth above, the Joint Applicants respectfully request the Commission grant this Motion. In addition, the Joint Applicants respectfully ask the Commission waive the affidavit requirement under ARM 38.2.5007(3)(c), as the protection and confidentiality of tax returns is a matter of law.

Respectfully submitted this 8th day of February, 2018.

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⁶ See e.g., Docket No. D2014.12.99, Order No. 7392a at ¶ 13.

CERTIFICATE OF SERVICE

I hereby certify that on this, the 8th day of February, 2018, the Joint Applicants' **MOTION FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT** was filed with the Montana PSC and served via U.S. Mail and/or e-mail, unless otherwise noted, to the following:

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