

**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
MONTANA CONSUMER COUNSEL’S MOTION TO COMPEL**

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 Montana Consumer Counsel’s (“MCC”) motion to compel Liberty to produce documents responsive to Data Request MCC-010.¹ Liberty incorporates by reference all arguments raised in its May 8, 2015 response to the City of Missoula’s similar motion to compel. Liberty requests the Commission deny MCC’s motion because it is not supported by Montana law.

FACTUAL AND PROCEDURAL BACKGROUND

On April 20, 2015, MCC submitted a number of data requests requesting that Liberty and Western Water Holdings, LLC (“Western Water”) produce various documents. Specifically, Data Request MCC-010 asked Liberty to “provide a working copy, including data, supporting

¹ MCC 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.

spreadsheets and all formulas and links intact, of the financial model used in evaluating the acquisition of Park Water Company by Liberty Utilities Co.”

Liberty provided responses to the MCC’s data requests, including Data Request MCC-010, on May 4, 2015. In its responses to Data Request MCC-010, Liberty objected that the information requested was not discoverable. Liberty’s objection was expressly authorized by ¶ 11 of Procedural Order No. 7392. 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 Data Request MCC-010 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 Data Request MCC-010 (April 20, 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.*

Data Request MCC-010 demands full access to Liberty's confidential and proprietary “financial model used in evaluating the acquisition of Park Water Company[.]” Although MCC alleges that its request is aimed at identifying Liberty's future plans, that assertion is undermined by the plain language of Data Request MCC-010. MCC has demanded that Liberty provide its pre-bid valuation of Mountain Water, including unlimited access to the proprietary financial model that produced that valuation, without identifying how Liberty's pre-bid financial analysis of Mountain Water has any relevance to the rates Mountain Water's customer might pay in the future. MCC's far-reaching request is especially troubling given Liberty's pledge 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.

On May 8, 2015, MCC filed a motion asking the Commission to compel Liberty to produce the documents requested in Data Request MCC-010. MCC did not fulfill its obligation to “meet and confer” with Liberty. In its motion, MCC generally asserted that, because Montana has liberal discovery rules, the information requested in Data Request MCC-010 must be relevant. MCC's motion to compel is premised on an incorrect legal conclusion and should be denied.

LEGAL ARGUMENT

I. THE COMMISSION SHOULD SUSTAIN LIBERTY’S OBJECTION TO DATA REQUEST MCC-010 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 Data Request MCC-010 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).

MCC argues that Liberty’s relevancy objection “ignores the liberal construction of the rules of discovery” under Montana law. In support of that argument, MCC cites two United States Supreme Court opinions—*Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S. Ct. 2380, (1978), and *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385 (1947). Although MCC correctly identifies a definition for relevancy, the cases MCC cites actually support Liberty’s

position that the Commission cannot compel irrelevant documents. In both *Oppenheimer* and *Hickman*, the United States Supreme Court ultimately held that the requested evidence was irrelevant and non-discoverable. *See Oppenheimer*, 437 U.S. at 352-53, 98 S. Ct. at 2390 (because “respondents do not seek this information for any bearing that it might have on issues in the case . . . respondents’ request is not within the scope of Rule 26(b)(1)”); *see also Hickman*, 329 U.S. at 513-14, 67 S. Ct. at 395 (“we are not justified in permitting discovery in a situation of this nature as a matter of unqualified right”). In both cases, the United States Supreme Court’s holdings were governed by its conclusion that “**discovery, like all matters of procedure, has ultimate and necessary boundaries.**” *Oppenheimer*, 437 U.S. at 351-52, 98 S. Ct. at 2389-90 (quoting *Hickman*, 329 U.S. at 507, 67 S. Ct. at 392) (emphasis added). That is precisely the conclusion Liberty has asked the Commission to reach, i.e. that there are limits on the Commission’s authority to compel discovery and that Data Request MCC-010 exceeds those discoverability limits.

The relevance and discoverability of information must be determined within the context of a particular case. In this case, the Commission cannot compel unlimited access to Liberty’s pre-bid financial model because that 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 MCC’s assertion that Liberty’s financial model must be produced because “without it, neither MCC nor the Commission can know what Liberty plans in the future, to the great risk of Montana ratepayers.” MCC’s Motion to Compel, p. 4. If MCC wanted Liberty to provide documents identifying its “future plans” for Mountain Water, MCC should have submitted a data request asking for such. Requiring Liberty to disclose its proprietary pre-bid valuation of Park Water simply will not accomplish MCC’s stated objective

or otherwise lead to discoverable information. Liberty has not produced its internal proprietary and confidential pre-bid 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 pre-bid financial model 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, pre-bid 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, as does the Commission's authority to review rate increases pursuant to § 69-3-302, MCA. 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 pre-bid financial model is irrelevant and, thus, non-discoverable because it will not assist the Commission's review in this matter.

CONCLUSION

As the United States Supreme Court noted in *Oppenheimer*, "discovery must be aimed at illuminating issues in the case." *Oppenheimer*, 437 U.S. at 354, 98 S. Ct. at 2391. 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.

Because compelling disclosure of Liberty's proprietary and confidential pre-bid financial model will not illuminate any of those three issues, the information requested by MCC is irrelevant and thus non-discoverable.

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 Data Request MCC-010 is not relevant to the Commission's limited powers of regulatory review of proposed utility sales and, in turn, deny MCC's motion.

Submitted this 15th day of May, 2015.

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**ATTORNEYS FOR LIBERTY UTILITIES CO.
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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on May 15, 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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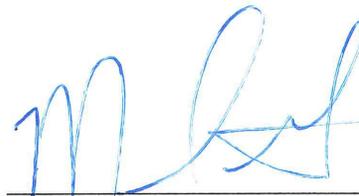
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