

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

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IN THE MATTER OF the Application of) REGULATORY DIVISION
AquaFlo, LLC, for Authority to Permanently)
Increase Rates and Charges and Amend Tariff) DOCKET NO. D2011.4.34
Rules and Regulations for Water and Sewer)
Service to its Helena, Montana, Customers)

**MOTION OF THE MONTANA CONSUMER COUNSEL FOR
ACCEPTANCE OF REPLY, OBJECTION AND REPLY TO OBJECTIONS OF
AQUAFLO, LLC, TO DATA REQUESTS**

In April 2011, AquaFlo, LLC (AquaFlo), filed an application to raise its rates and amend its rules. The Montana Consumer Counsel (MCC) intervened, participated in an on-site audit and on September 7, 2011, issued data requests MCC-001 – MCC-022 to AquaFlo. Under Order No. 7171, ¶¶ 12-13, the procedural order in this docket, objections to data requests were due to be filed seven business days after the data requests were filed, and data responses were due on September 21, 2011. AquaFlo asked for an extension of time to respond to data requests. MCC did not oppose the extension. Staff extended the deadline and temporarily suspended the procedural schedule. Notice of Staff Action, September 30, 2011. Then, on November 16, 2011, AquaFlo provided responses to the MCC data requests, including one objection, and failed to respond to one request. Because the procedural order was suspended, there was no effective deadline for MCC’s objection and reply.

I. MOTION FOR ACCEPTANCE OF OBJECTION AND REPLY

Therefore, MCC moves that the Commission accept the accompanying objection and reply to objections. Staff has told MCC that it will bring a work session in early January to consider objections to various Commission data requests, and that it will propose a new schedule for processing this case. MCC asks the Commission to accept this pleading and hopes that it will assist the Commission in evaluating the current discovery disputes.

II. OBJECTION TO DATA RESPONSE AND REPLY TO OBJECTION

A. Objection to Data Response MCC-002.

In data request MCC-002, MCC asked for an indication of whether any individual providers of contracted services to AquaFlo personally, or through ownership/membership of any legal entity have a direct or indirect interest in AquaSierra, LLC. The data request was directed to John Maxness, manager of AquaFlo. AquaFlo responded in part that Mr. Maxness is not a witness in this case, and asked that the data request be redirected to its witness Sandra Barrows.

MCC objects to this portion of the response to MCC-002. Although Mr. Maxness is more likely to have the requested information, AquaFlo itself can redirect the data request and provide the information to Ms. Barrows to respond. AquaFlo should not be permitted to evade an answer because MCC asked a question of the utility manager who may or may not become a witness in this proceeding. MCC asks the Commission for an order compelling a response.

B. Response to Objection to MCC-002.

In addition, AquaFlo objected to MCC-002 as irrelevant and beyond the scope of this proceeding, claiming that whether providers of contracted services have an interest in AquaSierra is irrelevant to this proceeding and that the data request is not likely to lead discoverable evidence.¹ According to AquaFlo, the scope of this proceeding is limited to whether it can make certain adjustments to its rates for water and wastewater service. On the contrary, however, whether or not contracted services are being provided by related parties is relevant and speaks directly to the scope of this proceeding as it is defined in the objection.

The specter of a related party transaction calls into question the need for and the level of expense associated with a service provided by a related party, expense that the applicant expects to recover from its ratepayers. In a non-arm's length transaction, additional Commission

¹ The objection misstates the applicable standard. Rule 26 (b) (1), M.R.Civ.P., states in part: "The information sought need not be admissible at the trial if the discovery appears calculated to lead to the discovery of *admissible* evidence" (emphasis added).

scrutiny is called for to protect consumers and the public interest in the determination of whether, and to what extent, AquaFlo should be authorized to make certain adjustments to its rates.² The Commission cannot give additional scrutiny to information it does not have.

The objection also states that AquaSierra is not a party to this proceeding and is not a public utility as defined by law, then argues that if MCC wants information relevant to this proceeding from AquaSierra, it should subpoena AquaSierra pursuant to the Rule 45, M.R. Civ.P. Data request MCC-002, however, is not asking for information about AquaSierra itself. It is asking whether or not any providers of contracted services to AquaFlo, the utility, have a direct or indirect interest in AquaSierra, AquaFlo's owner. This is surely information in the possession of the utility, subject to more intense scrutiny than normal by the Commission, and highly relevant to the issues in this rate case. It is placing form over substance to refuse to provide the requested information because AquaSierra is not a public utility. This is about affiliate transactions that may adversely affect ratepayers, and the information is typically and necessarily admissible as part of rate case deliberations before this Commission. The Commission should overrule the objection to MCC-002 and compel a response.

III. RESPONSE TO OBJECTION TO DATA REQUEST MCC-005.

Data Request MCC-005 asked for copies of any audit reports produced concerning AquaFlo or its parent AquaSierra since the inception of AquaFlo in 2007. In response, AquaFlo said that no audit reports had been produced for the utility, and it is not in possession of any audit reports for AquaSierra that may have been prepared by or for AquaSierra. AquaFlo objected, as it did with respect to MCC-002, that the information sought is irrelevant to this proceeding, which relates to whether it can adjust certain rates for water and wastewater service; that the aspect of the data request that pertains to AquaSierra is outside the scope of this case; that any response by AquaFlo would be unlikely to lead to discoverable evidence;³ AquaSierra is not a

² See *Montana-Dakota Utilities Co. v. Bollinger*, 193 Mont. 508, 513, 632 P. 2d. 1086, 1089 (1981) (“When one of the expenses submitted by MDU is caused by transactions with a subsidiary company, the scrutiny applied by the Commission must be all the more intense”(citations omitted)).

³ See footnote 1.

public utility and is not a party; and that if MCC wants information about AquaSierra, we should subpoena it pursuant to Rule 45, M.R.Civ.P.

The argument that the information sought is irrelevant and not likely to lead to “discoverable” evidence is spurious. The audit reports, if they exist, should contain the audited financial statements. In all utility rate cases, it is common to investigate the source of the funds used to finance the rate base. This is because it goes to the question of what return the ratepayers should pay and the utility investors should receive. For example, any customer-contributed capital is subtracted from rate base because those are not funds attributable to investors for which they should receive a return. Double leverage was historically an issue that helped to spawn concerns over public utility holding companies. The fact scenario in this case serves to heighten concerns regarding the source and nature of the funds used to finance the AquaFlo rate base. Shortly after the end of the last test year, AquaSierra paid off all of AquaFlo’s debt as indicated in the response to PSC-014. The Commission needs to know whether that money was equity capital or money borrowed from another party.

Before embarking on conceptual arguments about capital structure, it is useful to know the actual capital structure as a starting point. In addition, there is the problem that significant financial transactions (the debt payoff) are not fully reflected on the books of AquaFlo. Audited financial statements of AquaSierra would help to provide not only a complete financial picture, but also indicate how reliable the records of the parent company were found to be by an independent auditor. If such audits do not exist, then the Commission can be alerted that AquaFlo’s petition for new rates is tenuously supported by partially unverifiable financial information. This information is not only relevant, but also directly related to the scope of this proceeding. The Commission should overrule the objection and compel a response.

IV. CONCLUSION.

For the foregoing reasons, the Commission should grant this motion, sustain MCC’s objection to the response to MCC-002, overrule AquaFlo’s objections to MCC-002 and MCC-005 and compel responses to MCC-002 and MCC-005.

Respectfully submitted January 3, 2012.

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