

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

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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)	

**LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.’S RESPONSE TO THE CITY
OF MISSOULA’S MOTION TO COMPEL PRODUCTION OF DOCUMENTS
WITHHELD IN RESPONSE TO DATA REQUESTS PSC-031 TO PSC-033(B).**

Pursuant to Procedural Order No. 7392, Liberty Utilities Co. (“Liberty Utilities”) and Liberty WWH, Inc. (“Liberty WWH”) (collectively, “Liberty”), by and through their counsel, respond to the City of Missoula’s (“City”) motion to compel Liberty to produce documents responsive to PSC Data Request 033(b).¹ Liberty requests the Commission deny the City’s motion because it is not supported by Montana law, the Commission’s rules or Procedural Order No. 7392.

FACTUAL AND PROCEDURAL BACKGROUND

On April 2, 2015, the Commission propounded a number of data requests for Liberty and Western Water Holdings, LLC (“Western Water”) to produce a variety of documents. Specifically, PSC Data Request 033(b) asked Liberty to provide “the financial analysis that was

¹ As an initial matter, Liberty disputes that the City may rely on paragraph 14 of Procedural Order No. 7392 and file a motion to compel. Paragraphs 11 and 14 of Procedural Order No. 7392 govern the filing of motions to compel before the Commission in this docket number, and limit such motions to “requesting” or “discovering” parties. *See* Order 7392, ¶¶ 11, 14. For purposes of PSC data request 033(b), the City was neither the requesting nor discovering party, so has no authority to move for a motion to compel. To the extent the City was authorized to file a motion to compel, the City failed to satisfy the “meet and confer” obligations imposed by Montana Rule of Civil Procedure 37(a)(1), which the Commission has adopted. *See* Admin. R. Mont. 38.2.3301(1). However, based on prior staff action on a similar motion, and given the likelihood this same issue will recur regarding other discovery objections Liberty lodged, Liberty provides this substantive response in an effort to facilitate a prompt resolution of this issue.

done in conjunction with Algonquin's/Liberty's due diligence, including but not limited to projected financial results (e.g., income statements, balance sheets, cash flow)."

Liberty provided responses to various data requests, including PSC Data Request 033(b), on April 21, 2015. In its responses to PSC Data Request 033(b), Liberty objected that the information requested was not discoverable. Liberty's objection was expressly authorized by ¶ 11 of Procedural Order No. 7392. That provision establishes that "**a party may file an objection to a data request** by the deadline to respond," provided that the objection is "based on discoverability." Procedural Order No. 7392, ¶ 11 (emphasis added). The Commission also required that objections "be sufficiently specific **for the Commission to adequately rule on whether to sustain or object**." Procedural Order No. 7392, ¶ 11 (emphasis added).

Liberty satisfied ¶ 11 of Procedural Order No. 7392 because its objection was sufficiently specific to allow the Commission to rule on Liberty's objection. Liberty objected to PSC Data Request 033(b) as follows:

Response: Liberty objects to this request because it seeks information which is not relevant to this matter and is protected from disclosure as confidential and containing proprietary trade secrets. Liberty's due diligence work papers and financial projections are not relevant because they have no impact on Mountain Water's consumers. **The documents are not tied to the service consumers will receive, the operations of Mountain Water, or the rates consumers will pay. Moreover, Liberty's internal valuation will not affect Mountain Water's rates or the level of service, as stated in Liberty's application, because Liberty does not intend to seek an acquisition adjustment to the existing rate base.** Regardless of these considerations, all future rate changes will be subject to the Commission's review and approval. **Accordingly, this request seeks information that has no bearing on the Commission's decision in this matter, and as such seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible information.**

The requested information is also protected from disclosure because it is proprietary and contains confidential trade secrets. Liberty's due diligence efforts, including any financial analyses of potential investments, are based upon years of research and investment at a substantial cost to Liberty Utilities. The underlying financial and other analyses and overall bid strategy and methodologies that

Liberty implements in responding to solicitations relating to the sale of regulated utilities are proprietary and contain confidential trade secrets. Moreover, compelling winning bidders to disclose their successful strategy will necessarily have a chilling effect on the participation in the market of future offerings of utility assets. Disclosure of such information, even under seal, would be harmful to the business interests of Liberty, because both the seller and the City of Missoula are parties who potentially could obtain these materials, and the Commission cannot provide certainty that information produced, even under protective order, would not be subject to disclosure on challenge by a party or outside interested party.

Liberty's Response to PSC Data Request 033(b) (April 21, 2015) (emphasis added).

To date, the Commission has not ruled on whether it will "sustain or object" to Liberty's objection, as contemplated by Procedural Order No. 7392, ¶ 11. Similarly, the Commission has not decided whether it will "schedule oral argument before ruling on [Liberty's] objection."

Procedural Order No. 7392, ¶ 11. In any event, the Commission alone is responsible for ruling on Liberty's objection pursuant to the terms of Procedural Order No. 7392. *Id.*

On April 28, 2015, the City filed a motion asking the Commission to compel Liberty to produce the documents requested in PSC Data Request 033(b). The City did not fulfill its obligation to "meet and confer" with Liberty or identify the legal authority that permitted the City to file its motion to compel. Instead, the City generally asserted: (1) that Liberty had no procedural right to object that the documents requested were irrelevant, and thus non-discoverable; and (2) that the Commission instead should order Liberty to file a motion for protective order because Liberty's relevance objection should be addressed as a request to protect confidential information. There is no legal or procedural support for the City's assertions.

LEGAL ARGUMENT

I. THE COMMISSION SHOULD SUSTAIN LIBERTY'S OBJECTION TO DATA REQUEST PSC-033(B) BECAUSE THE REQUESTED INFORMATION IS NOT RELEVANT TO THE COMMISSION'S REVIEW IN THIS MATTER.

The Commission's legal authority, including its authority to compel discovery, is limited by statute. *See State v. Mathis*, 2003 MT 112, ¶ 15, 315 Mont. 378, 68 P.3d 756 (although Legislature may delegate power to agencies, "it must provide . . . limitations upon the agency's discretion" as required by Montana Constitution). As the Commission has noted, its authority to "supervise and regulate the operations of public utilities" is both created and limited by a Legislative grant of power. PSC Docket D2011.1.8, Order No. 7149(d), ¶ 49 (December 14, 2011) (citing Mont. Code Ann. §§ 69-1-101, *et. seq.*).

In the context of considering a proposed merger or acquisition involving a Montana utility, the Commission has interpreted its authority as follows:

The Commission has jurisdiction over and must approve any sale or transfer of a public utility, its assets, or utility obligations in order to assure generally that utility customers will receive adequate service and facilities, that utility rates will not increase as a result of the sale or transfer, and that the acquiring entity is fit, willing, and able to assume the service responsibilities of a public utility.

PSC Docket D2011.1.8, Order No. 7149(d), ¶ 51. Thus, the Commission's review in this docket is limited to: (1) assuring adequacy of service and facilities; (2) assuring rates will not increase as a result of the sale; and (3) assuring that Mountain Water will remain fit, willing, and able to provide its service responsibilities after Liberty's acquisition. The information requested by the Commission in PSC Data Request 033(b) is not relevant, and thus not discoverable, because the requested information will not assist with any of the three foregoing tasks the Commission engages in when reviewing proposed utility sales.

The Commission's authority to compel production of documents is expressly limited by Montana law. Citing Montana Code Annotated § 69-3-106, the Montana Supreme Court has held that the Commission "has the right to obtain from any public utility all necessary information to enable the PSC to perform its duties." *Mountain States Tel. & Tel. Co. v. Dep't of Pub. Serv. Regulation*, 194 Mont. 277, 284-85, 634 P.2d 181, 186 (1981) (overruled on other grounds by *Great Falls Tribune v. Montana Pub. Serv. Comm'n*, 2003 MT 359, 319 Mont. 38, 82 P.3d 876) (emphasis added). Thus, both the Montana Legislature and the Montana Supreme Court have determined that the Commission can compel Liberty to produce documents only if those documents are necessary to allow PSC to perform its authorized duties.

The Commission has adopted Montana Rule of Civil Procedure 26 through the Administrative Rules of Montana. *See* Admin. R. Mont. 38.2.3301(1). Rule 26 generally provides that "parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense." Relevant evidence is defined by Montana Rule of Evidence 401 to be "evidence having 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." The Montana Supreme Court has interpreted this rule to mean that "whatever naturally and logically tends to establish a fact in issue is relevant and that which fails to qualify is not relevant." *Monaco v. Cecconi*, 180 Mont. 111, 119, 589 P.2d 156, 161 (1979).

The relevance and discoverability of information must be determined within the context of a particular case. In this case, the Commission cannot compel Liberty's internal due diligence analyses because the information does not "naturally and logically" assist the Commission in determining adequacy of service or facilities, impact on rates or fitness of the utility. There is simply no legal basis for the City's assertion that the analyses must be produced because "PSC

and the Missoula community need to know whether the proposed sale is a good deal or a bad deal.”² City’s Motion to Compel, p. 3. As a result, the City’s unsupported desire to make a determination of whether this is a “good” or “bad” deal, cannot expand the scope of the material discoverable under the Commission’s narrow review of this transaction. Liberty has not produced its internal proprietary and confidential valuation analyses in any prior utility acquisitions and no other regulatory commission has required Liberty to produce such confidential and proprietary materials as part of any regulatory approval docket. This Commission should not either.

The Commission can complete its review of the proposed transaction without the requested financial analyses and other irrelevant trade secrets. The Commission is well acquainted with Mountain Water’s current level of service and facilities, as well as its fitness as a utility. Because Liberty intends to leave Mountain Water’s entire local team and system intact, Liberty’s internal financial model prepared in due diligence is irrelevant to the Commission’s consideration of the first and third factors of the Commission’s review. Liberty’s commitment not to seek an acquisition adjustment resolves the issue of potential impact of the transaction on rates. The impact of Liberty’s ownership will be dealt with fully in future rate cases, but even then, its performance and actual costs and expenses, not its hypothetical pre-acquisition financial projections, will impact rates. As a result, under well-settled Montana law, Liberty’s proprietary and confidential internal financial analyses and models are irrelevant and, thus, non-discoverable because they will not assist the Commission’s review in this matter.

² The City’s stated desire to evaluate the “deal” suggests it is looking for an opportunity to conduct additional discovery relative to the potential damages phase of its condemnation case against Mountain Water, rather than seeking information relevant to its participation in this case. Discovery in the condemnation case is closed, and the Commission should not allow the City to conduct additional discovery in this forum.

II. THERE IS NO LEGAL BASIS FOR REQUIRING LIBERTY TO FILE A MOTION FOR PROTECTIVE ORDER REGARDING NON-DISCOVERABLE, IRRELEVANT INFORMATION.

Put simply, Liberty’s internal, proprietary and confidential financial analyses are non-discoverable because they are irrelevant. In its motion, the City argues that assertions of irrelevance must be addressed by determining whether the information is confidential on a motion for a protective order. The City goes as far as to suggest that “Liberty’s outright refusal to provide the information requested by the PSC—without first moving for a protective order—is a blatant affront to the PSC’s rules.” City’s Motion to Compel, p. 5. Montana law simply does not support the City’s position.

Under the administrative rules applicable to the Commission, confidential information may be protected if a party files a motion for a protective order. *See* Admin. R. Mont. 38.2.5001 – 5031. Those rules are only applicable to **relevant** information, however. Rule 38.2.5002 makes it clear that the Commission’s rules regarding protective orders only “apply to confidential **information necessary to commission regulation and decision-making.**” Admin. R. Mont. 38.2.5002(4) (emphasis added). This administrative rule shows that there is a clear distinction between non-discoverable, irrelevant information, and relevant confidential information protectable by protective order; the Commission’s rules on protective orders only apply to relevant information the Commission needs to undertake its limited regulatory review. Contrary to the City’s unsupported assertions, the Commission must determine whether the requested information is relevant and discoverable **before** Liberty could properly move for a protective order. *See* Admin. R. Mont. 38.2.5002(4).

Furthermore, the City’s allegation that Liberty violated the Commission’s rules by objecting to the discoverability of requested data is demonstrably incorrect. The Commission

has expressly authorized Liberty to object to the discoverability of requested data. Procedural Order No. 7392, ¶ 11 (“a party may file an objection to a data request” if that objection is “based on discoverability”). Liberty should not be punished for exercising that right.

III. ALTHOUGH THE COMMISSION MUST DETERMINE WHETHER THE INFORMATION REQUESTED IN DATA REQUEST PSC-033(B) IS RELEVANT BEFORE LIBERTY MAY FILE A MOTION FOR PROTECTIVE ORDER, LIBERTY IS OBLIGATED TO FIGHT TO PROTECT ITS PROPERTY RIGHTS TO THE FULLEST EXTENT POSSIBLE.

The information requested in PSC-033(b) is Liberty’s proprietary and confidential information, fully protected by Article II, § 3 of the Montana Constitution. *See Williams v. Bd. of Cnty. Comm’rs of Missoula Cnty.*, 2013 MT 243, ¶ 74, 371 Mont. 356, 308 P.3d 88 (Liberty enjoys “the inalienable right of lawfully ‘acquiring, possessing and protecting property’”) (quoting Mont. Const. Art. II, § 3). The Fifth Amendment to the United States Constitution also protects Liberty’s proprietary rights. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004, fn. 9, 104 S. Ct. 2862, 2873, fn. 9 (1984)(holding that “a trade secret is property protected by the Fifth Amendment”). As a result, the Commission must make an initial determination regarding the discoverability of proprietary and confidential information before ordering its production to avoid violating Liberty’s constitutional and property rights.

Over many years and through many acquisitions, Liberty has developed a proprietary and confidential financial model used by Liberty in potential utility acquisitions. Liberty has spent substantial resources and money developing that model and that proprietary model provides an economic advantage over competitors as Liberty continues to engage in competitive bidding processes with a view to ultimately investing in and owning utility companies throughout North America. To build this proprietary and confidential model, Liberty has retained various financial experts over many years at considerable cost and expense to Liberty. Those financial experts

created the model based on their unique knowledge and experience and by integrating Liberty's trade secrets, including its proprietary valuations and assumptions. Liberty has invested considerable time, resources and expenses in creating, developing and refining this model. If Liberty's proprietary and confidential financial model were to fall into the hands of a competitor or other interested parties, such competitor or other party could reverse engineer Liberty's financial model and use that model to Liberty's economic disadvantage in future acquisitions and/or competitive bid processes, depriving Liberty of its proprietary trade secrets, its investment cost in the model and its opportunity cost and loss in acquiring future additional utilities.

While the Commission's rules and procedures offer a level of protection for confidential information it must require a company to submit, they do not require submission of all materials regardless of relevance or discoverability. As outlined above, the threshold determination for a relevance objection must be whether the information sought is actually relevant to, or will lead to the discovery of information relevant to, the Commission's review in a particular docket.

If the Commission determines that the information solicited in PSC-033(b) is relevant and discoverable, Liberty reserves its right to: (1) fully appeal that decision as allowed by Montana law; and/or (2) file a motion for a protective order to protect Liberty's confidential trade secrets. Although such a course of action may seem extreme, Liberty is obligated to fight to protect its property rights, or risk waiving them. The United States Supreme Court has held that "because of the intangible nature of a trade secret, the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others." *See Ruckelshaus*, 467 U.S. at 1002. For these reasons, Liberty is obligated to and fully intends to protect its proprietary and confidential information.

CONCLUSION

Liberty has pledged that it will not seek an acquisition adjustment to the existing rate base if the Commission approves the proposed transaction, and that Mountain Water's ratepayers will not be responsible for any premium that Liberty may have paid to acquire WWH. For the foregoing reasons, Liberty respectfully requests the Commission to engage in the process outlined in paragraph 11 of Procedural Order No. 7392, determine that the information solicited in PSC Data Request 033(b) is not relevant to the Commission's limited powers of regulatory review of proposed utility sales and, in turn, deny the City's motion.

Submitted this 8th day of May, 2015.

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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on May 8th, 2015, the foregoing LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.'S RESPONSE TO THE CITY OF MISSOULA'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS WITHHELD IN RESPONSE TO DATA REQUESTS PSC-031 TO PSC-033(B) was served via electronic and U.S. mail on:

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