

**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 COMBINED REPLY IN SUPPORT OF ITS MOTION TO
COMPEL PRODUCTION OF DOCUMENTS WITHHELD IN RESPONSE TO
DATA REQUESTS PSC-031(a) AND PSC-033(b)**

I. Western Water and Mountain Water’s response to PSC-031(a)

In PSC-031(a), the PSC requested that Carlyle and Western Water provide internal and external analyses related to the tax, bond indenture, and regulatory implications of a potential sale of Mountain Water to the City:

On pages 6-7 of your [Robert Dove’s] testimony, you state that Carlyle Infrastructure and Western Water conferred with outside experts as well as conducted internal analysis to evaluate the tax, bond indenture, and regulatory implications of a potential sale of Mountain to the City. Please provide any and all written evaluations provided to Carlyle and/or to Western Water that are associated with this external and internal evaluation process.

PSC-031(a).¹ With the exception of a two-line e-mail, Western Water and Mountain Water refused to provide the requested information, claiming it is irrelevant and

¹ In its response brief, Western Water and Mountain Water write: “[I]t should be apparent to the Commission that the City is abusing the Commission’s discovery process as a means to obtain additional information to support its condemnation

privileged. The information is relevant, though, which is why the PSC asked for it in the first place. To the extent Western Water and Mountain Water claim it is privileged, they must provide a privilege log under Rule 26(b)(6)(A).

Evidence is relevant under Montana law 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.” Mont. R. Evid. 401; Admin. R. Mont. 38.2.4201(1). The “basic standard of relevance is a liberal one;” it is not construed narrowly, as Western Water and Mountain Water suggest. *State v. Stewart*, 2012 MT 317, 367 Mont. 503, 291 P.3d 1187 (citations and internal quotation marks omitted).

In the single e-mail that Western Water and Mountain Water provided, Robert Dove indicated that a “Park Water advisor/agent” had calculated that, if Carlyle sold Mountain Water to the City, Carlyle would incur: “(1) Estimated tax on gains, at a 40% rate, is \$18.6 million; (2) Make-whole premium on the \$52 private placement bonds is \$27 million.” (WWH001080.) In other words, Carlyle seemed to be suggesting that it stood to take a financial loss if it sold Mountain Water to the City rather than selling it to a private corporation as a package deal along with the two California water systems.

These calculations and analyses – not to mention Carlyle’s response to those calculations and analyses – are relevant because they show Carlyle’s true motivation for selling Mountain Water to Liberty. Liberty was courted by Carlyle as a bidder not

effort.” (Western Water & Mountain Water Response Br., p. 2.) The City is not “abusing” the discovery process. The City did not serve the data request at issue. The City is simply asking Western Water and Mountain Water to fully respond to the PSC’s data requests by providing information that the PSC has already determined is relevant to this matter.

because it is best suited to own Missoula's water system or because it is in the best position to fix the system's epidemic leaks. It is at the table because it is big enough and has deep enough pockets to buy Mountain Water in a package deal along with the two California water systems. These calculations and analyses certainly have a "tendency" to show that Carlyle is more interested in protecting its shareholders' investments and collecting handsomely from this proposed sale rather than meeting the needs of the people of Missoula or its water system.

Regardless of whether the PSC's decision is based on the public interest, no harm, or net-benefit-to-customers standard, the internal and external analyses of the "tax, bond indenture, and regulatory implications of a potential sale of Mountain to the City" are relevant to that decision. That is precisely why the PSC requested the analyses in the first place. The analyses show that Carlyle prioritizes its shareholders' interests and benefits over the public's interest and benefit.

Since the information is relevant, Western Water and Mountain Water must produce it, as the PSC has requested. To the extent they claim it is confidential, they must file a protective order. Admin. R. Mont. 38.2.5007(1). To the extent they claim it is privileged, they must provide a privilege log. Mont. R. Civ. P. 26(b)(6)(A).

II. Liberty's response to PSC-033(b)

In request PSC-033(b), the PSC requested Liberty to provide "the financial analyses that was 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)." This request makes perfect sense. How else could the PSC gain insight into Liberty's future financial plans for Mountain Water but to examine

Liberty's "projected financial results" including its "income statements, balance sheets, [and] cash flow?"

In response to the request, though, Liberty refuses to provide the information. Liberty claims the PSC is wrong: The value of Mountain Water and the projected financial health of the water system under Liberty's ownership simply are not relevant. What is more, Liberty argues that information consists of "confidential trade secrets." Neither argument is convincing.

A. The requested information is relevant.

The PSC made its request for a simple reason—because the information is clearly relevant to the PSC's investigation into whether it should approve the proposed sale, regardless of what standard it applies. *See e.g.* Docket No. 2011.1.8, Order 7149d (¶¶ 52–53, discussing the public interest, no harm, and net benefit to customers standards).

If Liberty truly does not believe that "projected financial results," such as "income statements, balance sheets, [and] cash flow" will assist the PSC in determining whether Liberty will be able to provide "adequate service," then Liberty has no business operating Missoula's water system (or any utility for that matter). Liberty's capacity to provide "adequate service" in the future and to be "fit, willing, and able to assume the service responsibilities of a public utility" fundamentally depends on its financial health and priorities going forward. *See* Order 7149d, ¶ 51. For example, where, as here, Mountain Water and its corporate parents are now providing inadequate service by wasting more water than they deliver to the people of Missoula, the PSC must determine whether the sale will result in a "net benefit" to the customers.

Id. Will Liberty's and Mountain Water's financial future allow it to fix epidemic leaks throughout the water system in order to benefit the people of Missoula?

Liberty's internal financial projections and due diligence would answer this and other critical questions. Importantly, those analyses would shed light on its strategic objectives for Mountain Water. It would reveal, for example, Liberty's and Mountain Water's financial priorities going forward – including whether capital improvements will continue to take a back seat to shareholder dividends and payouts.

What is more, Liberty says its financial projections are not relevant because Liberty claims it will not seek an acquisition adjustment as a result of the proposed sale. But Liberty is tellingly silent on whether it will seek future rate increases as a result of the sale. Instead, borrowing from the failed Wizard of Oz argument, Liberty claims the PSC should pay no attention to what's behind the curtain: "The impact of Liberty's ownership will be dealt with fully in future rate cases" (Liberty Response Br., p. 6.) The people of Missoula deserve to know whether they are getting a bad deal before the deal is made, not in future rate cases when Liberty tries to recoup its purchase price by raising rates and ignoring much needed maintenance and repairs.

All this being said, the question of relevancy is far less complex than Liberty's ten pages of argument would suggest. If the financial projections and due diligence were not relevant to the proposed sale, why would Liberty have done them in the first place? The analyses are relevant, and that is precisely why Liberty did them. And it is why the PSC made the data request. The PSC should therefore compel Liberty to immediately provide the requested information.

B. Liberty must either publicly provide the information or move for a protective order.

This much is clear: Liberty cannot unilaterally withhold relevant information on the basis of “confidentiality” without first moving for a protective order. Admin. R. Mont. 38.2.5007(1); Order No. 7392c. Liberty does not and cannot dispute this point. Instead, Liberty claims the PSC must first make the threshold determination of whether the requested information is relevant before Liberty will move for a protective order. For the reasons above, the requested information is relevant. Liberty must follow the PSC’s administrative rules by publicly disclosing the information or moving for a protective order.

In its response brief, Liberty claims it is “reserv[ing] its right” to take an “extreme” “course of action” by appealing the PSC’s decision or moving for a protective order. (Liberty Response Br., p. 9.) That “course of action” is not “extreme.” Moving for a protective order is precisely what the rules require, and it is what Liberty should have done all along. If Liberty truly believes the information is confidential, then it must move for a protective order under Admin. R. Mont. 38.2.5007. To the extent that decision is appealable, Liberty can appeal it. While perhaps lacking in merit, that course of action is the opposite of “extreme” – it is precisely what is expected under the PSC’s rules.

CONCLUSION

For the reasons above, the City of Missoula requests the PSC to issue an order (1) compelling Mountain Water and Western Water to provide any documents withheld in response to PSC-031(a) or provide a privilege log for documents withheld on the basis

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail and email upon the following counsel of record at their addresses this 13th day of May 2015:

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of attorney-client privilege; and (2) compelling Liberty Utilities Co. and Liberty WWH, Inc. to produce the documents withheld in response to PSC-033(b).

Dated this 13th day of May 2015.



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